

RECENT DEVELOPMENTS IN SPECIALIZATION REGULATION OF THE LEGAL PROFESSION†

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Formal Regulation: Recent U.S. Developments

American Bar Association: Model Plan Developed

As many of the prohibitions surrounding advertising by the legal profession were falling in the wake of *Bates v. State Bar of Arizona*¹, the A.B.A. Standing Committee on Specialization² shifted from the role of simply monitoring state specialization projects to the role of directly encouraging the regulation of specialization by the states. As indicated in the Specialization Committee's report of February, 1978, the major impetus for this shift in roles was the view that the regulation of specialization was essential to the regulation of advertising for truthfulness and quality assurance. The report stated:

Although standards and methods used for regulation programs may vary among the states, and among different fields of law within the state, a specialization regulation program should permit certification or designation of specialists only if the program ensures truthfulness and quality assurance by (a) preparing and issuing labels and definitions for each field of law practice in which certification or designation will occur; (b) preparing and issuing specific standards of knowledge, experience and professional reputation for each field and (c) ensuring that each lawyer complies with the labels and definitions and meets the standards before holding himself out to the public as a specialist, as having special training or ability *or as limiting or concentrating his practice*. [emphasis added].³

Here we have in a nutshell the issue which has had the most prominence in the specialization regulation debate in recent years, namely the interface between advertising regulation and specialization regulation.⁴ At what stage does advertising regulation or deregulation, particularly in relation to fields or areas of law, become a kind of direct specialization regulation or impact on current or future specialization regulation? This issue will recur again and again in our survey of recent developments.

As we shall see when summarizing the state developments, the Specialization Committee's view that regulation of advertising should be built upon specialization regulation first and not the other way round, has not often happened in fact. Rather, a largely unrestricted right to advertise limitations of practice or concentrations of practice or preferred areas of practice is granted first, and then there is a later attempt to add a specialization scheme to it with standards of education, experience and reputation. The result may be public confusion over the whole issue of who is or was a "specialist" in terms of having "special" competence in an area.

In August of 1978, the Specialization Committee issued a discussion

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1. (1977), 433 U.S. 350.

2. Hereinafter referred to as the Specialization Committee.

3. A.B.A. Specialization Committee, *Report to the House of Delegates* (February, 1978) 18.

4. See e.g. David Brink, "Is Specialization Dead?" (1978), 3 Bar Leader #4, at 20.

report which dealt specifically with this interface between advertising and specialization.⁵ Either Proposal A or B of the A.B.A. Task Force on Lawyer Advertising⁶ was accepted by the Committee in so far as either proposal allowed lawyers simply to list fields they practised in or did not practise in. However, the Committee objected to any further right to describe listed fields with labels such as "concentrating in" or "limited to". Such statements of limitation or concentration in the view of the Committee would, without a specialization scheme, carry an implication of experience or competence without any safeguards assuring either.

The Committee, thus, suggested (one suspects reluctantly) that there can be "field advertising" first even without specialization regulation, but such advertising should not go any further than the listing of fields of practice or non-practice. To the "purist", of course, even this much "field advertising", without an immediate specialization regulation scheme, might be thought of as misleading the public. It seems a fair conclusion to suggest that if the Committee was willing to concede that advertising regulation might come first, at least specialization regulation should immediately follow if the public is really going to have informed access to legal services. What is unacceptable is permissive advertising without a scheme that also formally recognizes and regulates the holding out of specialized service *in whatever guise it presents itself*. What is assumed in such a statement is that informed access means not just information about who is *willing* to take cases in an area but also information as to who has met certain standards to show *ability* to take cases in an area.

To encourage state action on the specialization front, the Specialization Committee has been actively involved since 1978 in attempting some coordination of the inconsistent and factionalised developments taking place in the various states.

The Committee, in its discussion paper in August, 1978,⁷ included a proposal for designations and definitions of law practice categories. Whether as part of an advertising scheme or as part of a specialization scheme, there is a need for understandable and uniform labels for fields of practice. The paper notes:

Without established labels for categories of practice, no two lawyers may describe what they do in indistinguishably similar ways, thus frustrating the public's search for and ability to choose among lawyers and suggesting that the qualifications of each are unique.⁸

The Committee submitted the following list for discussion, and noted that brief, appropriate and accurate words of limitation or qualification may be used following a designation:⁹

Administrative Agency Matters
Admiralty
Antitrust and Trade Regulations
Appeals
Banking Law

5. A.B.A. Specialization Committee, *Discussion Draft II: On Law Practice Category Labels* (August, 1978).

6. A.B.A. Task Force on Lawyer Advertising, *Report to House of Delegates* (September, 1977).

7. *Supra* n. 5

8. *Id.*, at 5.

9. *Id.*, at 3.

Civil (non-Criminal) Trial
 Civil Rights and Discrimination
 Claims Against Government
 Constitutional Law
 Consumer Claims and Protection
 Corporate and Business Law
 Corporate Finance and Securities
 Criminal and Traffic Charges
 Debtor-Creditor and Bankruptcy
 Education
 Entertainment and Sports
 Environmental Law
 Divorce, Adoption and Family Matters
 General Practice
 Health Care and Mental Health
 Immigration and Customs
 Insurance
 International and Foreign Law
 Labour Law
 Legislation and Legislative Appearances
 Military Law
 Municipal and Local Government Law and Finance
 Natural Resources
 Patent, Trademark and Copyright
 Pension, Profit Sharing and Employee Benefits
 Personal Injury and Property Damage
 Public Utility Matters
 Real Estate
 Taxation
 Transportation
 Wills, Estates and Estate Planning
 Workers Compensation

The division of legal practice into different fields is an extremely difficult and uncertain enterprise. What is the relationship, for example, between "Natural Resources" and "Environmental Law" in the above list? Between "Administrative Agency Matters" and "Claims Against Government"? Any attempt to list for the public in a comprehensible way the titles of fields of practice is perhaps bound to include some overlaps and omissions. The Committee, nevertheless, suggested that the above list was at least a good starting point for uniform development.

Leadership by the A.B.A. in the specialist regulation movement culminated in August, 1979, when the House of Delegates adopted the Specialization Committee's Model Plan of Specialization¹⁰ which was built on the principles adopted by the A.B.A. in February, 1978.¹¹ These principles included the following:

- (1) recognition of the states as the sole appropriate source of regulation and recognition of specialists;
- (2) the voluntary and nondiscriminatory nature of programs;
- (3) the ability of non-specialists to practice in all specialty fields;
- (4) permitting specialists to practice in other fields;
- (5) providing that specialists obtaining matters by referral should not extend their representation;

10. A.B.A. Specialization Committee, *Report to the House of Delegates* (August, 1979).

11. *Supra* n.3.

- (6) participation in the program by lay representatives of the public; and
- (7) financing of the program solely from participants.¹²

While the states would have the jurisdiction to regulate specialization, the A.B.A. Specialization Committee, having evaluated all the pilot projects to date and debated the issues involved, could be of service to states by formulating a model plan that could be adopted by a state, thus saving a great deal of development time for a state. This is what the Specialization Committee has done.

The Model Plan is only the foundation upon which the Committee hopes to build a model list of defined specialities and specific suggested quality standards for each of them. The Model Plan currently is being presented as a flexible framework that can be adopted immediately by a variety of states to suit their individual needs.

As well as the need for controlled advertising which was so central to the Committee's motivation for the earlier 1978 Report, the new 1979 Report proposing the Model Plan adds two further urgent motivations for the formal regulation of specialization by the states. First, as outlined elsewhere in this paper,¹³ there are several proposals for specialization plans sponsored not by the states, but by various national organizations and other groups which do not necessarily conform to the A.B.A. principles. As the Report states, "if states that want specialization plans are unable to develop them rapidly, it is clear that government, profit-making groups or self-appointed associations, boards and colleges are ready to fill the void."¹⁴ Clearly the A.B.A. would prefer to have specialization regulation controlled by the individual states with some uniformity given through A.B.A. guidance rather than having a plethora of routes for specialization recognition. Secondly, the idea that specialization regulation hurts sole practitioners, small firm lawyers, general practitioners, and young and minority lawyers, is "turned on its head" so to speak. The report states that *not* formally recognizing specialization is what will hurt these groups. If one accepts the view that these groups do in fact increasingly concentrate their practice in certain fields just as large firm lawyers do, they are at a competitive disadvantage with the large firm lawyers for "specialized" work. As stated by the Report:

Other lawyers, including sole practitioners, small firms and young and minority lawyers, in general do not and cannot now obtain specialized business through reputation, reference or mass advertising. They are thus at a competitive disadvantage — a disadvantage that can only increase in the future. They are losing ground rapidly to large firms and clinics.¹⁵

The Committee suggests that the adoption of a specialization plan actually helps to restore the competitive balance between lawyers:

Thus, in the growing view of many lawyers, specialization plans confer no additional advantage on large firms and clinics, which now reap the maximum benefits from the growing demand for specialized services, but, instead, restore to the individual or small-firm practitioner and the young or minority lawyer the ability to compete successfully for specialized business that is bound to grow in the future.

12. See A. Esau, "Specialization in the Legal Profession", (1979), 9 Man. L.J. 255, at 300.

13. *Infra*, n. 135-142 and text.

14. *Supra* n. 10, at 9.

15. *Id.*, at 10.

The surge of interest in specialization plans among the states since the *Bates* decision reflects this new view.¹⁶

I would argue that there is a problem with this kind of justification for specialization regulation. If competitive balance is the goal, then it might be argued that we should just have a self-designation system of specialization regulation. Because objective standards of reputation, experience, and competence in a certification program may be more affordably met by large law firm lawyers than by other groups, a certification program does not necessarily lead to competitive balance. No doubt, sole practitioners, small firm lawyers and other groups can become certified and compete with large firm lawyers for specialized business, but the burden of gaining the substantial experience in the field for initial certification and the cost of time in meeting the educational and examination requirements is often higher for these groups than for big firm lawyers.

At minimum, if we are going to justify going beyond a designation system, the "quality" justification must ultimately take precedence over any "equality" justification. While standards should not be unnecessarily discriminatory to any groups, it is inevitable that the higher the standards are in terms of attempting to measure competence, the more exclusive the programme will be perceived to be by certain groups.

It is now commonplace to classify specialization plans into two broad categories. First, designation or self-identification programs that stress recognition of *de facto* concentrations and the freedom to inform the public about them. Second, certification programs that stress identification of specialized competence by the meeting of various standards before a lawyer can hold himself or herself out to the public as a "specialist". The difference between designation and certification is often perceived as arising from incompatible goals, one stressing as much informed access to legal services as possible, the other stressing the improvement of the quality of legal services.¹⁷

These two routes may, however, be combined concurrently or in sequence into what is commonly called a two-tier approach or combination approach. Instead of falling into the pattern of these familiar labels, however, the Committee in introducing the Model Plan opted to introduce a new label into the specialization debate, namely that of a "recognition" program. A recognition program tries to steer a balanced ground between the two goals of access and quality assurance, rather than trading one for the other as designation and certification programs are perceived as doing. Some designation programs with very few, if any, standards of competence are not much different than the "field advertising" currently allowed in most states and, therefore, are bordering on irrelevancy. Some certification programs may be criticized for being overly restrictive of participation by lawyers and consequently overly restrictive to the public in seeking "specialized" service.

16. *Id.*, at 11.

17. See O.R. Brink, "Let's Take Specialization Apart" (1976), 62 A.B. A.J. 191.

The Model Plan attempts to lay a flexible foundation for a recognition program with "attainable but nevertheless meaningful"¹⁸ standards of present competence. Minimum standards of substantial involvement, mandatory continuing legal education¹⁹ and peer review are called for, but examinations whether written or oral are not required. It would be up to the state involved to adopt them in any particular field of law. The Committee commented on the standards in the Model Plan as follows:

The standards incorporated in the Model Plan are minimum standards designed to measure a reasonable degree of competence. The Model Plan provides that additional requirements may be imposed by the state in particular specialties or in all specialties, although requirements and methods of measurement are expected to differ from specialty to specialty. The Committee designed the minimum standards of substantial involvement, mandatory continuing legal education and peer review after thoughtful consideration of standards already in use or being proposed in the states, but kept in mind the percept that both access and quality assurance must be provided. The Committee realized that standards should not be so rigid as to foreclose consideration of any lawyer's otherwise meritorious application. The Model Plan therefore permits the Board of Specialization in any state to substitute equivalents for standards, provided: (1) if the standard in question is one of an examination that a state decides to require, the equivalent standard should be substantially more stringent in assuring competence; and (2) as to other standards, the equivalent standard must be of at least equal stringency. This was considered by the Committee a better and more universal solution to the exceptional case than any "grandfather" clause.²⁰

The Model Plan may be thought of as a compromise between certification and designation because it has more standards than the usual designation scheme and less standards than the usual certification scheme. By not requiring written or oral examinations, the Model Plan differs from certification plans in a fundamental respect. It should be kept in mind, however, that there are two issues to be separated when talking about standards. One issue is the number and kind of standards required, the other issue is the level aimed at by each standard. You may have a C.L.E. requirement for initial recognition or rerecognition, but how many hours are required and what is the level of curriculum required? You may have a substantial experience requirement, but how much and how is it measured? Having a particular mix of several kinds of standards does not alone indicate that a program is too exclusive or permissive. What must be looked at is the level of each standard.

The Model Plan argues for having both a reasonable mix of standards and having reasonable levels set for each standard. It also argues for the concept of flexibility in allowing the levels set by a standard to be met in different but equivalent ways.

In February, 1980, in an Informational Report to the A.B.A. House of Delegates, the Committee noted that the Model Plan of recognition has received "quick and enthusiastic response."²¹ Seven states have already

18. *Supra* n. 10, at 5.

19. Hereinafter referred to as C.L.E.

20. *Supra* n.10, at 7.

21. A.B.A. Specialization Committee, *Informational Report to the House of Delegates* (February, 1980).

proposed specialization plans based on the Model Plan.²² Thus, while it is too early to assess just what impact the Model Plan will have, it is at least fair to say that it is a very important development. If the Committee can now follow up the Model Plan with proposals for uniform specific standards in various fields of law, perhaps some of the current uncertainty and controversy surrounding specialization might be alleviated.

State Developments:

THE CERTIFICATION APPROACH

a) California: Certification Program Runs Into Resistance

The California pilot certification program in the fields of Criminal Law, Workers' Compensation Law, and Taxation Law has been in operation for almost a decade, being one of the oldest and most widely studied and modeled specialization programs in the United States.²³ Utilizing a combination of standards including references, period of law practice, substantial involvement, special education experience and examinations, the program is an example of an attempt to certify those lawyers who are really "specialists" by way of some actual competence standards.

When the pilot project was adopted by the Board of Governors of the State Bar in 1970, a specific provision was included calling for an evaluation of the project not later than five years after it had commenced "to determine whether it should be continued, modified, broadened, terminated, or whether some other action should be taken by the Board of Governors"²⁴ The provision also called for a survey to be taken of the public and the bar at some stage to assist in making decisions about the future of the program. In February, 1976, the California Board of Legal Specialization²⁵ submitted an "evaluation" to the Board of Governors²⁶ but did not include a survey in it. The reason given for this was that since a large proportion of the public was still unaware of the existence of the program, due *inter alia* to the hitherto restrictive advertising rules under the program, a survey would be meaningless.²⁷ Despite the lack of survey data, the Specialization Board was enthusiastic about what it termed the "success" of the project and made a number of recommendations including the elimination of the word "pilot" from the project. Along with some administrative changes, other recommendations included:

- Placing a limit of two on the number of fields in which a lawyer may be certified.²⁸
- Grandfather provisions in new fields should be made substantially more restrictive by changing the period for application from 2 years to 6 months, by requiring significantly higher standards of involvement for grandfathers and by adding

22. See L. B. Andrews and S. O'Neill, "Seven States Base Specialization Plans on the A.B.A. Model Plan", Specialization Committee, *Information Bulletin #6* (1980), at 51. For further comment on these developments see *Infra* n. 128-132 and text.

23. For a survey of past developments in the state, see *Supra* n. 12, at 275-283.

24. "Pilot Program in Legal Specialization", s.14, reproduced in (1971), 46 Cal. St. B.J. 182.

25. Hereinafter referred to as the Specialization Board.

26. *An Evaluation and Report by the Board of Legal Specialization to the Board of Governors of the State Bar of California* (February, 1976).

27. *Id.*, at 4 - 5.

28. *Id.*, at 13.

- a special educational requirement for grandfathers.²⁹
- For recertification by examination, substantial involvement should also be required.³⁰
- The program should be enlarged to include four additional specialty fields at this time: Probate Law, Bankruptcy Law, Family Law and Labour Law, and to permit the addition of other fields from time to time. Adding Civil Trial as a field should be investigated.³¹
- Advertising opportunities by certified lawyers should be expanded.³²
- Making written examinations optional in new fields should be considered, though exams would normally be required unless determined to be inappropriate by the Board.³³

In June, 1976, the State Bar Board of Governors dealt with the Specialization Board's recommendations. However, at that time the Specialization Board submitted a supplementary report to the February report making some further recommendations:

- Grandfathering for new areas of specialization should be eliminated completely.
- The requirement for certification which states a lawyer must be at least five years at the bar before being eligible should be eliminated and more flexible standards adopted.³⁴

Also in the interim between February and June, the California State Bar was in the process of revising its advertising rules and suggestions had been made that lawyers should be able to advertise fields of practice with designations like "concentration in" or "practice limited to". Such advertising is, of course, very close to a self-designation scheme of specialization regulation. The Specialization Board in its supplementary report thus made some recommendations of its own as to what the interface between lawyer advertising and specialization regulation should be. In effect, the recommendation was to create a new two-tier specialization program as follows:

The Board believes that a self-designation program as set forth in the Advertising Report without certain safeguards as recommended below creates the probability that the public could be misled rather than informed. These recommended safeguards are:

- (1) Lawyers could advertise their interest in practice in certain fields of law in three ways only. These are:
 - (a) "Certified Specialist"
 - (b) "Practice limited to _____"
 - (c) "Primarily engaged in _____"
 Note that "primarily engaged in" is substituted for "concentration" as used in the Advertising Report because of our belief that "concentration" implies a degree of proficiency and that, when 3 fields are permitted, it implies more than is possible although, admittedly, "primarily engaged in" doesn't fully solve the problem (but see (2) and (3) below).
- (2) Lawyers who are self-designated would be required to mention all fields wherever one is mentioned, if possible. Therefore all fields must be included on letterheads, business cards, and the alphabetical listing in the classified pages.
- (3) Categorical listing in the classified pages (e.g., "Family Law") would include the name, address and telephone number only for those self-designated but would additionally state "Certified Specialist" if applicable.

29. *Id.*, at 16.

30. *Id.*, at 19.

31. *Id.*, at 22.

32. *Id.*, at 24.

33. *Id.*, at 18.

34. California Board of Legal Specialization, *Supplement to the February 1976 Report . . . and Recommendations For Rules Controlling the Advertising of Law Practice Fields* (June, 1976).

- (4) A lawyer cannot be certified in more than two areas and cannot be self-designated, or a combination of certified and self-designated, in more than three areas.
- (5) In order to self-designate a lawyer must be admitted to practice in California for at least two years (except as set forth in (7), below).
- (6) In order to be self-designated in a field of law a lawyer must file an affidavit with the State Bar that contains at least the following information:
 - (a) length of time admitted to the practice of law in California;
 - (b) a very brief description of the affiant's experience and education in the field;
 - (c) a statement that as a result of the matters described in (b) above, the affiant believes it appropriate to advertise to the public that the affiant is competent in the field;

(Note: In suggesting this provision, the Board rejected the concept of a minimum percentage of time involvement for each field as too arbitrary if the same percentage applied to all fields and too cumbersome and expensive if different percentages are established for each field).
 - (d) an agreement by the affiant to complete at least six hours per year of legal education classes in the field.
- (7) A lawyer may self-designate in general practice without filing any affidavit and without any required period of admission to practice.³⁵

By requiring at least two years at the bar for field advertising other than "general practice" and by requiring a number of hours of C.L.E. for such advertising right, the Board in effect would be creating a two-tier specialization program with one tier similar to a designation program in other states. It should be noted that the California Board at that time did not opt for the recent A.B.A. Board's position that a mere listing of fields of practice or non-practice is acceptable.

At the meeting of the State Board of Governors in June, 1976, the pilot program was not made permanent but rather extended for a further two years on the following conditions:

1. The Board of Legal Specialization [should] promptly develop and recommend to the Board of Governors sampling and testing procedures to ascertain the successes and shortcomings, including awareness and acceptance, of its present and proposed specialization activities as perceived by various segments of the bar and by the public;
2. The Board of Legal Specialization [should] develop and present to the Board of Governors at the earliest possible time a program which reflects its adjustments to
 - (a) The changes in rules respecting advertising, when and as the same are actually adopted, and
 - (b) any shortcomings revealed by the operation of the specialization program to date;
3. The Board of Legal Specialization [should] proceed forthwith to develop and submit to the Board of Governors, for approval or disapproval, concrete plans which would be available for immediate implementation, on a pilot basis, for a specialization program in the areas of bankruptcy, probate, labor and family law and to recommend members to be appointed to the Advisory Commission in each area; . . .³⁶

In effect, while the Governors gave the "go-ahead" to the development of standards in four new areas, many of the Specialization Board's recommendations were "put on ice" until a more thorough evaluation of the pro-

35. *Id.*, at 4 - 6.

36. Excerpt from the Minutes of the Board of Governors, June 24 - 25, 1976.

gram, including a survey of the public and bar, could be completed.

The Specialization Board proceeded with the development of certification plans in the new areas. In June, 1977, consulting groups were appointed to the Board of Legal Specialization in the fields of Probate Law, Family Law, Bankruptcy Law and Labour Law to draft tentative standards in those fields.³⁷

As to the evaluation question, however, the Board encountered many logistical problems. It was not until 1979 that the Board contracted with the Social Science Research Institute of the University of Southern California to carry out an evaluation of the Pilot Program. This evaluation was completed in June, 1979,³⁸ and submitted by the Board of Governors in September, 1979. The evaluation still did not survey the public, but only surveyed lawyers. Once again, surveying the public was not thought feasible due to the lack of information the public has about the program.

The S.S.R.I. study cannot be easily summarized and it is dangerous to quote statistics out of context from the total study. Nevertheless, it might be useful to highlight some observations from the study. The study summarized its conclusions as follows:

- (1) *What has been the effect of the Pilot Program on competence? —*
83.9 percent of the certified specialists included in the S.S.R.I. survey indicated that they thought the Pilot Program had at least some impact on competence; that compares to 59.3 percent of the non-certified specialists who indicated that the program had at least some impact on competence.
- (2) *Are there indications that certified specialists are more competent than those not certified? —*
Competence is an elusive concept and various measurements included in the survey instrument failed to reveal any difference between the competence of certified and non-certified specialists.
- (3) *Does the Pilot Program provide any useful services to the public? —*
While there is agreement among the attorneys surveyed, (96.8 percent of the certified and 57.6 percent of the non-certified specialists) that the program has had at least some impact in terms of providing an objective means of identifying specialists, the results suggest that the benefits of that feature have not carried over to the public. Despite the fact that 72.2 percent of all specialists indicate that the program has increased the accessibility of the public to attorneys in specialized areas of the law, only 20.9 percent of the entire sample thought the public was aware of the program, only 9.1 percent thought the public was aware of the specialties included and only 2.7 percent thought the public was aware of the rules and regulations which govern the program.
- (4) *How has the program affected educational opportunities? —*
84.1 percent of the certified specialists thought the Pilot Program had at least some impact on increasing the availability of advanced education as did 67.7 percent of the non-certified specialists.
- (5) *What are the implications of the Pilot Program for young attorneys?*
In response to a question which asked what impact the program had in assisting young attorneys to establish practice, 55.7 percent of the certified and 54.2 percent of the non-certified attorneys indicated they thought it had no impact. 11.5

37. See "Annual Report of Board of Governors" (1977), 52 Cal. St. B. J. 562, at 569.

38. Social Science Research Institute, University of Southern California, *Assessment of the California Pilot Legal Specialization Program* (June 23, 1979).

percent of the certified and 39 percent of the non-certified suggested that it had a negative impact on young attorneys. What support the program received as a benefit to young attorneys came from the certified attorneys, 23 percent thought it had a slight impact in terms of assisting young attorneys.

- (6) *What effect did grandfathering have on the quality of attorneys certified? —*
The study did not provide any direct evidence on this issue.³⁹

The S.S.R.I. study also provided some data about the operation of the certification program to date. In tabulating the basic characteristics of those lawyers who applied for certification, the study indicated the following⁴⁰:

Table 1.1 Basic Characteristics of Those Applying for Certification in California by Specialty (N = 2,679)

Variable	Specialty							
	Criminal Law		Worker's Compensation		Tax		Total	
	No.	%	No.	%	No.	%	No.	%
Sex								
Male	965	97.7	610	97.1	1,017	98.1	2,592	97.7
Female	23	2.3	18	2.9	20	1.9	61	2.3
Total	988	37.2	628	23.7	1,037	39.1	2,653	100.0
Missing information = 26								
Employment at Application								
Private Practice	370	52.9	255	75.7	803	87.7	1,428	73.1
District Attorney	192	27.4	0	0.0	0	0.0	192	9.8
Government	10	1.4	70	20.8	61	6.7	141	7.2
Public Defender	118	16.9	0	0.0	0	0.0	118	6.0
Corporation	4	0.6	10	3.0	46	5.0	60	3.1
Other	6	0.9	2	0.6	6	0.7	14	0.7
Total	700	35.8	337	17.3	916	46.9	1,953	100.0
Missing information = 726								
Certification Procedure								
Examination	467	47.2	224	35.4	243	23.4	934	35.1
Grandfathered	522	52.8	408	64.6	796	76.6	1,726	64.9
Total	989	37.2	632	23.8	1,039	39.0	2,660	100.0
Missing information = 19								
Years in Practice								
4-9 Years	437	44.2	191	30.3	254	25.5	882	33.7
10-19 Years	397	40.1	295	46.8	478	48.0	1,170	44.7
20-29 Years	120	12.1	105	16.7	189	19.0	414	15.8
30+ Years	35	3.5	39	6.2	75	7.5	149	5.7
Total	989	37.8	630	24.1	996	38.1	2,615	100.0
Missing information = 64								
Years of Practice (Average Years)								
Certified	13.3		14.7		15.6		14.5	
Non-Certified	8.5		13.2		14.6		12.0	
Total	12.3		14.4		15.4		14.0	

Note that of the certified lawyers, 64.9 percent were certified under the grandfather provisions and the average number of years in practice for all applicants was about 14. The study also shows that of the applicants who were not "grandfathers", the overall rate of success in becoming certified

39. *Id.*, at 2 - 3.

40. *Id.*, at 9.

was 63.9 percent.⁴¹ Note too, that the variable of sole practice, small firm, medium firm, or large firm was not included in the survey. Such information would have been very useful. While meaningful statistics for recertification are difficult to obtain, according to the study:

Those persons who have filed for recertification in each of the specialties include 44.9 percent of the criminal law specialists, 67.3 percent of the worker's compensation specialists, and 78.2 percent of the tax law specialists. This provides an average recertification filing rate of 64.1 percent for all specialties.⁴²

Does the low rate of recertification in Criminal Law raise a warning flag that something is wrong with the program in that field? The Specialization Board, after reviewing the S.S.R.I. study, noted that these recertification statistics could be misleading:

Another area where data is lacking is in the area of recertification. Lumped together in a category called "Did Not Recertify" are all those for whom a specific reason for failing to recertify was not available: this includes participants who had never submitted educational hours, who had changed addresses and could not be located or did not respond to inquiries, and those who simply withdrew without giving a reason. Thus we have no figures on the number of certified specialists who were eligible to recertify. This is especially unfortunate in the criminal field, where so many of the specialists are district attorneys and public defenders and where the recertification rate is the lowest.

It should be noted that the category "resigned" is defined as "resigned for reasons of ineligibility, such as becoming a judge, court commissioner, inactive Bar status, moved out of state, etc." If you calculate the recertification rate by eliminating those known to be ineligible ("Resigned" plus "Recertification Rejected" plus "Suspended/Revoked") the recertification figures are somewhat greater: 57.8 percent in criminal law; 83.7 percent in workers' compensation and 83% in the largest area, taxation law.⁴³

Still, in making its conclusions, S.S.R.I. noted that the Criminal Law specialists "voiced the greatest dissatisfaction with the Pilot Program . . . This group voiced complaints regarding the criteria which determines certification, and at least in Los Angeles County, felt that their local associations better reflect their interests."⁴⁴

In assessing the program in terms of attorney impact, it should be kept in mind that the S.S.R.I. study only sampled 294 lawyers and only 125 responded — a rate of 42.5 percent.⁴⁵ Of the 125 respondents, 64 were certified and 61 were non-certified "specialists". A readable summary of the results of this survey is provided as Table 2.4 in the study:⁴⁶

Table 2.4 Comparisons Between The Way Certified and Non-Certified Specialists Assessed Selected Aspects of the California Certification Program (N = 125)

41. *Id.*, at 13.

42. *Id.*, at 15.

43. Board of Legal Specialization, *Evaluation of the Pilot Program; Overall Plan for Certification* (September, 1979) 2.

44. *Supra* n. 38, at 36.

45. *Id.*, at 20.

46. *Id.*, at 23-24.

Program Impact	Respondent Classification					
	Certified Specialist (N = 64)		Non-Certified Specialist (N = 61)		Total No.	%
1. Impact on Competence of Certified Specialists						
Great	14	(22.6)	1	(1.7)	15	(12.4)
Moderate	22	(35.5)	11	(18.6)	33	(27.3)
Slight	16	(25.8)	23	(39.0)	39	(32.2)
No Impact	10	(16.1)	19	(32.2)	29	(24.0)
Negative	0	(0.0)	5	(8.5)	5	(4.1)
Total	62	(100.0)	59	(100.0)	121	(100.0)
Missing Information = 4						
2. Impact on Reducing Legal Costs						
Great	2	(3.3)	1	(1.7)	3	(2.5)
Moderate	7	(11.5)	0	(0.0)	7	(5.9)
Slight	10	(16.4)	0	(0.0)	10	(8.4)
No Impact	41	(67.2)	32	(55.2)	73	(61.3)
Negative	1	(1.6)	25	(43.1)	26	(21.8)
Total	61	(100.0)	58	(100.0)	119	(99.9)
Missing Information = 6						
3. Increasing Availability of Advanced Education						
Great	23	(36.5)	10	(16.9)	33	(27.0)
Moderate	21	(33.3)	15	(25.4)	36	(29.5)
Slight	9	(14.3)	15	(25.4)	24	(19.7)
No Impact	10	(15.9)	17	(28.8)	27	(22.1)
Negative	0	(0.0)	2	(3.4)	2	(1.6)
Total	63	(100.0)	59	(99.9)	122	(99.9)
Missing Information = 3						
4. Assisting Young Attorneys to Establish Practice						
Great	1	(1.6)	0	(0.0)	1	
Moderate	5	(8.2)	1	(1.7)	6	
Slight	14	(23.0)	3	(5.1)	17	
No Impact	34	(55.7)	32	(54.2)	66	
Negative	7	(11.5)	23	(39.0)	30	
Total	61	(100.0)	59	(100.0)	120	
Missing Information = 5						
5. Strengthening Local Bars						
Great	1	(1.6)	1	(1.7)	2	(1.7)
Moderate	7	(11.5)	1	(1.7)	8	(6.7)
Slight	11	(18.0)	2	(3.4)	13	(10.9)
No Impact	41	(67.2)	46	(79.3)	87	(73.1)
Negative	1	(1.6)	8	(13.8)	9	(7.6)
Total	61	(99.9)	58	(99.9)	119	(100.0)
Missing Information = 6						
6. Improving Career Opportunities for All Attorneys						
Great	4	(6.8)	0	(0.0)	4	(3.4)
Moderate	9	(15.3)	3	(5.1)	12	(10.2)
Slight	17	(28.8)	10	(16.9)	27	(22.9)
No Impact	29	(49.2)	33	(55.9)	62	(52.5)
Negative	0	(0.0)	13	(22.0)	13	(11.0)
Total	59	(100.1)	59	(99.9)	118	(100.0)
Missing Information = 7						
7. Improving Accessibility						
Great	17	(28.3)	1	(1.7)	18	(15.1)
Moderate	22	(36.7)	8	(13.6)	30	(25.2)
Slight	15	(25.0)	23	(39.0)	38	(31.9)
No Impact	6	(10.0)	20	(33.9)	26	(21.8)
Negative	0	(0.0)	7	(11.9)	7	(5.9)
Total	60	(100.0)	59	(100.1)	119	(99.9)
Missing Information = 6						

8. Providing Objective Means of Identifying Specialists

Great	27	(42.9)	4	(6.8)	31	(25.4)
Moderate	21	(33.3)	16	(27.1)	37	(30.3)
Slight	13	(20.6)	14	(23.7)	27	(22.1)
No Impact	2	(3.2)	13	(22.0)	15	(12.3)
Negative	0	(0.0)	12	(20.4)	12	(9.8)
Total	63	(100.0)	59	(100.0)	122	(99.9)

Missing Information = 3

Note that on the average the more positive responses come from certified lawyers and the more negative responses from uncertified ones.

In February, 1979, the Specialization Board sent out a mail questionnaire to all certified specialists.⁴⁷ Only 884 questionnaires were returned for a response rate of 50.3 percent. The survey indicated that "about half (50.5 percent) of those certified specialists felt the program increased their expertise, 32.9 percent indicated that the program increased their efficiency and 43 percent indicated that certification improved the quality of their services."⁴⁸

The response of the California Board of Legal Specialization to the S.S.R.I. evaluation was to interpret it as indicating success. To the Board of Governors in September, 1979, the Specialization Board stated:

Thus, while a re-examination of the existing programs, especially criminal law, is in order, the strong support for the program by those who have participated in it, coupled with the positive opinion of the majority of the non-certified specialists on the issues of competence, objective identification of specialists and increased educational opportunities make this a program of whose success the entire State Bar can be proud.⁴⁹

The Board, then, found the S.S.R.I. survey positive because the majority of both certified and uncertified lawyers said the program had increased competence, expanded the availability of C.L.E. and provided an objective means of identifying specialists in various fields.

At the meeting of the State Board of Governors on September 7th, 1979, James Corison, the chairman of the Specialization Board, argued that the program had achieved its major objectives and "seems to be recognized as a coming necessity in the practice of law."⁵⁰ Kurt Melchior of San Francisco, a member of the Specialization Board and a former bar governor, joined Corison in discounting the usefulness of further study and argued the Board of Governors to "vote us up or down today."⁵¹ The Board of Governors, by a split vote, agreed to follow the Specialization Board's recommendations and petition the Supreme Court to make the pilot program permanent. It also approved the following tentative schedule for the expansion of the specialization program: 1980 — Family Law; 1981 — Probate Law and Civil Trial; 1983 — Condemnation Law and Immigration Law; and 1984 — Business and Corporate Law and Human Rights.⁵² However, this shift to

47. The results of this survey are also included in the S.S.R.I. report. *Id.*, at 25-34.

48. *Id.*, at 28.

49. *Supra* n. 43, at 3.

50. See "California Law World" (1979), 54 Cal. St.B.J. 389, at 390.

51. *Ibid.*

52. See "Barristers' Bulletin", *Los Angeles Lawyer*, November, 1979, at 32.

permanent status was not to be, and the backlash against it was quick in coming.

Only a few days later, on September 15, 1979, at the State Bar Convention in Los Angeles several bar groups, particularly the Los Angeles County Bar Association and the L.A.C.B.A. Barristers, were able to marshal their opposition to the permatization of the certification program by bringing the issue onto the floor of the convention. The result was an overwhelming support for the following resolution:

The Conference hereby requests and directs its Executive Committee to (a) establish a Committee on Legal Specialization to solicit from Lawyers throughout the State their views on the legal specialization program adopted by the Board of Governors on September 7, 1979; (b) request The Board of Governors to return the specialization program to its original status as a pilot program and to continue the program on a pilot basis only, without expansion into new areas of specialization pending the outcome of a study by a qualified independent organization, which study would: (1) survey the public to determine the impact of the pilot program on the public, including awareness of the program, its meaning and possible increased costs to the consumer; (2) determine if the specialization program will unnecessarily preclude minority lawyers, general practitioners, and younger lawyers from becoming specialists and thus unfairly deprive them of a substantial source of business; (3) determine if the requirement for contested hearings will create a disincentive to settlement at the expense of the client's best interests and the judicial system's need for efficient dispute resolution; (4) consider the impact of expanded specialization on malpractice rates, the referral of cases by courts and lawyer referral panels only to certified specialists and the possibility of a restricted or limited licence to practice law; and (5) such other issues as may be appropriate; and (c) direct the Committee on Legal Specialization to report to the Conference of Delegates on its Survey and on the conduct and results of the study requested of The Board of Governors.

STATEMENT OF REASONS

Recent action by the State Bar Board of Governors on specialization may lead to discrimination against members of the minority bar, higher fees to the public, confusion among consumers of legal services and the elimination of the general practitioner.

At its meeting on September 7, 1979, the Board, by a split vote, made the pilot program in specialization permanent. Thus, the fields of taxation, criminal law and workers compensation law are now permanent areas of specialization. In addition, the Board approved the following tentative schedule for the expansion of the specialization program: 1980 — Family Law; 1981 — Probate Law and Civil Trial; 1982 — Consumer Rights Law and Real Property Law; 1982 — Condemnation Law and Immigration Law; and 1984 — Business and Corporate Law and Human Rights.

These steps were taken despite the fact that no survey of the public or the profession as a whole was made concerning the pilot program to determine the impact of specialization on the public, the minority bar, the general practitioner or the judicial system. In addition, comments were not solicited from local bar associations on the specific proposal tentatively to approve expansion of the pilot program into nine new areas.

A number of specific issues related to specialization must be addressed by the Board of Governors at the earliest possible date. These important issues include the following:

(1) Will Certification requirements unnecessarily preclude minority lawyers, general practitioners and younger lawyers from becoming specialists and thus unfairly deprive them of a substantial source of legal business?

(2) Will a certificate of specialization become a prerequisite for practice in the areas covered:

- (a) because court appointments might be limited to certified specialists:
- (b) because LRS and other panel referrals might be limited to certified specialists?
- (c) because changes in the structure of malpractice rates might make practice for noncertified specialists economically infeasible?
- (d) because rules of court — either federal or state — might limit all practice in covered areas to certified specialists?
- (3) Will certification increase the costs of the delivery of legal services?
- (4) The primary requirements for certification relate to particular types of experience and not to levels of competency. Will the public fail to understand that limitation and be misled into relying upon certification as a state bar guaranty of a minimum level of competence?
- (5) Will the requirement for contested hearings create a disincentive to settlement at the expense of the client's best interests and the judicial system's need for efficient dispute resolution?
- (6) Is there a less discriminatory method for accomplishing the legitimate goals of continuing legal education and consumer protection which are at the core of the movement for certification of specialists?⁵³

The passing of this resolution has without doubt been a major blow to the certification movement in California and perhaps will affect the certification movement in other parts of the country. The effect of setting up a separate Bar Committee to evaluate the project might be seen as at least a partial vote of "no confidence" for the Specialization Board which has had the effective control over the certification developments for so long. The momentum and morale of the Board will likely suffer considerably. However, if certification proponents are confident about the program's ability to contribute to the achievement of better quality and more accessible legal services, further studies may ultimately help the movement despite the temporary setback. Just how temporary the setback is remains to be seen.

As a result of the September 15 resolution, the Board of Governors immediately suspended implementation of its Sept. 7th decision and decided to reconsider that decision in December, 1979. Before the December meeting, the Board of Governors received submissions from 28 local bar associations and held a day-long public hearing on the issue.⁵⁴ Many groups recommended a go-slow approach to certification and the need for further study.⁵⁵ After the hearings, the Board of Governors, on December 15, 1979, voted 14-2 to retain the certification program in the original three fields and the new field of family law, 10-6 against delaying certification of family lawyers for one year, and 9-7 to permit the Specialization Boards to continue to explore new specialty areas.⁵⁶ However, the Board voted to reverse its September resolution and thus returned the program to a pilot status. Meanwhile, the Committee on Lawyer Services has been directed to propose studies to measure the impact of certification on the bar and the public.

The California controversy over the issue of certification of specialists is well documented in a recent forum on the issue in the *Los Angeles Lawyer*⁵⁷ and in a summary of the arguments of critics and proponents in

53. Provided to author by Specialization Board.

54. See "An Update on Legal Specialization", *Los Angeles Lawyer*, February, 1980, at 47.

55. "California Bar World" (1980), 55 Cal. St.B.J. 38.

56. *Id.*, at 39.

57. "Forum: Legal Specialization In California" *Los Angeles Lawyer*, February, 1980, at 10.

the San Francisco Bar Association's *Brief Case*.⁵⁸ Most of the arguments, either in favour or in opposition, are not new but have been made for decades.⁵⁹ Many of the issues involved are difficult to measure and yet a balancing of possible positive and negative factors is necessary as well as the implementation of measures to maximize positive goals while minimizing the dangers of negative collateral effects. In this debate, whatever side one takes, there should be agreement first as to the motivations for the debate. At the highest level of abstraction, some lawyers may oppose specialization regulation largely because it may place a competitive burden on them to increase their knowledge and skills. Any regulation of a lawyer's conduct may be seen as a net which limits freedom to do whatever he likes. Voluntary specialization schemes may be perceived that way in terms of their collateral effects on the way the practice of law develops. However, arguments motivated by a lawyer's self-interest, rather than the interest of the public, should not motivate the debate. Opposition to the certification of specialists must be motivated by solid arguments as to why it would not be in the public interest. Similarly, supporters must be motivated by public service, not by a private interest in maintaining or solidifying some privileged position.

It seems that a second level of agreement is necessary for the debate to be meaningful. There must be agreement that specialization regulation *alone* is not the only (or, even principal) vehicle in achieving the goals of increased quality of legal services and more informed access to them at reasonable cost for all segments of the population. There are many diverse factors which relate to these goals and action is necessary on many fronts to achieve them. What the certification of specialists may do is contribute to the achievement of these goals, but without placing such a program within the context of other reforms, proponents may overestimate the contribution of a certification program and critics may unfairly condemn the program for not "achieving" the stated goals. The issue is rather whether the formal recognition and regulation of specialization is *one* of the essential developments in the achievement of the goals mentioned above.

What is clear from the recent California developments is that a substantial element of the bar does not think it is an essential development. If we eliminate the arguments motivated by self-interest and those placing unfair demands on the certification program, we are still left with many legitimate concerns. Certification proponents may feel that some of these concerns have already been dealt with and that the others can be met. However, the arguments must now be marshalled and widely discussed before certification is finally "voted up".

b) Texas: Certification Program Expanded and Made "Permanent".

In 1977, three more fields of law — Estate Planning and Probate, Personal Injury Trial, and Civil Trial were added to the 1974 certification program in the three original fields of Family, Labour, and Criminal Law.⁶⁰ Recently, the field of Immigration and Nationality Law was added and in

58. "California: Critics, Proponents and Surveys", 5 *Brief/Case* #10, March, 1980, at 36.

59. See *Supra* n. 12, at 269-273.

60. For an outline of the Texas program see *Supra* n. 12, at 283-288.

January, 1980, 19 lawyers were certified in this new field.⁶¹ Further expansion is being contemplated, as Advisory Commissions now exist in the fields of Real Estate and Admiralty Law.⁶²

Unlike the numerous protests that greeted the move to permanent status in California, in Texas the program was made permanent "with no organized opposition reported."⁶³ In April, 1980, the Texas Supreme Court eliminated the January 1, 1981, termination date and thus took the program off a pilot status.⁶⁴ Bill Campion, executive director of the Texas Board of legal Specialization, has been quoted as saying in reference to possible young lawyer opposition, "Ironically our young lawyers have been our biggest supporters."⁶⁵ The question must be asked why Texas has managed to move confidently forward with certification when so many questions are being asked in California. The programs of the two states are, after all, very similar in the level of standards set for certification and in the mix of standards required.

While the standards for each field are not identical, a fair summary of the basic approach to certification requirements in Texas is (1) five years practice of law on a full time basis; (2) 25% of practice in the particular field of law during the preceding three years [and more specific substantial involvement standards]; (3) positive ratings in peer review; and (4) sufficient continuing legal education.⁶⁶ In addition, each candidate for certification must pass a six-hour comprehensive written examination.

One difference, however, between California and Texas is that the California standards of substantial involvement and educational experience tend to be as objective as possible, that is, a formal combination of detailed requirements must be met by an applicant for certification. If not met, then the applicant is not certified whatever other or arguably equivalent qualification he or she may have. Texas standards, on the other hand, have tended to be more flexible, even if aimed at the same quality levels as the California standards. In 1977, the Texas Board, with approval of the State Bar, introduced even more flexibility into the program:

A review board has the power to recommend to the Texas Board of Legal Specialization that a particular requirement is inappropriate or unnecessary as to an individual applicant where the applicant has the equivalent of what the standards would require.

....

In practice, review boards in each field will be empowered to conduct personal interviews, examine work products, give modified oral examinations, and seek intensified peer review in an effort to determine the qualifications of an attorney who applies for waiver of a fixed standard. By this process otherwise qualified attorneys will be admitted into the program, giving the public a choice from among a large number of competent attorneys in a specialty law field.⁶⁷

61. See "215 Attorneys Become Board Certified" (1980), 43 Texas B.J. 360.

62. See "Legal Specialization Plan Aids Public and Attorneys" (1979), 42 Texas B.J. 434, at 435.

63. See S. Slonim, "Specialization Plans Get Divided Response" (1980), 66 A.B.A.J. 270.

64. *Ibid.*

65. *Ibid.*

66. *Supra* n. 62, at 434.

67. R. Wells, "Certification In Texas: Increasing Lawyers Competence and Aiding the Public In Lawyer Selection" (1978), 30 Baylor L. Rev. 689, at 694.

One can only speculate as to whether this increased flexibility is a reason why the Texas program has not met the California resistance.

More likely, the idea that the Texas certification program is out of rough waters is premature. The main reason for this is that new advertising rules are still under debate.⁶⁸ Currently, the Supreme Court of Texas has ordered a referendum for the State Bar membership on the advertising rules approved by the Board of Directors of the State Bar back in December, 1978. These rules include the following provision:

Only the following information may be published or broadcast in a dignified manner:

.....

- (17) Fixed fees for specific legal services;
- (18) One or more fields of law in which the lawyer or law firm concentrates, a statement that practice is limited to one or more fields of law, or a statement that the lawyer is Board Certified in a particular field of law;⁶⁹

The allowance of advertising of "limitation" or "concentration" of practice could have significant impact on the Texas certification program. If it is perceived by lawyers that the public will not significantly distinguish "Board Certified in X field" lawyers from "Concentrating in X field" lawyers, what would be the result? What incentive would there be to go through an "onerous" certification program if you could advertise concentration freely without apparently any further competency standards attached? One cannot help but conclude that the Texas advertising proposals were drafted without enough consideration of the interface between specialization and advertising. Should there be some requirements before field advertising is allowed by the creation of a kind of two-tier system? Or should there be only a listing of fields for non-certified lawyers with words such as "willing to accept cases in [field(s)]"?

The former Executive Director of the Texas Board of Legal Specialization, Mr. Richard Wells, suggests that since the certification program has been in operation, the growth and quality of continuing legal education courses has accelerated.⁷⁰ These programs are often available to all members of the bar, not just to those lawyers who are certified. One might conclude that this is one indicia that certification does in fact increase the competency of lawyers generally.

It should be remembered, however, that the question of whether competence of lawyers is increased through a certification program must be partly examined in terms of the interface between mandatory continuing legal education and certification programs. Texas is not a mandatory C.L.E. state. What kind of impact would a certification program have in a state with mandatory C.L.E. already?

As of May, 1980, 9 states have mandatory C.L.E. programs. Only South Carolina has both a certification program and a mandatory C.L.E. requirement.⁷¹ This issue of the interface between mandatory C.L.E. and

68. See "Advertising Referendum" (1980), 43 Texas B.J. 318.

69. *Id.*, at 319.

70. *Supra* n. 67, at 692 - 693.

71. See "Developments in mandatory C.L.E., Certification, and Specialization" (1980), 26 C.L.E. Register #5, at 109.

specialization will be looked at again.⁷² All that is being suggested for the moment is that we must be careful in measuring the impact on the quality of legal services of a certification scheme by looking at C.L.E. developments.

It may be of some interest to note the pattern of participation in the Texas program, keeping in mind that the Texas bar is very large. By the end of 1977, 616 lawyers in Texas had been certified in the original three fields and in Estate Planning and Probate Law, which was a field introduced that year. The number of applications to that date was 968, indicating some failure rate over the years in meeting the requirements. The breakdown of numbers certified, as at that date, was as follows⁷³:

Criminal Law — 170
 Estate Planning and Probate Law — 137
 Family Law — 194
 Labour Law — 115

In 1978, with the new fields of Civil Trial Law and Personal Injury Law added, lawyers began to be certified in more than one field and the number of certifications went up dramatically. That year, 589 certifications were granted to 484 lawyers as follows⁷⁴:

Civil Trial Law — 227
 Criminal Law — 31
 Estate Planning and Probate Law — 42
 Family Law — 23
 Labour Law — 2
 Personal Injury Trial Law — 264

In 1979, 215 lawyers were certified, several in more than one field as follows⁷⁵:

Civil Trial Law — 59
 Criminal Law — 30
 Estate Planning and Probate Law — 28
 Family Law — 35
 Immigration and Nationality Law — 19
 Labour Law — 6
 Personal Injury Trial Law — 57

c) Arizona: New Pilot Certification Plan In Operation

After approval by the Arizona Supreme Court in 1977, and with some revisions by the State Bar Board of Governors in 1978, a certification of specialists plan in Workmen's Compensation, Tax, and Criminal Law is currently under way in Arizona.⁷⁷ It should be noted that these fields are the same as the original fields chosen by California, so it may be possible now after a few more years of experience with the Arizona plan to do a study comparing public and lawyer impact of the different standards involved in the two states.

The Arizona approach, which will allow eligible lawyers to call themselves "Certified Specialist, Criminal Law [Workman's Compensation, Tax Law] . . . Arizona Board of Legal Specialization", differs con-

72. *Infra* n. 82-84 and text.

73. "Professional Activities" (1978), 41 Texas B.J. 341.

74. "Professional Activities" (1979), 42 Texas B.J. 334.

75. "Professional Activities" (1980), 43 Texas B.J. 360.

77. See A.B.A. Specialization Committee, *Information Bulletin #6* (January, 1980), at 5.

siderably from both California and Texas in the approach taken to standards. The plan does not require examinations. Rather, initial certification is based on objective standards of substantial involvement in the field. One might argue that the plan does not attempt to measure some level of competence, but only a level of experience and concentration of practice. For initial certification, standards of special education, examinations, or peer review are not included. This approach then differs substantially from the Texas and California certification approach and does not conform to the A.B.A. model plan mix of minimum standards either. Only upon recertification is it necessary to show "such continuing educational experience in the field of law for which certification was granted, during the period of certification as the Board deems advisable."⁷⁸

Can the Arizona plan be criticized for misleading the public since the label "certified specialist" may imply something more than *de facto* concentration of practice and experience?

It should be noted in fairness that "each advisory commission may recommend, and the Board may establish additional or higher standards."⁷⁹ This in fact has happened in the field of Criminal Law where the specific standards adopted include taking an *annual* examination in the field of Criminal Law and procedure. However, this examination may be "of the self-assessment type". "Failure to take the examination shall result in revocation of recognized status, but a particular grade shall not be required during the pilot phase of the program as a condition to continued participation in the pilot program."⁸⁰ In Criminal Law there is also a peer review-reference standard to test an applicant's "proficiency — reputation" in practice. It will be interesting to all followers of specialization regulation to see how the Arizona program will develop, particularly on the issue of measuring "specialized competence" versus measuring "*de facto* concentration and experience".

d) New Jersey: Pilot Certification Plan In Operation For Trial Attorneys Only.

Under a nine member Board appointed by the New Jersey Supreme Court upon nomination from the President of the state bar, lawyers may now become certified in Trial Practice. Standards include at least three years in practice, a substantial proportion of time spent in litigation, peer evaluations, an examination, and, at the discretion of the Board, continuing legal education. According to the most recent A.B.A. survey⁸¹ this plan was adopted by the New Jersey Supreme Court while a more comprehensive plan sponsored by the State Specialization Committee was and is still pending before the court.

e) South Carolina: Certification of Specialists Linked With A Mandatory C.L.E. Program for All Lawyers.

In May, 1978, the South Carolina House of Delegates of the Bar ap-

78. *Id.*, "Specialization Program", s.6(b).

79. *Id.*, s.5.

80. *See id.*, "Criminal Standards" Part III.

81. *Supra* n. 77.

proved "Rules on Lawyers' Competence",⁸² which included a certification of specialization plan. In late 1979, these rules were adopted by the Supreme Court of South Carolina.⁸³ What makes the South Carolina situation noteworthy is that mandatory continuing legal education for the bar and a specialization scheme are dealt with together. Just as the advertising and specialization issues are linked, so arguably are the mandatory C.L.E. and specialization issues linked. Advertising connects with the specialization regulation goal of more informed access to legal services. Mandatory C.L.E. connects with the specialization regulation goal of maintaining a higher quality of legal service. As noted above, these goals cannot be advanced very far through specialization regulation alone, but rather with such regulation *integrated* with policies, procedures and rules dealing with a number of other factors bearing on the issues of informed and equal access to quality legal services at reasonable cost.

The South Carolina Rules, once implemented, will require all members of the bar to take 12 hours a year of C.L.E., except for lawyers who have engaged in the practice of law for over 30 years and certified specialists who have their own required C.L.E. under the certification rules. The definition of the fields for certification is left to the Commission on Continuing Lawyer Competence which has general jurisdiction over all matters pertaining to mandatory C.L.E. and specialization. In each field a Specialization advisory Board would be set up to deal with the implementation and enforcement of the standards and procedures in that field. Minimum certification standards include references on reputation and competence from five other lawyers and a minimum five years in practice or an equivalent experience.

However, unlike the cumulation of both experience and competency standards to be met in Texas and California, the South Carolina rules lay down a number of *alternative* ways of becoming certified:

As determined by the Specialization Advisory Board, an applicant must:

- (1) Make satisfactory showing of substantial involvement (i.e., actual performance) in the specialty field during a five-year period or other reasonable period, but not less than three years, immediately preceding the application, which demonstrates according to objective and verifiable standards that the applicant has been substantially involved (i.e., has actually performed) in the specialty field from which certification is sought, so as to justify certification under the program; *or*
- (2) Successfully complete a program of instruction approved by the Specialization Advisory Board; *or*
- (3) Undergo and satisfactorily complete an examination consisting of oral and/or written parts approved and administered by the Board designed to test the applicant's knowledge of and ability in the specialty field for which certification is sought. [emphasis added]⁸⁴

For recertification in five years, a specialist must show that during these five years he or she has attended a minimum of 60 hours of C.L.E. in each of the fields in which certification was granted. Continuing actual involvement in the fields is also required for recertification.

82. Available as Enclosure G in A.B.A. Specialization Committee, *Information Bulletin #5* (September, 1978).

83. See "Mandatory C.L.E. for South Carolina" (1979), 5 Bar Leader #3, at 6.

84. "Rules on Lawyer Competence", Rule 6 d, *supra* n. 82.

Because the examination, substantial involvement and prior special education standards are alternatives rather than cumulative standards, the same issue as was raised with the Arizona plan must be considered. For initial certification, are we measuring *de facto* experience alone, special competence alone, or should the two both be measured? Is there a trend being set by recent certification plans to achieve as much flexibility as possible so as to create as much accessibility for participation as possible? Is the "equality" goal swamping the "excellence" or even "competence" goal? Are these certification schemes really very close to being designation schemes? Should we allow lawyers to hold themselves out as "certified specialists" on the basis of these standards?

f) Other States: Certification Plans Pending or Defeated

As outlined above, there are now five states that have certification plans in operation. The most recent A.B.A. Committee survey lists another 7 states where certification plans have been proposed and are in various stages of consideration by the appropriate authorities involved.⁸⁵ These are Washington, Missouri, Wisconsin, Michigan, Minnesota, Nevada and Rhode Island. However, as illustrated by the California situation, the "certification" route is still meeting considerable opposition and this is reinforced by the fact that in New York and Alaska certification proposals did not meet with the approval necessary for implementation. An attempt to add a certification tier in Florida also ran into resistance. The Florida developments will be examined later on in this paper.⁸⁶

According to a recent report, the New York bar's House of Delegates voted against a pilot certification plan in the fields of Labour Law, Trusts and Estates, and Trial Practice.⁸⁷ The vote was estimated at two-to-one against the proposal, and in explaining the objections, Frank Rosing, a member of the Board of Directors of the New York County Lawyers Association, is reported to have said:

There is no demonstrated need [for a plan]. And, an inescapable consequence of adopting such a plan would be to fragment the practice of law, to discourage the general practice of law, to increase the cost of legal service and to add an administrative burden." A spokesman for the Association of the Bar of the City of New York added, "Our people believe that the special competence of particular lawyers cannot be measured objectively."⁸⁸

These concerns parallel many of those expressed in California.

The plan defeated in Alaska contemplated two routes for certification.⁸⁹ One route without an examination would have been available for applicants who had practiced law at least 10 years with substantial involvement in the applicable field for five years. For younger applicants with at least 5 years of practice who had substantial involvement in the applicable field for 3 years, an examination route would have been required.

85. *Supra* n. 77.

86. *Infra* n. 109-127 and text.

87. See "Warn Specialization 'No' Could Hurt Bar" (1979), 5 Bar Leader #2, 10.

88. *Ibid.*

89. *Supra* n. 77.

Recent developments in the certification approach to specialization regulation, then, indicate some "victories" for the movement, but also some "defeats" and many "compromises".

THE DESIGNATION APPROACH

- a) Designation Programs Operating in New Mexico, Florida, Georgia, and Iowa.

The "self-designation" New Mexico scheme and the Florida "designation with C.L.E. requirements" plan have been widely discussed and documented.⁹⁰

Recently in Iowa and Georgia new designation proposals have met with all the necessary approvals to be implemented.⁹¹ This brings to nine the number of states with some form of specialization regulation schemes in operation. (California, Texas, New Mexico, Florida, Arizona, New Jersey, South Carolina, Iowa, and Georgia).

The Georgia plan requires three years of "substantial experience" in a field for designation as a specialist in that field. To earn the right of redesignation after three years, 30 hours of C.L.E. are required in the field over that period.⁹² In Iowa, some mandatory C.L.E. is required for the initial designation, as well as 200 hours or 20 percent of time spent in the applicable field for each of the two preceding years before designation is sought.⁹³ It should be noted, however, that Iowa is a state requiring 15 hours per year of C.L.E. on the part of all its practicing members.⁹⁴

In Georgia, the question of advertising and specialization appears to have been integrated to a greater extent than in many other states. In June, 1978, the Georgia Supreme Court amended the Bar Rules related to permissible advertising.⁹⁵ The changes were very narrow in that field advertising as such was not allowed until the designation scheme came into effect. What was initially allowed was only the advertising of fixed fees for specific legal services. The specific legal services allowed to be advertised were listed and only those could be advertised. While it could be argued that such advertising regulation is too restrictive, the problem of a designation scheme being irrelevant because of field advertising is partly avoided. There is a considerable difference between an advertisement listing "John Doe . . . Uncontested Divorces — X dollars" and an advertisement listing "John Doe . . . Specialist in Family Law". That difference is wider than between "John Doe . . . Family Law" and "John Doe . . . Specialist in Family Law" or "John Doe . . . Limited To Family Law".

On the other hand, the avoidance of the problem of confusion between field advertising and the designation of specialists only raises another problem. The very fact of significant difference between advertising by nondesignated members and advertising by designated members places a greater burden on the specialization regulation program to avoid deception

90. For an overview of these early designation plans, see *Supra* n. 12, at 288-293.

91. *Supra* n. 77.

92. *Ibid.*

93. *Ibid.*

94. *Supra* n. 71.

95. See J.E. Spence, "Lawyer Advertising" (1978-79), 15 Georgia St. B. J. 7.

over the meaning of "specialization". Despite the usual disclaimers by the Bar that designation in any way implies specialized competence, will the public understand that? If not, then perhaps the specialization regulation plan should require meaningful standards of competence for participation?

b) Designation Proposals Rejected In Six States.

A few years ago many state specialization committees, in comparing the New Mexico self-designation plan on the one hand, and the formal combination of certification standards in Texas and California on the other hand, opted instead to make proposals resembling the Florida designation with C.L.E. requirement programs.⁹⁶ This was seen as a kind of compromise between the goal of wide participation in informing the public of *de facto* concentration and the goal of providing some increased quality incentive as well. It appears recent developments indicate, however, that the designation route has lost a great deal of its popularity. In Nebraska, Maine, Louisiana, Idaho, Arkansas, and Alabama designation proposals have met defeat by either the Bar House of Delegates or by the Court.⁹⁷

While the reasons for these defeats are undoubtedly complex and different from state to state, one major factor is the interface between new advertising freedom and specialization regulation. The issue is well illustrated by the following comments of Stephen Anderson, chairman of the Utah State Bar Committee on Specialization:

Under the new rules, Utah lawyers are permitted to publicize in print media that their practice or that of a firm "is limited to" or "concentrated in" as many as five areas of practice.

Members of the Utah Specialization Committee believed that the new advertising rules came so close to the draft designation plan for lawyer specialization that the plan would not meet with broad acceptance and the public would not be materially benefitted. Without a massive public education program, laypersons would hardly draw a meaningful distinction between "specializing in" as allowed under the draft designation plan and practice "limited to" as authorized under the new advertising rules. Moreover, absent some real meaning to the public, lawyers could hardly be expected to pay a fee and conform to even the minimal requirements of a specialization plan for the now dubious privilege of using a phrase such as "specializing in" — especially with an accompanying statement by the Bar that the lawyer is not necessarily more competent than others. As a result of the above considerations, the Committee decided not to submit a self-designation plan to the Bar Commission.⁹⁸

The Utah situation illustrates an example of where the A.B.A. Specialization Committee's suggestion as to what kind of field advertising should be allowed in the absence of a specialization scheme is not being followed.⁹⁹ It might be argued that even if the designation of "limited to" or "concentrated in" are removed and only lists of fields are allowed as a matter of advertising regulation, a designation specialization plan would still not significantly overcome these problems of lack of incentive to participate and confusion to the public.

96. For an overview of the Florida plan, See *Supra* n. 12, at 291-293. Recent developments in Florida will be examined below, *Infra* n. 109-127 and text.

97. *Supra* n. 77.

98. S. Anderson, "Status Report on Lawyer Specialization" [1978] Utah L. Rev. 681, at 687.

99. *Supra* n. 5.

The current question to be asked in the light of advertising rule changes is whether the designation route of specialization regulation will become largely irrelevant, unless the Georgia restrictions on advertising are adopted.

In states such as Idaho which is a mandatory C.L.E. state, another factor in the rejection of a Florida type designation scheme is that the C.L.E. requirements for designation may not advance quality standards significantly if lawyers are already required to take C.L.E. anyway. If a middle ground between certification with "tough" competency standards and self-designation is sought, it is more likely now that the A.B.A. model plan will be widely considered, or as illustrated in the Arizona and South Carolina developments noted above,¹⁰⁰ certification plans with fewer and more flexible standards may become popular.

THE COMBINATION (TWO-TIER) APPROACH

a) Five States are Considering Combination Plans

Instead of having either designation or certification, why not have both? Why not a designation system in a wide number of fields of law so that the majority of lawyers could, without too much burden, represent to the public the fact of *de facto* concentration? Perhaps some standards of substantial involvement and a minimum C.L.E. requirement could be attached to this right of designation. Why not immediately or some time after also add a "second tier" for the certification of specialists in all or some of the designation fields? The goals of informed access to legal services and improved quality of legal services might both be better advanced by having two tiers instead of just one or the other or one scheme that tries to be a "middle ground" like that of the A.B.A. Model Plan. These questions have been considered by state specialization committees for some time.¹⁰¹

Unless permissible field advertising is equated with tier-one specialization, no pilot two-tier programs are currently operating. Nevertheless, according to the latest A.B.A. Committee survey, such an approach is under consideration in five states — Pennsylvania, Oklahoma, Ohio, Kansas, and Kentucky. However, a combination plan was rejected recently in Massachusetts.¹⁰²

One example of a two-tier approach is the plan outlined in the Final Report of the Specialization Committee of the Kansas Bar Association in December, 1977. The Report briefly summarizes the proposals contained in the plan as follows:

1. The Plan contemplates a dual system:

- A. Area of Practice Identification.

Under this part of the Plan a lawyer may designate up to three areas of practice, in addition to general practice, in which his or her practice is limited or in which emphasis is placed. Such identification does not require certification or examination. Requirements are: three years practice, commitment to ten hours per year C.L.E. and written approval.

- B. Commission Certification of Specialists.

If desired, a lawyer may also apply for Commission certification of genuine

100. *Supra* n. 78-84 and text.

101. *Supra* n. 12, at 295-297.

102. *Supra* n. 77.

specialty in up to two legal fields. Requirements: five years practice, significant experience, passage of a written examination, full disclosure to the Commission of any ethical complaints against the applicant and twenty hours annual C.L.E.

2. Renewal of permission to identify is required every three years with proof of compliance with requirements. Renewal of certification is required at five-year intervals.
3. The entire Plan is totally voluntary. No one is prohibited from practicing in areas covered by identifications or specialties, even if not certified or covered by permissions to identify. General practitioners may identify general practice as an interest without any involvement with the Plan.
4. The authority governing the operating of the Plan is a Commission to be created by the Kansas Supreme Court consisting of six practicing lawyers, one law faculty member, one judge and one nonlawyer. Subcommittees are provided for to assist the Commission in preparing and giving examinations for Certified Specialists. Terms of all Commission and Subcommittee members are limited.
5. Those identifying areas of practice in which emphasis is placed and those obtaining Certificates of Specialty are permitted to state these facts to the public in a specified ethical and dignified manner.
6. Fees generated from applications are contemplated to be adequate to fund the operation of the Plan.
7. The public is to be advised concerning the meaning of the two permitted designations.¹⁰³

If the plan was adopted, a Kansas lawyer meeting the appropriate standards for "identification" could advertise "Practice limited to (area or areas identified)" or "Practice emphasizing (area or areas identified)."¹⁰⁴ If the lawyer met the certification standards, he or she could advertise "Certified Specialist in (X) Law, Kansas Commission on Legal Specialization."¹⁰⁵ The Plan included a notice as to the significance of identification:

5.8 Notice to the Public.

The Commission shall cause the following notice, or one of like import, to be published in yellow page telephone directory listings and in such other places as it may deem appropriate.

"NOTICE

Attorneys who have practiced for three years or more are permitted, if they so desire, to inform the public of not more than three areas of the law in which they practice, in addition to the right of any attorney to engage in the general practice of law.

Such listing DOES NOT MEAN that such attorney has been certified by any person or group as an "expert" in any area of law, nor does it mean that such attorney is any more expert or competent than any other attorney.

ALL PERSONS ARE URGED TO MAKE THEIR OWN INDEPENDENT INVESTIGATION AND EVALUATION OF ANY ATTORNEY BEING CONSIDERED.

This notice published by the Kansas Commission on Legal Practice Identification and Specialization."¹⁰⁶

However, a notice to the public as to the significance of certification is not

103. This proposal is included in A.B.A. Specialization Committee, *Information Bulletin #4* (February, 1978) 3.

104. *Id.*, at 7, Art. 5.5.

105. *Id.*, at 9, Art. 6.5.

106. *Id.*, at 8, Art. 5.8.

included in the plan but is left for future consideration.¹⁰⁷ It would of course have been highly interesting to see a model notice in the plan since the question of whether the public will “properly” recognize a distinction between the two tiers is an obvious issue facing such an approach.

The plan called for the initial approval of the following areas for designation and certification¹⁰⁸:

Designation

(in addition to
“General Practice”):

Appellate Practice
Antitrust Law
Bankruptcy Law
Corporation and Business Law
Criminal Law
Estate Planning and Administration
Family Law
International Law
Environmental Law
Labour Law
Patent, Trademark and Copyright Law
Real Estate Law
Tax Law
Trial Practice
Worker’s Compensation Law
Administrative and Governmental Law
Personal Injury and Negligence
Collections
Condemnations — Eminent Domain
Domestic Relations (Divorce)
Oil and Gas Law
Probate and Wills
Products Liability

Certification:

Tax Law
Labor Law
Criminal Law
Civil Trial Law
Worker’s Compensation Law
Probate Law
Domestic Relations Law
Oil and Gas Law
General Practice
Patent, Copyright and Trademark Law
Corporation and Business Law

While these lists are only “initial” ones, some questions about them immediately come to mind. What does it mean to be a certified specialist in “General Practice”? Why is “Trial Practice” a designation area, but only “Civil Trial” is a certification area? Why are some of the certification areas given a different label from the same area in the designation column?

b) Florida: Proposal To Add Certification Tier Rejected By Court.

The Florida self-designation plan with C.L.E. requirements for redesignation has been in operation since late 1975.¹⁰⁹ If a member has practiced law at least three years and has “substantial experience” in each area of practice in which the member is seeking designation, the member may designate up to three areas of law as well as “general practice”. The right to renew a designation after three years is given only if the member has devoted at least 30 hours to approved C.L.E. in each of the areas in which renewal is sought. The designation plan does not allow lawyers to advertise the designated areas with terms such as “specialist in” or “limited to” but simply allows them to list the designated areas after their name with no further descriptive words.

107. *Id.*, at 10, Art. 6.9.

108. *Id.*, at 11.

109. *Supra* n. 96.

While the plan required some revisions in the number of fields and the labelling of the fields,¹¹⁰ participation by lawyers has been widespread. Mr. Barry Davidson, the Chairman of the Florida Bar Designation Coordinating Committee, writing in 1978, noted that one positive result of the plan has been the increase in voluntary participation at C.L.E. seminars:

The number of C.L.E. seminars offered by the Florida Bar has risen from 6 in 1974-75 to 51 in 1977-78. Registration for those same years has risen from 9,373 to 27,946. While Florida Bar membership has increased 23.5% in that period of time, registration at Florida Bar C.L.E. seminars has increased 298%.¹¹¹

However, he noted that what impact the plan has had on the public in terms of providing better access to appropriate lawyers has still not been formally studied.¹¹²

In August, 1977, the Florida Bar Membership Survey asked the membership whether The Florida Bar should develop certification plans in appropriate areas of the law, understanding that certification requires evaluation of competence in an area of law by written examination, peer review of work products, or a combination of these. Fifty-one percent of the respondents said yes, 36 percent said no, and 13 percent had no opinion.¹¹³

In September, 1978, the Florida Bar petitioned the Supreme Court both to amend the designation plan (tier-one), and to add the beginnings of a certification program (tier-two) onto the existing plan.¹¹⁴ The certification plan called for certification in two initial fields — Taxation and Civil Trial — but also laid down the administrative structure and framework for the development of certification in other fields.¹¹⁵

The brief to the Court in support of the certification plan included the following outline of the proposed standards:

... A member in good standing of The Florida Bar who meets the requirements will be granted a certificate of competence in the appropriate area of certification. The certificate should be issued by The Florida Bar and shall state the member is a "Board Certified _____ Lawyer."

When certification without examination is available in an area, the minimum requirements for such certification are as follows: a minimum of ten years of actual practice of law on a full-time basis; a satisfactory showing of competence and substantial involvement in the particular field of law for which certification is sought during five of the last ten years, including the year immediately preceding certification; and payment of any fee required by the Board of governors. Certification without examination may be granted only within a period of two years after the date on which the plan for certification of a particular field of law is made effective by the Board of Governors. After that date, all certification in that field of law shall be by examination.

110. See B. Davidson, "The Florida Designation Plan: A Practical Approach To Legal Specialization" (1978), 30 *Baylor L.Rev.* 701.

111. *Id.*, at 704.

112. *Id.*, at 705.

113. "The 1977 Florida Bar Survey" (1978), 52 *Fla. B.J.* 10.

114. See, *Brief of the Florida Bar to the Florida Supreme Court, dated Sept. 7, 1978, Re: Petition to Amend the By-laws Under the Integration Rule of the Florida Bar.*

115. See *Proposed Amendments to establish Florida Certification Plan.*

The minimum requirements for qualifying for certification by examination are as follows: a minimum of five years of actual practice of law on a full-time basis; satisfactory showing of substantial involvement in the particular field of law for which certification is sought during three of the last five years preceding certification; satisfactory showing of such educational experience in a particular field of law for which certification is sought as the Board of Governors deems advisable, but in no event less than the minimum required under the Florida Designation Plan; passing a written and/or oral examination applying uniformly to all applicants before certification to demonstrate sufficient knowledge, proficiency and experience in the field of law for which certification is sought and in the various fields of law relating to such field; and payment of any fee required by the Board of Governors

No certificate of competence will be issued or renewed for a period longer than five years, and the term of any certificate shall be stated on its face. Recertification will be required at least every five years under the following minimum standards: a satisfactory showing of substantial involvement in a particular field of law for which certification was granted, during the period of certification; a satisfactory showing of continuing legal education experience in the field of law for which certification was granted; and the payment of any fee prescribed by the Board of Governors.¹¹⁶

Notice, then, that the possibility of "grandfathering" may be available in fields for a two year period. In support of the argument in favour of the possibility of "grandfathering", the brief notes:

Broad based support for a program of certification is desirable and in fact necessary if it is to be successful. That support may only be generated if acknowledged leaders in particular fields of law initially join the program. It is to be noted that only the written examination is waived for attorneys with ten or more years of experience. In all other respects, the requirements of eligibility are the same as for other applicants. Because it is felt that the remainder of the application requirements are rigorous, the quality of the successful applicant should remain uniformly high whether or not exempted from the examination because of his or her practice experience.¹¹⁷

The proposed standards for Taxation permitted "grandfathering" while the Civil Trial standards did not.

Changes to the existing designation tier were proposed as well. The basic thrust of the changes were directed at increasing the quality assurance standards for designation. Now C.L.E. would be required not just to redesignate but also for initial designation. The accumulated hours proposed for each area of practice were as follows:¹¹⁸

- a. Ten hours if the application is filed on or before December 31, 1979.
- b. Twenty hours if the application is filed on or before January 1, 1980, but not later than December 31, 1980.
- c. Thirty hours if the application is filed on or after January 1, 1981.

Another proposed change included the deletion of the right to designate "general practice" without fulfilling certain designation requirements. Also, the 30 hours of C.L.E. over 3 years requirement for redesignation remained, but no more than 20 of these hours could be accumulated in any one year.

The changes to the designation tier were approved by the Supreme Court of Florida in a *per curiam* judgment on March 15, 1979.¹¹⁹ However,

116. *Supra* n. 114, at 16-17 and 20.

117. *Id.*, at 18-19.

118. See, "Petition to Amend the Bylaws . . . Florida Designation Plan" at 3.

119. (1979), 368 S. 2d 1303 (Fla. Sup. Ct.).

the certification tier proposal was not dealt with until later. Meanwhile, on July 26, 1979, the Supreme Court of Florida amended the advertising provisions of the Florida Bar Code of Professional Responsibility.¹²⁰ Of great significance to the designation plan was the right of a member to advertise "one or more particular areas or fields of law in which he practices."¹²¹ The provisions also state that such field advertising by a non-designated lawyer must be drawn so as not to confuse laymen.¹²² That is, there should be a nonconfusing distinction between lawyers qualified to advertise areas under the designation plan and everyone else who now has a right to advertise fields of law. What that distinction could be is not spelled out by the court, particularly when the designation plan simply allows a listing of fields and not a label like "designated in X" or something of that sort. How can there be a nonconfusing "distinction" between simple field advertising and the designation scheme when the designation scheme includes the following notice to the public?:

FOR THE GENERAL INFORMATION OF THE PUBLIC

ATTORNEYS LISTING AREAS OF PRACTICE IN THE YELLOW PAGES HAVE NOT BEEN CERTIFIED BY THE FLORIDA BAR AS HAVING ANY MORE COMPETENCE IN THESE AREAS THAN ANY OTHER ATTORNEY. ALL PERSONS ARE URGED TO MAKE THEIR OWN INDEPENDENT INVESTIGATION AND EVALUATION OF ANY ATTORNEY BEING CONSIDERED.

This notice published by The Florida Bar, Telephone A.C. 904/222-5286, Tallahassee, Florida 32304.¹²³

Why should a lawyer designate if he or she can list fields of law anyway? Once again, it is submitted, the interface between advertising and specialization regulation was not well handled. To prevent the designation scheme from becoming irrelevant, either designated members should use some label indicating such status and the public should be given explanation of how that status is achieved, or field advertising for nondesignated members should be prohibited and just advertising of specific services and fees allowed to nondesignated members.

On September 6, 1979, the Supreme Court of Florida, in a 5 to 1 decision written by Overton J., rejected the certification plan (tier-two) addition to the existing designation program.¹²⁴ While Overton J. did not disapprove of attempts to actually measure and certify specialized competence in an area as opposed to *de facto* concentration or experience in an area, it cast cold water on the proposed method for that testing:

In developing the method to do this, however, we must avoid the pitfalls of protectionism, and we must avoid, in particular, a procedure that might allow unfair advantage to one segment of the legal profession. Certification of special competence in a designated field of law requires a fair way to measure this special competence. The measuring or testing technique to determine competency for certification requires lawyers, in most instances, to subjectively judge one another's ability. This, in itself, may lead to a suspicion that lawyers who have been accepted within a specialty are using their inside position to foreclose the entry of newcomers.¹²⁵

120. Unreported, July 26, 1979.

121. *Id.*, at 16.

122. *Ibid.*

123. *Supra* n. 119, at 1305.

124. Unreported, September 6, 1979.

125. *Id.*, at 2.

Overton J. later suggested that the designation plan, which does not purport to measure specialized competence, could not exist side by side with the certification plan, purporting to measure such competence, "without causing some substantial confusion to the public."¹²⁶

After rejecting the certification proposal, Overton J. suggested that the Bar should make a new proposal for a pilot certification program only in the field of Taxation. He then suggested the following alternative methods for certification in this field:

There should be a grandfather provision which will allow certification of a lawyer who has practiced for a substantial period of time and can demonstrate to an appropriate peer review committee that he has specialized in the field of taxation for an appropriate period of time. There should be a structured educational alternative provision which will allow certification for an applicant who holds an LL.M. degree in taxation. The third alternative method of qualifying for certification should be a testing provision under which any member of the bar, regardless of how long he has practiced, may establish his competence by passing a written or oral examination pertaining to tax law. These alternatives are similar to those prescribed in the proposed bylaws.

By providing three alternative means of qualification and including certification for holders of educational degrees in the specialty, the problems of protectionism are largely avoided because any lawyer who can demonstrate his competence in the field can be certified. The sole legitimate purpose of any specialization proposal is to ensure the technical competence of lawyers certified in the specialty and to inform the public that their services are available.¹²⁷

That this judgment is a substantial setback for both pure certification supporters and for combination supporters cannot be doubted. It may be some time before we have another attempt in Florida to add a certification tier in enough fields to make it meaningful in relation to the present designation plan. Perhaps the alternative is to move the tier-one designation program toward tier-two standards over a period of time by slowly adding more standards to the designation and redesignation system.

The Overton judgment once again raises the issue of possible equality by flexibility and fewer standards, versus possible excellence by cumulations of formal standards giving rise to exclusiveness.

THE RECOGNITION APPROACH (A.B.A. MODEL).

a) Under Consideration In Seven States.

In seven states — Carolina, Illinois, Indiana, Maryland, New Hampshire, Tennessee, and Virginia — Specialization Committees have proposed plans based on the A.B.A. recognition model plan outlined earlier.¹²⁸ However, these states have not followed the model to the letter but have both added to and deleted certain provisions. The A.B.A. Committee expected this to be the case when formulating the plan and indeed built flexibility into the plan for "local options." Still, some of the differences between the state proposals and model plan are relatively fundamental. Some of the plans do not contain a peer review standard.¹²⁹ Some do not have C.L.E. standards in *each* of the three years preceding application or

126. *Id.*, at 3.

127. *Id.*, at 4.

128. *See Supra* n. 22.

129. *New Hampshire and Indiana.*

rerecognition.¹³⁰ Some do not have provision for an Advisory Committee of non-lawyers.¹³¹

An interesting example of an addition to the model plan is the specific advertising regulation formulated in the New Hampshire proposal. Whether one agrees with it or not, it is submitted that it is one of the better examples of an attempt to seriously come to grips with the interface between field advertising and specialization regulation. Section 5.7 of the plan provides:

Only a lawyer recognized as a specialist under this Plan shall be entitled to advertise that he or she is a "Board Recognized Specialist" in his or her specialty.

A lawyer not recognized as a "Board Recognized Specialist" under this Plan shall not advertise or otherwise hold himself out as having any particular competence in any field of law, whether or not such field of law is designated as a specialty under this Plan. In this regard, statements that a lawyer's or a firm's practice is "limited to" or "concentrated in" a certain field or fields of law or that otherwise imply some competence based on concentration are likely to be misleading or deceptive and shall therefore not be used in advertisements.

A lawyer not recognized as a "Board Recognized Specialist" may, however, represent that he practices or prefers to practice in a particular field or that he does not practice or prefers not to practice in a particular field. Firms may also advertise such preferences or limitations.

The following statements of practice or non-practice are acceptable:

- a. A listing of fields of practice without additional descriptive language (e.g., "Real Estate; Probate; Commercial, General Practice");
- b. "engaged in the practice of _____";
- c. _____, _____, _____, and other areas of general practice";
- d. "general practice, except _____";
- e. "no _____ cases accepted".

Advertisements which do not involve Board Recognized Specialists need not be confined to the categories of specialties itemized below in Section 13.¹³²

The categories listed in Section 13 of the New Hampshire plan are:

Administrative and government law
 Admiralty
 Antitrust
 Bankruptcy
 Civil trial practice
 Corporation and business law
 Criminal trial practice
 Copyright, trademark and patents
 Estate planning and probate
 General practice
 Labor law
 Marital and family law
 Real property law
 Taxation

Specialization Proposals by Organizations Other Than States.

NATIONAL BOARD OF TRIAL ADVOCACY.

The notorious debate over the issue of competence of trial advocates has led to several proposals aimed at national certification of trial advocate

130. New Hampshire, Illinois, and Colorado.

131. Maryland and Indiana.

132. *Supra* n. 22, at 57.

specialists. As noted previously,¹³³ the A.B.A. has not supported national certification schemes, preferring instead that specialization regulation should remain with the states. What kind of arguments then can be made in favor of national certification? Mr. Theodore Koskoff, president of the American Trial Lawyers's Association (A.T.L.A.), has suggested several:

In today's increasingly mobile society, in which law firms have offices in several states, national certification of trial specialists is an absolute necessity to assure the public that an attorney is competent to practice in more than one state.

....

Also militating toward adoption of a national plan rather than 50 state-administered programs are the expense and logistical problems that would be encountered by small states attempting to establish meaningful guidelines to certify trial specialists.

...

Moreover, national certification is consistent with the philosophy of the multi-state bar examination and could provide the basis for uniform continuing legal education requirements.

National standards will also provide protection to the consumer of legal services where no other vehicle for certification exists or where specialist status could be achieved by mere self-designation.¹³⁴

....

In August, 1977, the A.T.L.A. Board of Governors established the National Board of Trial Advocacy (N.B.T.A.), an organization to certify trial lawyer specialists.¹³⁵ Three other groups have also joined A.T.L.A. as sponsors of N.B.T.A. — the International Society of Barristers, the American Board of Trial Advocates, and the National Association of Criminal Defence Lawyers. Recently, N.B.T.A. implemented its certification program, with the first examination given in 1980.¹³⁶ There are two certificates, one for Civil Trial Advocacy and one for Criminal Trial Advocacy. [N.B.T.A. is apparently willing to certify Canadian trial lawyers who can meet the standards. Will Canadian jurisdictions allow advertising of such certification as opposed to the advertising of membership in the organization? As yet, Canadian jurisdictions do not have specialization regulation schemes in operation, but the listing of memberships in organizations is often allowed. Advertising of membership in N.B.T.A. is different than a statement of the sort "Certified Specialist in Civil Trial Advocacy, National Board of Trial Advocacy". Should Canadian jurisdictions respond positively to this development in the absence of having any certification scheme of their own?]

The N.B.T.A. standards for certification include five years of law practice, substantial involvement as a matter of percent of practice, specific standards of actual involvement in the field, educational experience, peer review, examination, plus the submission of a trial brief. The certification standards, then, are definitely geared to measuring competence as opposed to *de facto* concentration of practice. The recertification standards, however, are not as stringent and are also more flexible:

133. *Supra* n. 12 at 297-301.

134. T.I. Koskoff, "Specialization Update" (1979), 15 Trial #2 21, at 24.

135. See T. Lumbard, "N.B.T.A.: National Specialty Certification In Trial Advocacy" (1979), 14 Int. Society of Barrister's 325.

136. *Id.*, at 327.

IV. Recertification Standards.**A. Other than by Examination.**

1. The applicant for recertification must have been engaged in the practice of law for at least 10 years prior to the date on which his/her certification is due to expire.
 2. The applicant must show that he/she during the Certification period participated for 25 days as counsel of record during a jury trial beginning with the voir dire and continuing to decision; OR for each year participated in at least five days of jury trial, OR was engaged full time and exclusively in the civil or criminal law field.
 3. The applicant must have spent at least 30 percent of his/her time in the practice of civil and/or criminal trial law, depending on his/her certification.
 4. The applicant for recertification must show that he/she has participated and completed at least 15 hours of educational activity per year as set forth in IIC, above.
- B. The applicant who fails to meet the requirements of point A under Recertification Standards above shall be entitled to recertification only upon successful completion of written examination given uniformly to all applicants prior to certification.¹³⁷

Thomas Lumbard, the Director of N.B.T.A., in writing about the certification program, made the following comment:

All of us who are involved in the work of the National Board of Trial Advocacy see it as a process of constant experiment. Our whole program is an experiment, because no one has ever before tried to administer a nationwide specialization program in a legal specialty. All of the state programs in legal specialization are equally experimental. None of us has all the answers, but all of us are working on the same basic belief: that the public needs to have access to information about the qualifications of lawyers in specialized fields, and that the bar has a duty to see that such information is made available to the public. This is what specialization programs are all about.¹³⁸

AMERICAN BOARD OF PROFESSIONAL LIABILITY ATTORNEYS.

This national board was organized to provide official recognition of specialist qualifications for both plaintiff and defense counsel who handle professional liability cases.¹³⁹

Currently the Board operates a kind of certification scheme in that membership in the organization is given only upon meeting certain standards of competence. For all applicants there is a peer review standard but then further standards differ as between "grandfathers" and other lawyers. For "grandfathers", the following standards apply:

- A. No applicant applying for admission under this provision shall have practiced law less than ten years.
- B. Substantial involvement:
 1. No applicant seeking admission under this provision shall be considered unless he shall have tried a minimum of ten documented jury trials as an advocate involving professional liability of which at least five went to a verdict, and
 2. Within three of the last five years immediately preceding application for admission, or within the total time of the past five years, the applicant has

137. *Supra* n. 134, at 26.

138. *Supra* n. 135, at 329.

139. See A.B.A., Specialization Committee, *Information Bulletin #5* (September, 1978) Enclosure H.

devoted a minimum of one-third of his time in the practice of professional liability actions.

- C. Applications for and admission under this provision shall be granted only within three years after this pilot program of admission shall have been made effective by the Board of Professional Liability Attorneys.¹⁴⁰

For other lawyers the following standards have been formulated:

- A. No applicant shall be considered who has not practiced law for at least five years.
- B. Substantial involvement:
1. No applicant shall be considered unless he has devoted one-fourth of his practice to this specialty in each of four out of the last five years immediately preceding the application.
 2. No applicant shall be considered unless he has tried a minimum of ten documented civil trials in the state or federal court, not less than three of which have been decided by a jury verdict.
 3. No applicant shall be considered unless he has tried three documented professional liability cases.
- C. Special educational expertise.
1. Applicants must show a special educational expertise in the field and an effort to keep current by educational activities, and
 2. Compliance with any three of the following seven educational experiences:
 - a. He shall have actively participated in professional societies or committees devoted to professional liability;
 - b. Instructed a course on professional liability;
 - c. Completed a course based on professional liability;
 - d. Participated as a speaker or panelist on professional liability at least five times;
 - e. Attending Continuing Legal Education or other professional liability lectures for not less than twenty hours;
 - f. Published a book or at least three professional articles covering professional liability;
 - g. Other comparable experience.
- D. Each applicant must pass a written examination applied uniformly to all applicants prior to admission covering his expertise in the field of professional liability in such form as the Board shall direct.
- E. Each applicant shall be given an oral examination covering his expertise in the field of professional liability in such form as the Board shall direct.¹⁴¹

An interesting question is just how the N.B.T.A. and the A.B.P.L.A. schemes fit together. Mr. L.S. Charfoos, President of A.B.P.L.A., in a recent speech, suggested that the A.B.P.L.A. certification might be made a subspecialty of a wider trial lawyer scheme such as that developed by N.B.T.A.¹⁴²

Formal Regulation: Recent Canadian Developments.

National Conference on Quality of Legal Services.

In October, 1978, under the sponsorship of the Federation of Law Societies, the Canadian Bar Association and the Canadian Institute For The Administration of Justice, a conference was held in Ottawa on the quality

140. "Standards for Admission", As reprinted in *Ibid.*

141. *Ibid.*

142. *Ibid.*

of legal services. At this conference there was discussion on the issue of whether the certification of specialists might contribute to the improvement of the quality of legal services. After debate in smaller groups, the conference met in plenary session and adopted the following proposal on the specialization issue:

12. CERTIFICATION OF SPECIALISTS

- (1) The majority of the members of the conference believe that the quality and availability of legal services could benefit by some form of certification or identification of specialists, but are not presently convinced that such benefits outweigh the practical problems of implementing such a system. The Conference therefore recommends that existing systems of certification and identification be examined, with a view to finding whether solutions to the practical problems can be devised.
- (2) If a system of certification or identification of specialists is established, the Conference is of the view that it should be the responsibility of the governing body of the province.

COMMENT

There was a substantial body of opinion in the Conference to the effect that the formal certification of specialists is not relevant to the quality of legal services. Proposal 12(1) records the majority view.

13. IDENTIFICATION OF FIELDS OF PRACTICE

Whether or not a system of certification of specialists is established, the Conference is of the view that lawyers should be permitted to advertise their fields of practice, but only subject to special regulation by the governing bodies for the protection of the public.¹⁴³

Perhaps some personal comments might be offered here, keeping in mind, however, that the writer was not privy to the debate that preceded these resolutions. Proponents of specialization certification would argue that the incentive to work up skills and knowledge sufficiently to pass the certification standards and also the incentive to meet the recertification standards thereafter, does have the effect of improving the competence of participating lawyers. The C.L.E. standards for certification and recertification may also contribute to the development of more sophisticated C.L.E. programs generally available to the bar which might not otherwise be available in the absence of a specialization program. Specialization regulation may serve as an alternative to mandatory C.L.E. by providing incentives for many lawyers to voluntarily accept mandatory C.L.E. for themselves as part of the duty of being certified. Specialization regulation with advertising regulations that serve clearly to distinguish certified specialists from noncertified lawyers may have the effect of channelling clients with needs for specialized service away from those lawyers who might perform inadequately instead of referring. *De facto* concentration of practice in certain areas, or for certain types of clients, or around certain skills is one essential way to maintain competence in an increasingly complex legal world, and the formal regulation of specialization may provide further incentives to such concentrations. The question then, it is submitted, is not whether the formal certification of specialists is relevant to the quality of legal services, but rather the question is one of prioritizing its relevance in relation to all the other factors that impact on the quality of legal services. It is submitted that certification is very high on the scale of

143. "Record of Proposals", *Report and Materials of the Conference on Quality of Legal Services* 29, at 32-33.

relevance, keeping in mind, however, that achieving the goal of improved quality of legal services requires multiple reforms in which certification of specialists must be integrated.

If we accept that there would be benefits, do the practical problems outweigh them? In response, it must be emphasized that Canadian jurisdictions do not have to start from scratch. In the United States, there has been about a decade of actual regulation experience to draw on. The development, implementation, administration, and setting of standards for a specialization regulation plan have been experimented with, evaluated, and have evolved in various jurisdictions of the United States. Thus, for many of the practical problems there are various existing solutions available. This does not mean that in jurisdictions with small bars there are no inherent limitations nor that all practical difficulties have disappeared in general. All that is being suggested is that a careful look at the American developments should serve to narrow the practical problems confronting us. The debate in the United States over the specialization issue has a lot more to do with the priority value of certification and the collateral effects involved than it does about any practical problems with "doing it". Aside from the question of whether to certify or not, the two issues in "doing it" that have the most current debate are: 1) the integration of advertising regulation with a specialization regulation program, and, 2) how the level and mix of standards should be set to aim at maximizing equality — fairness, by few and flexible standards, versus the aim of maximizing excellence, by exclusivity through cumulations of formal standards.

Finally, field advertising in the absence of a specialization regulation program does indeed require special regulation so that the public will not be confused and the future development of specialization regulation compromised. In looking at the Canadian developments, since no true specialization regulation schemes are in operation, the only comments to be made are on the issue of the interface between specialization and advertising.

Provincial Developments.

BRITISH COLUMBIA

The most detailed pilot proposal in Canada for the certification of specialists was formulated in 1977 by a special Joint Committee of the B.C. branch of the C.B.A. and the B.C. Law Society.¹⁴⁴

In British Columbia it was recognized that advertising and specialization regulation were interconnected. In January, 1979, Mr. Allan McEachern, head of a Benchers' Committee on Advertising, recommended that discussion of the advertising issue should be deferred until the Benchers had dealt with the specialization proposal.¹⁴⁵ However, while it could be argued that a certification plan should be implemented first and then an advertising plan built around it, this was not to be in B.C. The certification plan was shelved and new advertising rules were implemented. Effective

144. See *Supra* n. 12, at 302-04. This proposal can be found in the *Report and Materials of the Conference on Quality of Legal Services*, Appendix C6.

145. See "Advertising Choice Prompts Discussion", *C.B.A. National*, January, 1979, at 20.

March 30, 1979, the B.C. advertising rules allow the following information to be disseminated:

- (8) Any preference by a member or a firm for practice in fields of law as designated by the Benchers or the Professional Standards Committee of the Benchers (for example: criminal law, labour relations, family law).

.....

It is improper in announcements, letterheads, business cards or advertisements for members to use the word "specialist" or "specializing" or like words suggesting a recognized special status or accreditation.¹⁴⁶

In January, 1980, the Advertising Subcommittee issued the following directions in field advertising:¹⁴⁷

With respect to Ruling 2 (1) (h) of Part C of the Handbook permitting advertising of areas of preferred practice, the Committee is of the view that the following designations, or any reasonable facsimile thereof, would be considered acceptable and informative to the public. There may well be other acceptable designations, but any which do not appear on the following list should be submitted to the Advertising Committee for prior approval.

PREFERRED AREAS OF PRACTICE

Administrative Law	Counsel Practice
Admiralty Law	Criminal Law
Air Law	
	Divorce Law
Bankruptcy Law	Divorces (uncontested)
Civil Liberties Law	Environmental Law
Civil Litigation	Estates, Wills and Trusts
Commercial Law	
Communications Law	Family Law
Company Law	Forestry Law
Constitutional Law	
Consumer Law	
Copyright	
Corporate Law	
General (Solicitors) (Litigation) Practice	Natural Resources Law
	Patents
Immigration Law	Personal Injury Law
Incorporations	Product Liability Law
Insurance Law	
International Law	Real Estate
Labour Relations	Separation Agreements
Landlord and Tenant Law	
	Taxation
Marine Law	Trademarks
Maritime Law	
Media Law	
Mining Law	
Municipal Law	

Several questions about field advertising in the absence of a specialization regulation scheme must be asked. Even if the words "specialist" or "specializing" are not used, will the public think that an area or areas of practice listed after a lawyer's name implies special competence in that area

146. B.C. Law Society, "Notice to All Members", March 30, 1979, at 2.

147. B.C. Law Society, "Notice to All Members", January 21st, 1980, at 2.

or areas? Could there be at least some announcement in the yellow pages or elsewhere by the Law Society explaining that a list of areas behind a name does not imply special competence in them? Why is there not a limit to the number of areas a lawyer may "prefer"? Is a list of preferred areas of practice at least less misleading to the public in the absence of a formal specialization regulation plan than the right to advertise "limited to" or "concentrating in" designations? However, why not at least require the following words before an area is listed: "willing to accept cases in ()" or "prefer cases in ()"? Doesn't that reduce the chance of the public implying special competence when fields are listed behind a lawyer's name? Questions like these about the interface between specialization and advertising must be faced by most Canadian jurisdictions as action is fast on the advertising front but slow in any movement to actually certify specialists.

An example of the resistance faced by a Canadian certification proposal at this time can be found in a recent article by Robert M. Dick published in the *Advocate*.¹⁴⁸ Mr. Dick argues that the B.C. pilot proposal to certify specialists in Criminal law, Family law, Immigration law, and Wills and Trusts is not necessary to the furtherance of the goals of increased quality and accessibility of legal services at reasonable cost. After raising a litany of "horrors" associated with certification, Mr. Dick concludes:

While specialization may exist in fact I do not believe certification of specialists is an idea whose time has arrived.

The goal of increased competence will not be served by the certification of specialists. Indeed the certification presumes the existence of a competence which can be illusory. Further, some of our clients will no doubt believe that our failure to obtain a certificate in a specialist field is a certificate of incompetence on our part. If increased competence generally is the goal then efforts must be made to achieve this through continuing legal education.

If the goal is the accessibility of legal services then it is not necessary to engage in a program of certification. While it is not something that can be objectively measured it is my view that there are "recognized" specialists in existence at the present time. Since it cannot be measured objectively it would be folly to attempt to certify it. Let's use the grandfather provisions only and thus determine who the "recognized" specialists are and then permit them to advertise a "limited practice" if they choose to do so.

Alternatively, the goal of increased accessibility could be achieved after due proof of "substantial involvement" by permitting an indication of the work which a member holds himself out as willing to undertake in the ordinary way of his practice.

In short, the certification of specialists is far too sophisticated and complicated a program for British Columbia at the present time.¹⁴⁹

The issue of whether the certification of specialists is irrelevant to competence and is too sophisticated and complicated for British Columbia, as suggested by Mr. Dick, is left to the reader to decide. However, a few comments on Mr. Dick's views will be offered. Mr. Dick states: "The main distinction between the various American plans centres around the controversial question of whether or not the governing bodies are able to certify competence."¹⁵⁰ He goes on to say:

148. R.M. Dick, "The Certification of Specialists: A Contrary View" (1979), 37 *Advocate* 249. This article was influential in halting the certification movement in B.C. as the article was considered by the special committee of the Benchers recommending that certification must not be implemented. Letter from G. Everitt, Assistant Deputy Secretary of the Law Society, to the author, June 27, 1980.

149. *Id.*, at 264.

150. *Id.*, at 250.

He goes on to say:

. . . I would like to say that I remain unconvinced that certification will ensure competence or indeed continuing competence. Given the fact that certification will constitute a representation of expertise it follows that we can anticipate an increasing number of claims upon our assurance fund!¹⁵¹

Given that no certification scheme could or tries to *ensure* competence, does that mean that we must give up actually trying to measure in a reasonably objective way by a mixture of standards a certain level of specialized technical competence (avoiding the question of motivational competence for the moment)? Do law schools give up the effort of setting standards just because it is possible that some students will “pass” on paper who are a “failure” in reality? Is the general competency in “learning the law” that we aim to measure in law school any more “objectively measured” than the specialized competency we might aim to measure by a certification program?

Given that the goals aimed for by a certification program can be advanced by other reforms, does that mean that a certification program does not advance the goals and is unnecessary? Once again, the goals of more informed access to better quality legal services at reasonable cost for all segments of society can be advanced significantly only by the integration of a number of reforms and programs, of which certification of specialists is only one such factor to be integrated.

ALBERTA

Effective September 1st, 1979, the Law Society of Alberta passed new advertising rules that permits field advertising. As compared with B.C., however, more control over this aspect of advertising is included in the rules.

3.1 General

- (ii) The following information may be advertised by a lawyer or a firm by way of announcement, business card, letterhead, advice to the Lawyer Referral Service or by way of advertisement in any regularly published newspaper, magazine, legal directory, law report or other periodical:
 -
 - (h) a preference by a lawyer or firm for practice in a field or fields of law. Use of the words “specialist” or “specializing” or like words suggesting a recognized special status or accreditation or “practice limited to” or like words is not however permitted;
 -
 - (v) A lawyer or firm shall not advertise a preference for practice in a field or fields of law otherwise than in compliance with the following provisions:
 - (a) The Benchers may designate areas of practice for advertisement as preferred areas of practice, and no other preferred areas of practice may be advertised as such. Until such designation is made, a lawyer or firm may designate his or its own area or areas of preferred practice other than in telephone directories in respect of which areas shall be designated by the Benchers;
 - (b) A lawyer or firm shall not advertise a preference for practice in a field or fields of law in which the lawyer or firm is not competent, the onus of proving which shall be on the lawyer or firm;

- (c) A lawyer may not advertise a preferred area of practice under this Ruling otherwise than on the basis that the lawyer shall, if requested by the Society, file annually with the Secretary a written undertaking:
- (1) to comply with all requirements which the Benchers may hereafter impose with respect to participation in courses of legal or continuing education, and,
 - (2) to pay such fees as the Benchers may from time to time determine as a condition of his right to advertise a preferred area of practice, and,
 - (3) to cease advertising his preference for engagement in any limited area of practice pursuant to the decision of an Investigation Committee, the Competence Committee or the Benchers or pursuant to a request of the Secretary of the Society given on the failure of the lawyer to file the undertaking referred to above,
 - (4) to comply with all other requirements which the Benchers may hereafter impose with respect to the advertising of preferred areas of practice.¹⁵²

In effect, the Alberta rules have the potential of becoming a kind of tier-one designation specialization plan by formulating some competency and C.L.E. standards for the right to advertise fields of law.

MANITOBA

New advertising rules were passed by the Benchers of the Law Society of Manitoba in October, 1978. These rules include the following:

- (1) Individual members or firms may advertise, provided the advertising
 - (a) is accurate and not capable of misleading the public;
 - (b) is of a dignified nature and otherwise such as not to bring the member or the profession into disrepute; and
 - (d) does not claim any superiority for the advertising member over any other member of the Society.
- (2) Individual members or firms may advertise areas of preferred or restricted practice provided that they do not use the words, "specialty" or "specializing" or like words suggesting a recognized special status.¹⁵³

Are these rules much too liberal in the absence of a specialization regulation scheme? The advertising of restricted practice in particular can mislead the public as to special competence.

While Manitoba does not have a specialization regulation proposal under consideration, the issue was recently raised again by the Manitoba Trial Lawyers Association which passed the following resolutions for the Law Society to consider:

The Manitoba Trial Lawyers Association recommends that minimum standards of competency be established by criteria to be set by The Law Society of Manitoba suitable to enable lawyers to advertise a specialized field of practice.

That the Manitoba Trial Lawyers Association propose to The Law Society of Manitoba Institutional Advertising Committee that on a recurring basis they point out that lawyers advertising are not and cannot advertise in a specialized practice and if they do so, any specialty they purport to have is not certified by The Law Society of Manitoba or any body, and is self-conferred.¹⁵⁴

At a meeting of the Law Society on March 17th, 1980, Mr. G. Greg Brodsky, President of M.T.L.A. stated:

152. Law Society of Alberta, "Notice to All Active Members: Professional Conduct Handbook Amendments", August 24, 1979, at 5-5A.

153. Law Society of Manitoba, *Professional Conduct Handbook*, "Rules of the Law Society" — Rule 72.

154. Law Society of Manitoba "Minutes of Benchers' Meeting", March 27th, 1980, at 3.

that it was now the practice to allow members to indicate their preferred areas of practice. His Association did not think this was proper. There should be some standard established. They would like to see some minimum qualifications on the part of the member before he should be permitted to state his areas of practice. Such as a minimum number of years at the bar, some attendance at continuing legal education courses in the particular subjects, some experience in trials. There was not much difference in saying that you confine your work to a specific field of law, from saying that you were a specialist.

With respect to the second resolution, Mr. Brodsky stated that the public should know that The Law Society does not put its stamp of approval on the advertising of its members, and that any reference to restricting their practice to specific areas is by choice and does not indicate any specialist certification. He referred briefly to the practice followed in Ontario and suggested Manitoba should look at it.¹⁵⁵

Currently, the Benchers have deferred discussion on the resolutions. Even if Manitoba does not adopt a certification or designation scheme should something be done with the advertising rules to better deal with the interface between advertising and specialization?

ONTARIO

In January, 1979, the Professional Organizations Committee under the Ministry of the Attorney General issued a staff study on professional regulation in Accountancy, Architecture, Engineering and Law.¹⁵⁶ In a chapter on "Specialization and Non-Price Advertising", the authors note that a survey of all legal firms in the province was undertaken by the Committee and this survey confirms that a great deal of *de facto* concentration of legal practice exists. According to the study:

The striking conclusion to emerge from the analysis of functional specialization by individual lawyers is that, for the overall sample of firms reporting on their lawyer's activities, 84% of their lawyers appear to spend more than 50% of their billable time in a single area of law.¹⁵⁷

While confirming that *de facto* "specialization" is rampant, the authors of the study do not, however, favor the certification of specialists. They look at the matter largely from the question of informed access to legal services as opposed to the question of competence. The segment of society which needs more information about lawyers are individuals and small businesses located in large towns or urban settings, and the authors suggest that the Manitoba position of largely unrestricted advertising of fields is all that this segment needs to become better informed in lawyer selection. The issue of information or misrepresentation about competence does not seem to be seriously addressed. Indeed, in criticizing the Ontario proposal to build in some minimum requirements for field advertising, the authors say:

If all that the proposals envisage is an ability to advertise preferred areas of practice, without any implication being conveyed either by the advertising lawyer or by the Law Society of special competence in those areas, it is difficult to see why there is a need for any regulatory requirements to be met beyond, perhaps, one of uniform category labels to facilitate Yellow Page or Legal Directory listings. Indeed there is a risk that the existence of such requirements will generate false signals to consumers of legal services about the special competence of Lawyers so advertising.¹⁵⁸

155. *Id.*, at 5.

156. Trebilcock, Tuoy, and Wolfson, *Professional Regulation*, Ministry of the Attorney General (1979).

157. *Id.*, at 287.

158. *Id.*, at 291.

This last point that building in some quality enhancing standards into advertising regulation can actually be more misleading than having none at all is an interesting one. However, normally the lawyer is not given the right to advertise the *requirements* he or she met to list a field, he or she only has the right to list that field. That some information about there being requirements might drift down to the public cannot be denied, but is that anymore misleading than the implied special competence that plain listing may signal anyway without widely understood disclaimers attached? The real issue appears to be that if freedom to advertise fields is upon us, the goal of informed access to lawyers *willing* to take certain kinds of cases is enhanced. The only reason now for specialization regulation is the goal of informed access to lawyers *able* to take certain kinds of cases. In other words, a specialization scheme should now be geared to recognition and enhancement of special competence. Designation schemes or self designation schemes with only a minimal thrust at measuring and enhancing special competence are thus largely irrelevant in the context of freedom to advertise preferred fields or practice limitations.

In Ontario, unlike in Manitoba, the right to advertise fields is more restricted, and thus in Ontario the advertising regulation approaches a specialization scheme of the designation variety. Ontario lawyers are permitted to advertise, in the yellow pages and the newspapers, up to three areas, out of a list of 13 prescribed areas, provided that they attend C.L.E. courses in the areas which they have selected. Currently, the Law Society's program of C.L.E. for those who advertise is undergoing re-examination,¹⁵⁹ so it is too early to tell what impact the requirement will have on the development of C.L.E. or on quality of legal services generally.

Brief Conclusion

It would appear, to this writer at least, that there is more resistance in Canada on the part of members of the legal profession to *any* specialization regulation than there is in the United States. The American debate seems to be more focused on what kind of regulation there should be as opposed to whether there should be any at all. In other words, the debate is more about the various approaches and values associated with them than with whether or not any formal regulation of specialization should take place at all.

It could be argued, however, that many Canadian jurisdictions *are* regulating specialization through the use of advertising rules which allow field advertising, because such advertising by implication involves the specialization issues of concentration of practice and special competence. If specialization regulation cannot be avoided (unless advertising by lawyers remains very restricted), what approach to that regulation should we take? Hopefully, this paper has, in surveying issues and the developments around them, contributed to these considerations. However, above all, our decision must be justified by reasons that have to do with the public interest.

159. Letter from K. Jarvis, Secretary of the Law Society of Upper Canada, to the Author, June 4, 1980.