

# *SPECIALIZATION AND THE LEGAL PROFESSION*†

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## **Introduction**

### *Pressures For Change*

Lawyers have often reminded themselves of the need to be responsive to changing needs in fulfilling the self-regulating mandate of the legal profession to focus on the public interest.<sup>1</sup> This challenge appears to have become particularly urgent in our time as increasing pressures for change from both inside and outside the profession are converging around a number of often interrelated and difficult issues which have found their way to the top of the profession's agenda for consideration.

### **Informed Access to Legal Services**

The increasing growth and complexity of the law in substance and range, coupled with the increasing demands made by people for participation, protection, and equal rights within the legal process has led to increasing demands for legal services.<sup>2</sup> We have witnessed in response a growing emphasis on legal aid plans aimed at providing essential legal services for those who cannot afford to pay for them. The provision of legal aid is still a very live issue for the legal profession due to such continuing problems as funding and the formulation of the most appropriate form of delivery system. However, the pressure for change appears to have shifted now to the legal needs of the majority of the population, namely the middle income groups.<sup>3</sup> There appears to be some evidence that the general public has difficulty knowing when a legal problem exists, or how to find a lawyer to help, and that a segment of the public fears the size of legal fees or has a general distrust or even fear of lawyers. A recent survey in the United States revealed that even though adult Americans experience an average of 3.3 "serious legal problems" during their lives, a third of the public has never used a lawyer and another 28.9% has used a lawyer only once.<sup>4</sup> This survey also revealed that 79.2% of all

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† This paper was prepared for the Conference on Quality of Legal Services sponsored by the Federation of Law Societies in Ottawa, October 1978. The author wishes to thank Professor Trevor Anderson, Director of Legal Education, Law Society of Manitoba, for providing many of the informational sources for the paper and Professor William H. Hurlburt Q.C., Director of the Alberta Institute of Law Research and Reform, for his encouragement and support as President of the Federation.

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1. See, C. Harvey (ed.), *The Law Society of Manitoba 1877-1977* a collection of essays documenting the developments and concerns within the Manitoba profession over time.
2. See, H. Arthurs and P. Verge, "The Future of Legal Services" (1973), 51 Can. B. Rev. 15.
3. See, B. Christenson, *Lawyers for People of Moderate Means; Some Problems of Availability of Legal Services* (Am. Bar. Foundation 1970).
4. B. Curran and F. Spalding, *The Legal Needs of the Public, Preliminary Report of a National Survey by the A.B.A. in collaboration with the Am. Bar Foundation.*

respondents agreed that "[a] lot of people do not go to lawyers because they have no way of knowing which lawyer is competent to handle their particular problem."<sup>5</sup> As well, the survey revealed that over 60% of the respondents, including both people who have used and those who have not used lawyers, thought that lawyers cost too much.<sup>6</sup>

That middle income groups in Canada have difficulty making informed choices about legal services and how much they cost, given traditional professional advertising rules, was recently documented in the *Canadian Consumer*.<sup>7</sup> From inside the profession, Stuart Thom, the Treasurer of the Law Society of Upper Canada, confirmed that the public needs more knowledge about the availability and kinds of legal services:

The large corporation or institution with sophisticated personnel in charge of its affairs usually has a well-established legal connection. The average man or woman who as a rule seeks legal assistance only occasionally and for some immediate specific reason such as buying a house, because of an accident, to get a divorce, is not so equipped. The questions the occasional clients have to ask and try to get answered are "How do I get in touch with a lawyer who will do the work I want done?", "How do I know he will be any good?", "How much will he charge me?". The legal profession hasn't done much, in fact it has done very little, to help people answer these questions.<sup>8</sup>

At the same time that these claims are made about unmet needs for legal services there appears to be a serious and growing problem finding articling positions and jobs for the increasing number of law school graduates. Thus pressure for change to provide better access to legal services is increased by the perception that a "job gap" should not exist when there is a "need gap" to fill.

### Quality of Legal Services

Delay and neglect continue to be frequent complaints lodged against lawyers by their clients,<sup>9</sup> and there is a rise in the number of successful malpractice suits against lawyers.<sup>10</sup> Much of the pressure which has made the competency issue of such current concern, however, has come from within the legal fraternity itself. For example, Chief Justice Warren Burger of the United States Supreme Court has expressed the opinion on several occasions that up to one-half of the attorneys practising before the courts are incompetent as

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5. *Id.*, at 95.

6. *Id.*, at 17.

7. D. Purich, "You and Your Lawyer" *Canadian Consumer*, Oct., 1977, at 10.

8. S. Thom, "Advertising and Accreditation" (1976), 10 L.S.U.C. Gazette 1.

9. See, *Avoiding Unintentional Grievances*, Standing Committee on Professional Discipline, A.B.A., 1975.

10. See, Gates and Ziely, "Legal Malpractice", in American Bar Assn., *Professional Responsibility: A Guide For Attorneys* (1976) 311.

trial advocates.<sup>11</sup> Professor Irving Younger, a former New York State Court judge, has stated:

Perhaps half of the lawyers who tried cases before me showed an inadequate grasp of the law of evidence, the law of procedure, and trial technique. Some — perhaps 10% — were total strangers to those interesting subjects. The remaining 40% did not know enough about them to do a workmanlike job. Usually they stumbled through somehow — because the lawyer on the other side was just as bad, or the judge helped, or the jury managed to figure the case out despite the lawyer. This state of affairs is inexcusable.<sup>12</sup>

Chief Justice Irving Kaufman of the United States Court of Appeals has stated that many attorneys lack competency as well as integrity,<sup>13</sup> and one judge went so far as to say that only two percent of the lawyers appearing before him were competent.<sup>14</sup>

Whether or not incompetence has reached such a crises proportion can certainly be debated with regard to trial skills,<sup>15</sup> and in non-trial aspects of lawyering as well,<sup>16</sup> but in this period of both rapid change and increased complexity within many areas of the law, the problem of what the profession's response to the incompetency problem should be, is a current issue of utmost importance occupying a great deal of the profession's attention, not only in the United States but also in Canada.<sup>17</sup>

#### The Delivery and Cost of Legal Services

Related to the need for informed access to quality legal services, is the issue involving the method of delivering these services and their cost.<sup>18</sup> The suitability of the traditional delivery system of the sole practitioner or small law firm has been challenged by demands for prepaid and group legal services plans,<sup>19</sup> by demands for special community legal clinics utilizing a high degree of standardization procedures and paraprofessional services,<sup>20</sup> and by "public interest" law firms.<sup>21</sup> Furthermore, demands for change in the method of delivering legal services are related to concurrent demands for change in the legal process such as legalization of certain conduct, no-fault laws,

11. See, "Burger" (1974), 60 A.B.A.J. 171.

12. Quotation from J. McLaughlin, "In Defense of the Clare Cure" *Trial*, June, 1976, at 69.

13. As reported in the *New York Post*, Dec. 7, 1973, at 10.

14. See, E. Tamm, "Advocacy Can Be Taught — The N.T.A. Way" (1973), 59 A.B.A.J. 625.

15. See, W. Pedrick and J. Frank, "Questioning the Clare Cure" *Trial*, March, 1976, at 47.

16. See, *Report of the Special Committee on Competence of the Law Society of Manitoba* (1977). The Committee stated that "it is believed that there are individuals in the profession who do not come up to the level of competence as defined in this section, and that there are areas of the practice of law in Manitoba which require improvement." *Id.*, at 3.

17. *Ibid.*

18. See *Supra* n. 3.

19. See P. Stolz, "Insurance for Legal Services: A Preliminary Study of Feasibility" (1968), 35 U. Chi. L. Rev. 417; and "California Report on Group Legal Service" (1964), 39 Cal. St. B.J. 639.

20. See Smith, "Legal Service Offices for Persons of Moderate Means" (1974), 31 Am. Jud. Soc. 37.

21. See R. Rabin, "Lawyers for Social Change: Perspectives on Public Interest Law" (1976), 28 Stan. L. Rev. 207; and Ford Foundation, *Public Interest Law Firms* (1973).

law reform proposals aimed at simplified and understandable legal forms and procedures, and the utilization of less formal mechanisms of dispute resolution.

### The Ethics of Lawyers and Public Trust

While the value of professional services to the public, often provided within the context of the most unpleasant times in people's lives, cannot be evaluated on the basis of how the profession ranks in a popularity contest with other groups, the issue of whether the public has at least a fundamental trust in lawyers must be confronted. A 1974 New York survey, concluded that lawyers had a much higher opinion of themselves than the public had of them.<sup>22</sup> Very recently, *Time* magazine carried a cover story on lawyers which stated that one 1978 Harris poll rating public confidence in 16 institutions found law firms at the bottom.<sup>23</sup> The high-publicity Watergate affair may have served to confirm in some people's minds a view that the lawyering process itself leads to an amoral "hired gun" attitude focusing on process and technique and winning at all costs, without moral sensitivity toward consequences or substantive value questions.<sup>24</sup>

While the true level of confidence may be higher than the critics suggest, demands for change in education for professional responsibility, more stringent disciplinary enforcement procedures, and the formulation of more adequate standards of ethics are all matters requiring the continual attention of the profession.

### *The Need For A Comprehensively Planned Response*

The goal of providing more information about legal services, and delivering better quality and affordable legal services within a context of professional integrity and high ethical standards cannot be achieved by tampering with any single component factor in the system of lawyering. Rather, achieving the goal, (or more realistically, attempting to move closer to it) requires a comprehensive plan of reform which must attempt to plot the positive and negative effects of each proposed change on all other components of the lawyering process and on other legitimate goals, and then to formulate a coordinated series of changes best suited to achieve the overall goals. For example, the policy adopted with regard to informational advertising by lawyers is interconnected with any policy regulating specialization in the law, which is in turn interconnected with any policy of mandatory continuing legal education (CLE), or incentives

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22. J. Thomason, "What the Public Thinks of Lawyers" (1974), 46 N.Y.St.B.J. 151.

23. "Those XXX Lawyers!", *Time*, Apr. 10, 1978, at 40.

24. See e.g., J. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (1976).

for voluntary CLE. These matters are in turn interconnected with policies on lawyer referral services; on education in pre-law, law, and bar admission programs; on public legal education; on the availability of group and prepaid legal plans and community legal clinics; on the content of our Code of Professional Conduct; on disciplinary standards and procedures related to competency; on unauthorized practice rules; on paraprofessional training and status; on relicensing policy; and on general changes in the administration of justice and other law reform proposals.

Unfortunately, the luxury of time and energy for such comprehensive planning is seldom afforded decision-makers. For example, recently in *Bates v. State Bar of Arizona*,<sup>25</sup> the United States Supreme Court decided that lawyers have a constitutional right to advertise the prices of "routine" legal services. Because routine legal service advertisements impliedly hold out to the public that the lawyer is willing, and perhaps able, to take cases in certain areas, the decision has a direct effect on specialization regulation schemes which also provide for the advertising of fields of law. Any formal specialization scheme must now take this new factor into account. In Canada, partly as a result of the recent amendments to the *Combines Investigation Act*,<sup>26</sup> and the publicity surrounding the *Jabour* case,<sup>27</sup> advertising policy is under very active scrutiny. However, changes in advertising policy should not be made without first calculating what the effects might be on potential schemes for specialization regulation. Permitting advertising of "limited practices" or "field of law concentrated on," and the like, without first arriving at a policy on specialization regulation might well foreclose potential options.

While the provincial Law Societies will continue to formulate policy in response to felt needs, perhaps the time has now come for the Federation of Law Societies of Canada or the Canadian Bar Association to establish a National Institute on the Legal Profession, devoted to fulltime research and comprehensive planning. *Ad hoc* approaches may not carry a self-regulating profession into the 1980's.

### The Concept of Specialization

One of the most debated proposals aimed at responding to the challenge of providing more informed access to competently performed, efficiently delivered, reasonably priced legal services is the demand for some formal regulation of specialization within the legal

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25. (1977), 433 U.S. 350.

26. R.S.C. 1970, c. C-23, as am. by (1st Supp.), c.10, s. 34; (2nd Supp.), c.10, s.65 Sch. II, Item 9; S.C. 1974-75-76, c. 76.

27. See "Jabour" *C.B.A. National*, June-July, 1978, at 2.

profession. This paper will outline the developments on this front in the United States and Canada and raise some of the specific problems involved in the formal regulation of specialization. First, however, some comments on *de facto* specialization, the problems of definition encountered in the concept of specialization, and the assumed positive goals and possible negative effects of specialization must be presented as a background to understanding the developments taking place.

### *De Facto Specialization*

Leaving aside for a moment the problems of defining what it means to be a "specialist," it is at least common knowledge within the legal profession that some lawyers only handle certain matters and not others, or spend most of their time on certain matters. It is also common knowledge in the profession that the growth of large law firms is often based on teamwork within the context of a high degree of individual specialization.

Generally, a poll of Wisconsin lawyers found that 55% of the respondents indicated that their practices were more than 50% in one given field.<sup>28</sup> A random survey of 125 Toronto lawyers in 1971 found that 72% were restricting their practice and that 58% of the lawyers were spending more than 70% of their time in one field of law or spending their full time in one or two fields.<sup>29</sup> On a provincial basis, the MacKinnon Committee in Ontario found that of 4,411 lawyers responding to a questionnaire in 1972, approximately 50% said they specialized rather than engaged in general practice.<sup>30</sup> According to a

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28. As reported by Herbert L. Terwilliger, "Arguments Against Further Recognition And Designation of Specialty Practice in the Law" (1969), 42 Wis. B. Bull. 15.
29. H. Arthurs, J. Willms, and L. Taman, "The Toronto Legal Profession: An Exploratory Survey" (1977) 21 U. of Toronto L.J. 498, at 505-06.
30. *Special Committee on Legal Education in Ontario*, 1972. The results of the questionnaire are reprinted in V. Alboini, "A Lawyer's Limited Practice in Ontario: The Time for More Appropriate Recognition" (1976), 10 L.S.U.C. Gazette 154, at 156:

<i>Categories</i>	<i>Percentage Responses</i>
General Practice	49.9
Specializing in:	
Criminal Law	3.4
Civil Litigation	7.5
Corporate Law	5.5
Commercial Law	2.8
Real Estate	3.5
Taxation	1.2
Estates	.9
Family Law	.4
Administrative Practice	1.1
Labour Relations	1.0
Industrial and Intellectual Property	1.2
Admiralty Law	.0
Corporate and Commercial Law	1.9
Criminal Law and Civil Litigation	1.1
Other Specialties	13.8
Not Directly Connected With Law or Practice	3.7
No Response	1.1

1969 California survey, two out of three lawyers in that State considered themselves specialists, and four out of five lawyers who were members of firms with more than ten lawyers called themselves specialists.<sup>31</sup> A 1975 Illinois State Bar Association survey found that 48% of the lawyers in that State said they engaged in specialized practice only, while 51% called themselves general practitioners who also had one or more specialties.<sup>32</sup>

While surveys may not help establish the actual amount of *de facto* specialization that exists, and until there is a consensus as to what the definition of "specialization" is; one can conclude at least that many lawyers do not hold themselves out as willing to help every potential client who happens to call. Thus, the issue is not whether specialization should exist in the profession, since it already does; but rather the issue is whether it should be encouraged and formally regulated and what the approach to that regulation should be.

There are undoubtedly many factors leading to the *de facto* narrowing of legal practice. Commonly noted is that with the increasing complexity of society, there is an increasing complexity in the law and an increasing difficulty in keeping up with legal developments in many areas. Some typical expressions in favor of narrowing practice are as follows:

If a lawyer truly tries to be proficient in a great number of fields, he must necessarily spend a fantastic number of hours in understanding those fields before he can move forward in them. When he develops a particular subject as his field, he can much more expeditiously accomplish the work to his own benefit, as well as to the benefit of his client, so that his time is utilized in the most efficient manner.<sup>33</sup>

Concentration of experience enables lawyers to provide better legal services in their speciality in less time with consequent savings to their clients.<sup>34</sup>

New developments, procedures and problems in every field of practice are generated continuously by the courts, legislatures, administrative agencies and special bar groups. Many popular and active fields of legal practice did not even exist forty years ago. The volume of current material in the form of advance sheets, services, synopses, summaries, articles, journals and the like are so numerous and voluminous that no practitioner can possibly read it all. It is unrealistic to expect any modern lawyer to stay abreast of all the developments in all the areas of law or to be competent in all fields of general practice.

Since most lawyers simply cannot maintain more than a nodding acquaintance with most areas of the law, we have witnessed the growth of an informal system of legal specialization.<sup>35</sup>

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31. "Preliminary Report: Results of Survey on Certification of Specialists" (1969), 44 Cal. St.B.J. 140, at 144.
  32. "Economics of Legal Services in Illinois — 1975 Special Bar Survey" (1975), 64 Ill. B.J. 73, at 102.
  33. Mr. Markus in discussion, "Should Legal Specialists Be Certified: Local Lawyers Discuss Pro and Con" (1969-70), 41 Clev. B. J. 156, at 157.
  34. L. Bucklin, "Change is Always A Shock: Is There Some Other Reason You Resist Controlling Specialization?" (1973), 50 N.D.L. Rev. 169, at 170.
  35. L. Eiger and D. Morrison, "Legal Specialization in Illinois: Designation, Certification, or Stagnation?" (1974-75), 63 Ill. B.J. 296.

Few practitioners today can hope, claim, or even pretend to be master of every field of the law — the day of the true general practitioner who handles every matter himself without referring to or consulting with others who have more particularized knowledge and experience is a thing of the past.<sup>36</sup>

The connection between competence and specialization, then, appears to be a leading factor in the development of *de facto* specialization. Competence, furthermore, is a dimension of professional ethics, and thus to some degree *de facto* narrowing of practice is encouraged by our Code of Professional Conduct.<sup>37</sup> Even the general practitioner may not be so “general” after all. Chapter II of the Code dealing with “Competency and Quality of Service” has the following rule:

(a) The lawyer owes a duty to his client to be competent to perform the legal services which the lawyer undertakes on his behalf.

(b) The lawyer should serve his client in a conscientious, diligent and efficient manner and he should provide a quality of service at least equal to that which lawyers generally would expect of a competent lawyer in a like situation.<sup>38</sup>

The commentary after the rule includes the following provision:

It follows that the lawyer should not undertake a matter unless he honestly believes that he is competent to handle it or that he can become competent without undue delay, risk or expense to his client. If the lawyer proceeds on any other basis he is not being honest with his client. This is an ethical consideration and is to be distinguished from the standard of care which a court would invoke for purposes of determining negligence.<sup>39</sup>

If becoming competent in a matter without undue delay, risk, or expense is an increasingly difficult problem, then one may conclude that *de facto* specialization is not only a present reality but may well substantially increase in the future.

One factor, however, which may be pointing away from a substantial increase in *de facto* specialization is the greater number of lawyers who are not able to stay with the law firms they articulated in or find jobs with established law firms and thus move immediately into setting up their own independent practices, alone or in association with lawyers in the same position. This growth of independent practice by very recently licensed lawyers may lead to a greater number of general practitioners unable economically to restrict their practices to a few fields, at least for many years. How are the Code provisions noted above accepted by these lawyers who may have a considerable lack of confidence and experience in many areas of the law, but who must nevertheless gain experience and confidence by taking cases if their independent practices are going to survive? What reforms, if

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36. D. Fromson, “The Challenge of Specialization: Professionalism At The Crossroads” (1976), N.Y.St. B.J. 540, at 542.  
37. Canadian Bar Assn., *Code of Professional Conduct* (1974).  
38. *Id.*, Ch. II, at 4.  
39. *Ibid.*



any, should be undertaken by the legal profession to be fair both to young lawyers caught in a "job squeeze" and to the public who deserve high quality legal services?

Aside from the difficulty of being "omnicompetent" as one factor leading to *de facto* specialization, a variety of other factors could be cited, including a lawyer's own special interests in certain fields; or a lawyer's innate aptitude, or lack thereof, in particular skills like advocacy or negotiation; or the lawyer's sensitivity to perceived economic, political, or moral status attributed to certain kinds of legal work; or just the general effects of a lawyer being in a larger law firm or being employed for the particular needs of a certain group or individual, in government or industry.

### *The Definitional Problem*

Any movement from the existence of *de facto* specialization to some formal regulation of specialization, including the provision for advertising to the public of the availability of specialists, must first deal with the fact that no consensus appears to exist as to what "specialization" really means.

#### Concentration or Expertise or Both?

The motorist will likely have noticed a movement away from all-purpose automotive service centers. Several large companies concentrate on the removal and replacement of mufflers and pipes, other shops deal exclusively with tires, alignments, brakes, and shocks. There are numerous automatic transmission shops, body shops, rust-proofing shops, and shops handling only automotive electrical problems. Should one call this the specialization of the automotive service industry and then note that the substantial concentration of lawyer's practices to certain fields is an analogous movement? While one would expect that the shop concentrating on automotive transmission repair should have therefore a special expertise in such matters, should one not be careful, however, in making the leap from concentration to expertise in the profession of law? When someone is a "specialist" does it mean merely that he devotes time to a narrower aspect of some larger enterprise, or that he has a special expertise to handle the narrower aspect? The A.B.A. Special Committee on Specialization stated in 1969 that ". . . we find that *specialization* is not synonymous with expertness."<sup>40</sup> It could be argued that what the Committee should have said is that *concentration* is not synonymous with expertness, and therefore concentration alone does not mean specialization, because specialization implies something more, namely, special expertise. But this just demonstrates the problem of defini-

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40. "Report of the Special Committee on Specialization" (1969), 94 A.B.A. Reports 248, at 250.

tion. The formal regulation of specialization may take different forms depending on whether the center of definitional gravity is on concentration or on expertise.

### Specialization in An Area, or Specialized Areas?

Another definitional difficulty can be illustrated by a statement made in the Alberta Law Society Committee Report on Specialist Certification.<sup>41</sup> The Committee noted that, "To an increasing degree lawyers practice in *specialized areas* of law. . . ."<sup>42</sup> Similarly one might hear a lawyer say "I don't do copyright work, that is a specialized area." All of this implies that some areas of law are not specialized areas for various reasons; perhaps because they are perceived as areas giving rise to more routine, or less demanding, or just more frequent and therefore generally familiar problems. That the Alberta Report contemplated some division between specialized areas and non-specialized areas can be further illustrated. The report stated:

Upon admission to the Bar the neophyte is unrestricted in practice. The theory is that if a lawyer lacks knowledge in a particular field, he will acquire it by the necessary research. The great complexity of many present fields of law, however, really means that there are many areas in which the non-specialist simply cannot function, at least without unreasonable risk or expense to his client.<sup>43</sup>

What then is the appropriate response to the lawyer who states, "I specialize in routine legal services," or "I specialize in general practice," or to the view that specialization means concentration and that therefore any and all definable fields of law can be specialized in? Even if special expertise is emphasized, is it possible to argue that all fields of law lend themselves to special expert treatment? A profession by definition is already "special", of course, providing an "essential service . . . determined by standards of excellence brought about by a high degree of education and experience in a way that a reasonable man would not call 'ordinary.'"<sup>44</sup>

The acceptance of a definition recognizing some specialized areas or one recognizing the possibility of specialization in any area may profoundly affect what kind of specialization scheme which gains support. A related question is whether there should be a distinction between practitioners with basic competence in a field of law and those with a special competence in that area. Instead of thinking about certain specialized areas, one might consider whether it is more sensible to think of many areas having problems calling for specialized treatment, as well as having the more usual problems calling for

41. Alberta Law Society Committee Report, "Specialist Certification in the Legal Profession" reprinted in (1973), 39 Man. Bar News, #2, 82.

42. *Ibid.*

43. *Id.*, at 85.

44. B. Broden and J. Hornitz, "Toward Certifying Tax Specialists in Law and Accounting" (1975), 6 The Advisor 467, at 469.

basic familiarity and skill. If specialization in any area is what is emphasized, however, should the criteria be ability to handle particularly difficult problems, or rather mere concentration in the field coupled with basic competence?

There is no evidence that there exists commonly shared answers to these questions. How one chooses to define specialization — as expertise or concentration, in specialized areas or in all areas — may depend on the goal to be accomplished by the regulatory scheme.

### *Assumed Positive Goals of Specialization*

While the existence, and perhaps increase, of *de facto* specialization may by itself further certain sought-after goals, the formal regulation of specialization may both accelerate the movement toward these goals as well as add to or modify them. At this stage, however, one must still make assumptions and speculate about the effects of formal regulation schemes because sophisticated evaluations of existing formal regulation programs have not been completed.<sup>45</sup> The most recent report of the A.B.A. Committee on Specialization stated: "No data exists now, or will exist in the foreseeable future, which provides definitive answers to the access, quality and cost implications of specialization regulation."<sup>46</sup> Until we have more data on the effects of formal regulation we are left with a number of assumed effects which may be considered worthwhile if achieved by regulation. These assumed effects are related directly to the demands for change cited earlier.

### Improved Quality of Legal Services

The A.B.A. Committee on Specialization formulated a list of possible "pros and cons" of specialization.<sup>47</sup> Of the sixteen items on the "pro" list, at least eight items related to the argument that specialization improves the quality of legal services:

1. The certified specialist will become more proficient in solving problems in his specialized field.
2. Other lawyers will become more proficient in solving legal problems.
3. The overall quality of legal services to the public will improve.
4. . . . .
6. The quality of solutions to legal problems on an individual basis will improve.
7. Specialized services will be made available to the general practitioner.
8. . . . .
14. Specialists will recognize a legal problem or solution overlooked by a general practitioner.
15. Law schools will be encouraged to offer in depth courses in the areas of specialization certification.

45. The American Bar Foundation is doing an evaluation on the California and New Mexico programs. See *Supra*, n. 36, at 543.

46. A.B.A. Standing Committee on Specialization, "Report to 1978 Midyear Meeting" *ABA Proceedings*, Report #134, at 4. (This report was issued in 1977).

47. A.B.A. Special Committee on Specialization, "Pros and Cons of Specialization," reprinted in Appendix C, Zebrule, *Specialization in the Legal Profession*, (1975) 29.

16. Because quality of legal work will be improved, there will be less load on court dockets.<sup>48</sup>

How could a formal regulation scheme arguably lead to this effect of increased quality of service and competency of lawyers, individually and generally? As noted earlier,<sup>49</sup> incentives to narrow practice may help lawyers to keep up with developments in their chosen areas and help lawyers gain substantial experience in certain matters which should lead to increased skill and familiarity in handling them. The primary function of a formal regulation scheme should be to encourage greater numbers of lawyers to move from generalist practice and thus generally raise the level of competence in the profession.<sup>50</sup> With the advertising of the availability of specialized legal services, matters calling for special expertise will more likely be channelled away from nonspecialists to the specialists and thus these matters will be better handled and the overall quality of legal services will be higher than in the present situation where some of these matters would be handled by generalists wanting work. Setting high standards and testing for experience, skill, and knowledge as entrance requirements for the formal certification or recognition of specialists may serve to weed out those who do not deserve to be called specialists and generally encourage achievement to reach the standards set, all of which may serve to improve standards of legal practice.<sup>51</sup> Furthermore, periodic mandatory recertification requirements may serve to maintain high standards of competence over time.<sup>52</sup> The formal regulation of specialization may encourage development and utilization of specialized C.L.E. programs and special post-graduate university educational programs all of which would help lawyers become more competent and maintain such competency. The formal regulation of specialization may provide general practitioners with more knowledge about the availability of specialists than they now have, and thus, a greater number of referrals may result with a consequent rise in the general quality of legal service.<sup>53</sup>

These propositions about increased competency depend obviously on what form the scheme of regulation would take. As well, the effects of specialization on competency must be taken together with the effects of the many other factors bearing on the competency issue.

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48. *Ibid.*

49. *Supra* n. 33-36.

50. Argument made by W. Adams, "The Florida Plan Is Best" (1974), 48 Fla. B.J. 185.

51. See B. Davidson, "A Brief For the California Plan" *Id.*, at 184.

52. *Ibid.*

53. *Supra* n. 47, Item 7.

### Informed Access to Legal Services

Professor Reed, commenting on the view that formal regulation of specialization coupled with informational advertising, might increase informed rather than random access to legal services, noted that: "If I've got trouble with my head and I want to see a psychiatrist, I can find out who one is. I don't have to call some doctor and say, 'Do you know anything about psychiatry, Doctor?'"<sup>54</sup> Similarly, demands for the formal regulation of specialization in California arose originally, not out of a perceived competency problem, but out of the suggestion of a Committee on Group Legal Services which urged the certification of specialists as a possible alternative or adjunct to meeting the needs of the public for informed access to legal services.<sup>55</sup>

More informed access is accomplished through a formal regulation scheme providing some method whereby lawyers who meet certain standards can hold themselves out to the public as specialists in a certain field or fields of law. Again the achievement of this goal will depend on what form the specialization scheme takes, what fields of law are chosen, how many lawyers will meet the standards set or attempt to meet them and thus be able to participate in the program, how quickly the program can be implemented, and so forth.

The definitional problem of what it means to be a "specialist" may well depend on which goal is primarily pursued: increased access to legal services or increased quality.<sup>56</sup> Whether the focus is, or should be primarily on access, may depend on the policies adopted or lacking regarding other factors that aim at public knowledge of the availability and kind of legal services.

### Efficient Delivery and Lower Cost of Legal Services

Another assumed positive goal of the regulation of specialization is that the specialist can spend much less time on matters because the substantial experience gained by concentration should lead to increased efficiency. Decreased costs should also result because the client would not have to pay for as many research hours and perhaps in some situations with high volume, the lawyer may even have standardized procedures and paralegal services, which will lower the cost for the client.<sup>57</sup> Of course, in all of this, the specialist, it is argued, will still be able to earn more than the generalist.<sup>58</sup>

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54. J. Reed, "Specialization, Certification, and Exclusion in the Legal Profession" (1974), 27 Okla. L.Rev. 456, at 461.

55. *Supra* n. 19.

56. See, D. Brink, "Let's Take Specialization Apart" (1976), 62 A.B.A.J. 191.

57. See, R.M.R. "Legal Specialization and Certification" (1975) 61 Va. L.Rev. 434, at 444.

58. *Ibid.*

### Public Trust and Legal Ethics Improved

Clients generally may be more satisfied with results achieved when specialists are used, so the public image of the legal profession may improve.<sup>59</sup> The formulation of special standards of ethics and increased discussion of the special ethical problems encountered within certain areas of practice may lead to heightened sensitivity toward ethical dimensions of practice.

### Controlled Advertising

While the formal regulation of specialization may *encourage* advertising to achieve the goal of informed access to legal services, the formal regulation of specialization may also serve to *control* advertising. If lawyers will be allowed to advertise fields of law in which they are willing to accept cases, then some formal regulation of specialization may serve to minimize the problem of misrepresentation to consumers of implied special expertise that results from such advertising in the absence of a specialization scheme.<sup>60</sup> The most recent report of the A.B.A. Committee on Specialization noted that the changes made in advertising policy have resulted in an increased demand for regulation of specialization as "One step toward increasing the accuracy of information which the public and the bar will have about the lawyers who have appropriate qualifications to help with particular problems."<sup>61</sup> Such regulation, of course, requires the formulation of generally accepted labels, definitions and quality standards if it is going to be successful in providing accurate information to the public. Specialization regulation might have the effect of allowing only those who are likely to be *able* to take problems in certain fields and not just *willing* to take them, to advertise such actual or implied competence.

### Less "Unauthorized Practice"

The Alberta Law Society Committee reporting on specialization noted:

If the public does not have specialist legal assistance available, there is a likelihood it will turn to other professions and groups for assistance in some fields. An example given is that a great deal of the work in tax matters formerly done by the legal profession is now done by chartered accountants. Similarly, in real estate transactions the parties may not use a lawyer at all or, at any event only in a late stage of the transaction. The specialist doing a volume of such work as a routine, can offer a superior service at a lower fee.<sup>62</sup>

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59. *Supra* n. 47, Item 8.

60. See D. Morrison, "Field Advertising — Special Competence or Ordinary Hucksterism? We Need a Specialization Rule Now!" (1977), 66 Ill.B.J. 78.

61. *Supra* n. 46, at 8.

62. *Supra* n. 41, at 85. Whether the goal of "less unauthorized practice" is a laudable one could be disputed. Any monopoly on an activity must be justified as being in fact in the public interest and not just in the interest of the holders of the monopoly.

### *Possible Negative Effects of Specialization*

The formal regulation of specialization may be criticized without necessarily pointing to a list of possible negative effects that must be balanced against the assumed positive effects listed above. Rather the criticism can proceed by asserting that the positive effects cannot be attained by formal regulation anyway. For example, it may be argued that setting standards and testing for competency cannot achieve a measure of quality assurance because standards cannot be formulated that objectively measure competence in any case, and that furthermore, the cost to the consumer of legal services will rise with specialization, not fall.<sup>63</sup>

The criticism of formal regulation might proceed as well with the assertion that the need to examine possible positive and negative effects is unnecessary because there is no public demand for specialized legal services in the first place. Those groups in need of specialized service have the legal connections to serve them in the present situation, and the public simply needs competent generalists and more information about their services.<sup>64</sup> This, of course, begs the question again as to what the definition of a "specialist" should be.

If a critic, however, does accept that positive goals may be furthered by formal regulation, the argument may be made that the negative effects may outweigh the positive effects. What these negative effects are will depend on what form the regulation takes in the light of what priority of goals is emphasized and what concept of specialization is adopted.

### Overspecialization Dangers

Beneath the surface of the pressures for change in the legal profession there appears to be a tension between two value clusters which might broadly be labelled "consumerism" and "humanism." While these two movements are certainly not opposing systems of thought, there are points of tension discernible between them. On one hand, the consumer movement appears to favor developments that provide legal services very much like the supply of goods in a supermarket. Standardization of forms and procedures, check-list interviews, pre-advertised fees, labelled services, and the like, are indicative of this consumer movement stressing efficiency, low cost, and accessibility. On the other hand, there is a movement, most visible in legal education, but also discernible from both within and without the profession, stressing the need for greater awareness and aptitude on the part of lawyers in handling the relational aspects of

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63. *E.g.*, *Supra* n. 28; and H. Wright, "It's Time for Specialization — Against" (1971), 45 Fla. B.J. 11.

64. *Ibid.*

legal practice.<sup>65</sup> Legal educators stress the need to be sensitive to the whole person, to see the client as a person not simply as a problem, to have a greater sensitivity to the interaction of nonlegal aspects with the legal aspects of a client's problems, to be sensitive to feelings in the interviewing and counselling process, and generally to concentrate on the lawyer-client relationship rather than on commercial dimensions of law practice. These humanistic values may be difficult to pursue within the delivery systems arising out of the consumer movement.

Perhaps a third force, partly related to humanism, might be labelled "traditionalism" which views many of the proposed changes in the legal profession with scepticism. Related to both the humanistic and traditionalistic forces are criticisms of the formal regulation of specialization focusing on a series of dangers brought about by over-specialization. The bad joke is told about the old doctor who was talking to the young doctor, who was just going into a specialty. The old doctor said, "I hear you are not going to be an ear, nose, and throat doctor like your daddy. You are just going to take the nose?" "Oh no," said the young man, "just the left nostril."<sup>66</sup> The legal profession has traditionally viewed itself as being the architect of democracy, a prime source of wise leadership at all levels of policy making, with the capacity for a broad vision applied to human problems. Thus, a mass movement toward narrow practice is feared by some lawyers. The following comments are indicative:

In some ways, it seems that as we get better and better at more restricted assignments, we are valued less and less on matters of general importance.<sup>67</sup>

A specialist loses touch with the many problems which present themselves in the general practice of law; specialists are generally ignorant of matters outside their specialty; a narrow and confined approach to overall problems tends to hasten the disintegration of a free society which needs generalists as well as specialists; and, the well-rounded lawyer can more easily see the interrelated problems of a client and can thus better serve him.<sup>68</sup>

The principal and overriding defect of most certification/recognition proposals is their acceptance of the theory of *expertise*. That concept is delusive because technical experts tend to destroy the integrity of any discipline of which they are a part. In the legal profession, more likely than not, they will substitute the ways of the expert for the traditional qualities of the generalist lawyer: reflection, comprehension, discrimination, imagination, inspiration, wisdom, fortitude and tenacity.<sup>69</sup>

[S]pecialization, of necessity, tends to segmentize the law and, to some extent, emphasizes the mechanics of law as distinguished from a broad sense of justice acquired from familiarity with the legal problems of people of different walks of life in a variety of situations.<sup>70</sup>

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65. See e.g., T. Shaffer, *Legal Interviewing and Counseling* (1976).

66. *Supra* n. 54, at 459.

67. W. Pedrick, "Collapsible Specialists" (1970), 19 De Paul L.Rev. 699, at 700.

68. W. Derrick, "Specialization: Where Do We Go From Here?" (1970), 33 Tex.B.J. 255, at 258.

69. P. Teschner, "Certification of Legal Specialists: Skeptical Views of A Chicago Country Lawyer" (1974), 62 Ill.B.J. 658, at 665.

70. E. Warren, "Law, Lawyers and Ethics", (1974), 23 De Paul L.Rev. 633, at 635.



While some specialization of the "specialist area" or "specialist problem" variety giving rise to a number of "lawyer's lawyers" might be acceptable to these critics, any movement in the direction of full scale encouragement of narrow practice is viewed as leading to a dehumanized, less creative, overly technical profession. As one commentator, speaking about the virtues of a country lawyer, expressed it, "He will sometimes sacrifice efficiency to solve individual problems individually."<sup>71</sup>

Is this just naive romantic traditionalism or is there something here which must be taken seriously? After all, legal education continues to be based on a broad exposure to many doctrinal fields and some orientation to the "seamless web" view of law. Is it really true, however, that most general practitioners perform such a variety of work that their skill of legal analysis is particularly creative and that their understanding of legal principles is likely to be sharper than that of the lawyer concentrating on a few areas? Or is broad perspective more likely to result from a willingness to study with focused intensity the policies, practices, theories, and principles both legal and non-legal interacting on a particular area of practice? How can we have omniscient judges, however, if they are to be picked from a profession which will be largely specialized? Must we have a great number of specialized courts as well? Our perception of the importance of these questions may depend partly on how narrow or broad the recognized specialty fields will be. A formal regulation scheme which encourages very wide participation by formulating attainable standards, and allowing lawyers a number of specialty designations from many broadly defined fields, including perhaps even a catch-all "general practice" field, would hardly mean a mass movement away from generalist practice, even if lawyers called themselves specialists. But, how meaningful would such a scheme be? Similarly, support for such a scheme might affect our perception of the importance of possible negative effects on those who choose to remain nonspecialists.

### General Practitioners May Be Hurt

The formal regulation of specialization may accelerate the movement of business from the sole practitioners and small firms to the large law firms.<sup>72</sup> Even if specialists do not have a monopoly in their field, and lawyers are allowed to take on whatever they feel willing to do, in reality the market forces with formal regulation may result in an inability to practice in as broad a way as one might

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71. *Supra* n. 69, at 658.

72. *Supra* n. 47, Items 5, 6, and 12.

prefer.<sup>73</sup> It has been suggested that the regulation of specialization will tend inevitably to the next step of a monopoly. Professor Mindes writes:

The desire of specialists to distinguish themselves from other less "professional" practitioners is the key to the internal processes that lead a group to want to separate itself from the rest and also to its subsequent course after separation is achieved.

....

A distinctive identity increases the feeling of commonality with others in the specialty and increases the psychological, social, and professional distance from other members of the bar. Contacts within the group increase, and those with other lawyers decrease. A special language develops by stages, as do special techniques and attitudes. The in-group feeling of "we" against "they" grows, and this in turn leads to more isolation of the specialty group.<sup>74</sup>

Professor Mindes suggests the final step would be a monopoly by specialists of the right to practice in their area.

A formal regulation scheme may have the further effect of implying to the public that a nonspecialist is not special and therefore not competent or important, and so public confidence in the nonspecialist may fall. Furthermore, a traditional concept is that law is a "seamless web" and that problems may result from clients self-diagnosing which specialist is needed.<sup>75</sup> The validity and weight of some of these criticisms may depend on how generalists are related to the specialists in a formal regulation scheme.

The problem of possible negative effects on the nonspecialist is most often countered by the argument that formal regulation schemes include provisions relating to the referral of business from nonspecialist to specialist which protect the nonspecialist. "Anti-pirating" provisions could be formulated so that the specialist would be prevented from providing services to the referred client beyond the confines of the referral.<sup>76</sup> The client would still "belong," as it were, to the generalist. This argument does not of course counter the argument that many clients will, or should, self-diagnose which lawyer they need, this being part of the goal of more informed access to legal services, which may lead to a movement of business from the generalist to the specialist.

The A.B.A. Committee on Specialization in 1969 suggested that formal regulation may, nevertheless, help rather than hinder the sole practitioner or small firm to compete with the large firm:

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73. *Ibid.*

74. M. Mindes, "Lawyer Specialty Certification: The Monopoly Game" (1975), 61 A.B.A.J. 42, at 45.

75. *Supra* n. 69.

76. *See Supra* n. 35, for discussion of "Anti-Pirating" clauses.

The most frequently voiced objection to regulation of specialization presented to our committee was its supposed harmful effect upon the sole practitioner and the small partnership in rural areas. Everyone agrees that the big firm lawyer already has the benefits of specialized practice. It was argued that large law firms in general are not adversely affected by the failure of the bar to regulate specialization, because a large law firm usually has little difficulty in making the availability of the specialized services of its individual lawyers collectively known to its prospective clients, and that regulation would only encourage clients to leave general practitioners to go to those large conglomerates of legal specialists. The committee did not accept that argument as we believe that experimentation may demonstrate that regulation of legal specialization tends to equate the sole practitioner and small law firm with the large law firm in making specialized services available to their respective clients.

Realistically, one of the principal reasons for the success of large law firms is that they have had no difficulty in communicating to the public that they offer specialized services, and that the collective abilities of their lawyers enable them to be specialists in every field of the law. Many lawyers argue that the official recognition of specialists would enable general practitioners more easily to obtain qualified specialists to assist them in situations where they may occasionally need such specialized legal services. Certainly, the committee believes that it would aid those lawyers in informing the public that specialized legal services can be made available by general practitioners as well as by large law firms. If experimentation does show that it enables the small practitioner more effectively to compete with the large law firms, regulated specialization may be the means whereby the ultimate survival of the independent sole practitioner is insured.<sup>77</sup>

That ever present ghost of definition haunts us again with the statement made above that "specialized legal services can be made available by general practitioners."

The questions that have been raised thus far surrounding the definition of specialization and surrounding the assumed positive and negative effects of specialization have not received a united response as can be illustrated by examining the developments in the United States and Canada. If anything, these developments raise even more questions that may elicit a variety of responses.

### **Formal Regulation: United States Developments**

#### *American Bar Association: 1954-76*

In 1954, and again in 1963, the American Bar Association considered plans for the formal regulation of specialization on a national level, envisaging an independent Council of Legal Specialists establishing fields and the organization of "Societies" in those fields to set standards for their members.<sup>78</sup> These plans met vigorous opposition and were dropped.<sup>79</sup> In 1967, the A.B.A. House of Delegates authorized the Board of Governors to study the question again and a Special Committee on Specialization was formed.<sup>80</sup> The

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77. *Supra* n. 40, at 254.

78. See "Proceedings of the House of Delegates" (1954), 79 A.B.A. Rep. 477, at 450.

79. See *Supra* n. 68, at 256.

80. *Ibid.*

Committee reported in 1969.<sup>81</sup> The majority report was of the view that regulation on a nationwide basis was not desirable at that time but, rather, experimental programs in one or more states should be conducted and evaluated and then a decision could be made about the desirability of a nationwide plan. The experimental programs could provide experience in handling the difficulties of defining fields and setting standards, and the evaluation of concrete proposals would allow some assessment of the assumed positive and possible negative effects of regulation. The majority report suggested, however, that at least the following minimum standards should be included in any experimental state program:

1. Participation therein should be on a completely voluntary basis.
2. A certified specialist should not retain the referred client upon completion of the referred matter. He should not again represent the client without the consent of the client's lawyer.
3. Certified legal specialists should be permitted to give appropriate and dignified notice that they are certified legal specialists, designating the particular fields of law in which they are so certified.
4. Any lawyer, alone or in association with any other lawyer, should have the right to practice in any field of the law, even though he is not certified therein; any lawyer, alone or in association with any other lawyer, should also have the right to practice in all fields of law, even though he is certified in a particular field of law.
5. A lawyer may be certified in more than one field of the law if he meets the standards established therefor.
6. All responsibilities and privileges derived from the certification as a specialist should be individual and may not be attributed to or fulfilled by a law firm.
7. Any lawyer may publish in a reputable law lists and legal directories a statement that this practice is confined to one or more fields of law, whether or not he is certified as a specialist therein.
8. Appropriate safeguards to insure continued proficiency as a specialist should be provided.
9. Adequate financing to cover the cost of administration should be derived from those who are certified as specialists.<sup>82</sup>

The seventh point about concentrated but uncertified practice only contemplated very limited advertising, not the yellow pages or newspapers, for example.

The majority report was adopted by the A.B.A.<sup>83</sup> A minority report, however, was submitted by Mr. Charles W. Joiner, who called for the immediate establishment of a national Council of Legal Specialization to oversee the development of formal regulation.<sup>84</sup> As we shall see from the development of state plans outlined below, Mr. Joiner may have been prophetic when he suggested:

Unless some strong central agency acts as the overseeing agency, development of specialization will likely become so inconsistent and factionalized that it will be

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81. *Supra* n. 40.

82. *Id.*, at 252.

83. *Supra* n. 68, at 256.

84. *Supra* n. 40, at 255.

beyond redemption in the future and the practice of law, as we know it today, will be lost, as well as will the possibility of ever developing the full potential of specialization.<sup>85</sup>

In 1973, the Special Committee on Legal Specialization, in reporting on state developments since the 1969 Report was adopted, said that it was "engulfed in an avalanche of state projects on specialization."<sup>86</sup> In 1974, the Committee reported that: "We now urge states which have not begun specialization programs to forego implementing pilot programs until we have had an opportunity to evaluate these programs which are in existence or may soon be in existence."<sup>87</sup>

In 1977, the Committee issued an evaluation and major report, which was adopted with some amendments at the 1978 A.B.A. Midyear Meeting in New Orleans.<sup>88</sup> A note on this report follows the outline presented below of the state developments which serve as background for the report.

### *State Pilot Projects*

#### California: Certification of Specialists

The California pilot project attempts to identify and develop special competence by allowing only those who meet appropriate standards to publicly identify themselves as legal specialists. After a thorough study of specialization by a Committee appointed in 1966, which conducted a survey in 1968 revealing that a large majority of lawyers were in favor of the certification of specialists,<sup>89</sup> the Committee in 1969 recommended an experimental formal regulation program in three fields — criminal law, workmen's compensation law, and taxation law.<sup>90</sup> Such a plan was to be voluntary; any certified specialist could still practice in other fields, and no generalist would be prevented from practicing in the three fields. The plan would also be self-supported by application fees and annual dues for participants. The plan was approved by the State Board of Governors and the California Supreme Court in 1971.<sup>91</sup>

The fields of law involved were selected on the basis of what they could contribute by way of experience in an experimental program. Mr. James Kovacs, Program Director of the California Board of Legal Specialization summarized the reasons given for the selection, as follows:

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85. *Ibid.*

86. A.B.A. Summary of Action, 1973 Annual Meeting, Report no. 113, at 3.

87. A.B.A. Summary of Action, 1974 Annual Meeting, Report no. 238, at 1. This report was later withdrawn.

88. *Supra* n. 46.

89. *Supra* n. 31.

90. "Final Report, Committee on Specialization" (1969), 44 Cal.St.B.J. 493.

91. "Pilot Program in Legal Specialization" (1971), 46 Cal.St.B.J. 182.

Workmen's Compensation . . . because it represents a fairly narrow area of the law; there are a limited number of lawyers in the practice; and it is a field important to a portion of the public which does not deal with lawyers on a continuing basis. This portion of the pilot program will not provide answers to all of the numerous problems in certification of specialists, but it will provide some. Workmen's Compensation was selected rather than patent law because that field is already substantially regulated by the Patent Office of the federal government. Criminal Law . . . because of wide public interest in criminal law and because lawyers practicing in this field represent a portion of the public which does not seek legal advice on a regular basis. Although a substantial number of lawyers are engaged in this field, the number is not too large for the conduct of a pilot program.

Taxation. The Committee hesitated in selecting tax law as the third field of the pilot program because it is extremely broad, contains many independent sub-fields, and cuts across many other substantial fields of law. For example, in a panel discussion on specialization, conducted by the ABA Tax Section at the 1968 Annual Meeting, there appeared to be general agreement that taxation should not be classified as a specialty for these reasons. Yet, in any complete and comprehensive program of specialty certification, these problems will exist in many fields of specialty practice, and experience in these problems is essential.

Accordingly, after much discussion, the Committee selected tax law precisely because it will present practically all of the difficult problems which might arise in the development of a comprehensive plan of certification. For example, it will present the problems of whether certification should be on a broad or narrow basis; and of overlapping fields of law. It will affect a large part of the public and many lawyers in both large and small law firms, as well as sole practitioners.<sup>92</sup>

Under the authority of a nine-member Board of Legal Specialization, representative of both specialists and generalists, and with the advice of Advisory Commissions in each of the three fields; the plan called for the establishment of standards and for the establishment of procedures for testing to meet those standards.<sup>93</sup> The plan provided a skeleton of standards around which the Board was to flesh out the requirements in detail. These standards included a "grandfather" provision which would apply for a two-year period only, whereby a lawyer with at least ten years of practice would have to meet a standard of substantial involvement in the field during the last three to five years to become certified. Other applicants would have to meet a combination of standards, including minimum years of practice, substantial involvement in the field, special educational experience, a written examination, and an oral examination, if necessary.<sup>94</sup>

The plan included a recertification provision to be applied every five years, but the skeleton of standards for recertification were not as comprehensive as those of initial certification. All specialists, whether certified under the "grandfather" provision or not, would

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92. J. Kovacs, "Development and Implementation of the Pilot Program in Legal Specialization of the State Bar of California" (1974) 11. Paper on file with author, available from California Board of Legal Specialization.

93. *Supra* n. 91, at s. 5.

94. *Ibid.*

have to meet substantial involvement and special education standards or, if they did not meet these standards they would be entitled to take a written examination for recertification.<sup>95</sup> The plan also provided for the advertising in the classified sections of telephone directories that certificate holders were certified specialists.<sup>96</sup>

During 1971 and 1972 the Board and Advisory Commissions developed standards, held public hearings on them, and then worked out final detailed standards in December, 1972, inviting applications for testing so that the first certificate could be issued in 1973.<sup>97</sup> The standards for each field are different but the basic approach is the same and can be seen by taking one field, criminal law, as an example.

### References

All applicants, both "grandfather" and "regular," must submit the names of persons to be contacted as references to attest to the applicant's proficiency.<sup>98</sup> Four lawyers practising in the same geographic area, one judge before whom the applicant has appeared, and three lawyers with whom he has tried a case, are required. Another four independent references are contacted by the Advisory Commission and the applicant must receive a favorable recommendation from at least eight within this group of twelve.<sup>99</sup>

### Period of Law Practice

A "grandfather" applicant must have been engaged in the practice of law for a period of at least ten years, and a regular applicant for a period of at least five years. "Practice of law" is very carefully defined.<sup>100</sup>

### Substantial Involvement

For both "grandfather" and "regular" applicants, substantial involvement means not only a minimum percentage of time spent in the field, but also specific minimum standards of actual involvement.<sup>101</sup> A summary of the substantial involvement standards for criminal law is provided by Mr. Kovacs:

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95. *Id.*, at s. 6.

96. *Id.*, at s. 12.

97. "Standards For Specialization Announced" (1973), 48 Cal. St.B.J. 80.

98. "Standards for Certification of a Criminal Law Specialist," *Id.*, at 81.

99. *Ibid.*

100. *Id.*, ss. II.A., III.A., at 81-82.

101. *Id.*, ss. II.B., III.B., at 82.

<u>Requirement</u>	<u>Grandfathers</u>	<u>Non-grandfathers</u>
a. <u>Per cent-of-practice</u>	1/3 of time in Criminal Law practice for 3 out of 5 years immediately preceding application.	Same as for grandfathers.
b. <u>Experience as Principal Counsel in Criminal Cases</u>	A. 10 felony jury trials. B. 5 misdemeanor jury trials. C. 60 other criminal matters. D. 2 of the following: 1) 10 suppression hearings and 3 extraordinary writs 2) 3 appeals 3) 20 additional jury trials 4) 5 years full-time criminal law practice	A. 5 felony jury trials. B. 5 misdemeanor jury trials. C. 40 other criminal matters. D. 2 of the following: 1) 5 suppression hearings and 3 extraordinary writs 2) 3 appeals 3) 10 additional jury trials 4) 3 years full-time criminal law practice <sup>102</sup>

Hypothetically, a lawyer may have spent 50% of his time, or more, in criminal law over a period of more than three years and yet not meet some detail of the actual substantial involvement standard, *e.g.*, by not having enough felony jury trials.

In taxation law, due to the problem of subfields within the broader field, the substantial involvement standards recognize both broad and subspecialty practice and are much less specific about what exactly constitutes actual minimum involvement in the field.<sup>103</sup> It may be concluded that in a very broad field like tax, “objective” standards, like the list of matters which must have been handled by a lawyer in criminal law, cannot be formulated without treating some lawyers unfairly, and thus more flexible “subjective” standards must be formulated where the Board has discretion to deal with applicants on an individual basis.

Another question arising out of the substantial involvement standards is why “grandfathering” should be allowed if the substantial involvement standards for “grandfathers” are not very different from those of “regular” applicants anyway? A criminal law “grandfather” must have practised law for ten years but needs only to satisfy the “one-third of time in criminal law in three out of the last five years” standard, which is the *same* standard as for regular applicants; and the “experience as principal counsel” standards are not that much higher for grandfathers as they are for regular applicants. Does this justify exempting the “grandfathers” from all the other standards which must be met by “regulars”?

102. *Supra* n. 92, at 21-23.

103. *Id.*, at 24-25.



### Special Educational Experience

A regular applicant must show that within the three years immediately preceding application, he or she has completed a program of study approved by the Board of Legal Specialization.<sup>104</sup> The Board does not design a particular post-graduate program or delegate to some institution a special program, but rather approves educational programs offered by a variety of institutions, such as the California Continuing Education of the Bar Program, law schools in California and other states, county bar associations, and specialty groups like trial lawyers associations, and so forth.<sup>105</sup>

The rules, as formulated in 1972, did not however, reveal the number of hours that an applicant would need, nor did they provide much guidance as to what an approved program of study was. For example, for criminal law, they simply stated:

An approved program shall provide advanced instruction in areas such as criminal trials, criminal procedure, evidence, constitutional law, and the operation of administrative adjuncts of the criminal law system (such as public prosecution and defense offices, probation departments, law enforcement agencies and correctional agencies and institutions).<sup>106</sup>

The Board probably needed more time to work out what programs should be approved and what the number of required hours should be. This is evidenced by a special provision, included in the rules in 1972, that stated that for the first year of the program applicants in criminal law would meet the educational requirement, by fulfilling in the past three years, any three of the following six endeavors, involving at least 60 hours of effort, in a manner approved by the Board:

- a. teaching of a course in criminal law,
- b. completion of a course in criminal law,
- c. participation as a panelist or speaker on a symposium or similar program in criminal law,
- d. attendance at a lecture series or similar program, concerning criminal law or related fields, sponsored by the California Continuing Education of the Bar program or other qualified educational group,
- e. authorship of a book or article on criminal law, published in a professional publication or journal,
- f. active participation in the work of a professional committee dealing with a specific problem of substantive or procedural criminal law.<sup>107</sup>

### Written Examinations

A "regular" applicant must pass a written examination.<sup>108</sup> The 1973 examinations were one day in length and included answering three questions of approximately equal difficulty in a three-hour

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104. *Supra* n. 97, at s. III.C.1., at 83.

105. *See Supra* n. 92, at 29.

106. *Supra* n. 104.

107. *Supra* n. 97, s. III.C.2., at 83.

108. *Id.*, s.III.D., at 83.

morning session and three questions in a similar afternoon session.<sup>109</sup> For the first examination in 1973, the questions were developed by the Criminal Advisory Commission over a six-month period and marked anonymously by a group of acknowledged experts in the field.<sup>110</sup>

After these standards were published,<sup>111</sup> the staff of the Board of Legal Specialization began to process applications, and each application was reviewed by the appropriate Advisory Commission to ensure that the standards had been met.<sup>112</sup> In November 1973, certificates were issued to 1,182 applicants in the three fields, and 47 others were added through March, 1974. As of that date, the statistics were:

	<u>Number of Applicants</u>	<u>Number Certified</u>	<u>Number of Examinees</u>	<u>Number Passing</u>	<u>Percent Passing</u>
<u>Criminal Law</u>					
Grandfather	313	285			
Non-grandfather	<u>211</u>	<u>126</u>			
Total	524	411	216	139	64%
<u>Workmen's Compensation Law</u>					
Grandfather	334	289			
Non-grandfather	<u>67</u>	<u>43</u>			
Total	401	332	66	50	76%
<u>Taxation Law</u>					
Grandfather	510	439			
Non-grandfather	<u>74</u>	<u>47</u>			
Total	<u>584</u>	<u>486</u>	<u>80</u>	<u>53</u>	<u>66%</u>
<u>Combined Fields</u>	1,509	1,229	362	242	67% <sup>113</sup>

In 1974 the detailed rules and regulations of the Board were published,<sup>114</sup> and then after holding public hearings, recertification standards and revised certification standards and rules and regulations were published in 1975.<sup>115</sup> The special education standards were

109. *Supra* n. 92, at 30.

110. *Ibid.*

111. *Supra* n. 97.

112. *Supra* n. 109.

113. *Id.*, at 35.

114. "Rules and Regulations of the California Board of Legal Specialization January 1974" (1974), 49 Cal.St.B.J. 170.

115. "New Standards Set For the Certification and Recertification of Legal Specialists" (1975), 50 Cal.St.B.J. 309.

made more specific. The special education provision for criminal law, for example, now states that an applicant must show that within the past three years he or she has completed approved educational programs for the number and manner set forth in the Rules and Regulations.<sup>116</sup> The Rules state the following hour requirements aggregated over the three years preceding application:

<u>Applications filed in the year:</u>	<u>1974</u>	<u>1975</u>	<u>1976</u>	<u>1977</u>
(a) Criminal Law	20	30	42	42
(b) Workers' Compensation Law	30	30	40	40
(c) Taxation Law	30	30	45	60 <sup>117</sup>

The Rules also set out more detailed provisions on the process of formal educational approval by the Board, including criteria for approval of programs. An important provision is that education for specialists should not be just of the C.L.E. "review" variety:

(c) Level of Curriculum. A program must not be designed or conducted principally as a "review" course to prepare applicants for the written examination, but should provide in-depth study of the area covered and should be directed towards attorneys who meet the law practice and experience requirements of the Standards for Certification and Recertification.

...

(g) Renewal of Approval. Approval is necessary for each offering of a program. Approval shall not be renewed if it is determined that a program does not add significantly to education in the specialty, is designed merely to be a "review" course for the examination, or otherwise does not constitute appropriate education for legal specialists.<sup>118</sup>

The recertification provisions that were formulated follow the skeleton standards set out in the 1971 Pilot Plan.<sup>119</sup> For example, a specialist who fails to meet the substantial involvement and special educational standards for recertification may write an examination.<sup>120</sup> In criminal law, the substantial involvement standard for recertification includes the minimum "one-third time period" and the following actual involvement test:

2. Substantial Involvement in the Specialty Field.

a. An applicant for recertification must show that: (1) during the current certification period he or she has personally attended a trial court in California for twenty-five (25) days as principal counsel of record for a party in a criminal jury trial during the phase of trial commencing at the start of voir dire examination and ending when the case is submitted to the jury or is otherwise earlier concluded. Attendance in court during any part of a day shall be counted as attendance for a full day. Military courts-martial and trials conducted pursuant to the Lanterman-Petris-Short Act shall not be counted as criminal jury trials; or, (2)

116. *Id.*, s.II.C., at 311.

117. *Id.*, "Rules and Regulations of the California Board of Legal Specialization," s. 3(a)(1), at 317.

118. *Id.*, ss. 3(b), (4)(c) and (g), at 317-18.

119. *Supra* n. 91.

120. *Supra* n. 115, s. III.B., at 311.

during each year of the current certification period he or she either: (a) has participated in five (5) days of criminal jury trials as specified in (1), above, or, (b) has been engaged full-time and exclusively in the practice of criminal law in California.<sup>121</sup>

The special education requirements for recertification are:

(2) Hours Required for Recertification.

An applicant for recertification shall attend and complete educational programs for specialists within the five (5) year period immediately preceding application for recertification, totalling in the aggregate not less than the following number of hours:

(a) Criminal Law	36
(b) Workers' Compensation Law	30
(c) Taxation Law	75 <sup>122</sup>

In February 1976, the California Board of Legal Specialization completed an evaluation of the Pilot program.<sup>123</sup> The Board concluded that the Pilot program was successful and that "the basic questions of whether such a program could be administered at all, and, if so, whether it could be administered in a self-supporting, economically-feasible way, [had] been answered in the affirmative."<sup>124</sup> The Board then suggested that family law, probate law, labour law, and bankruptcy law should be added as specialty fields and that civil trial or some aspect of it should be investigated as a possible field to add in the future.<sup>125</sup> For these new fields the Board recommended either no "grandfathering" or higher standards for "grandfathers."<sup>126</sup> As well, the Board recommended that current recertification standards should be raised, so that at least substantial involvement could not be waived by the option of writing an examination.<sup>127</sup>

In June 1976, the Board suggested that extension of certification to more fields of law was very important because of the possibilities that lawyers would be given the right to advertise that their practices were "limited to" various fields of law. The report states: "The Board believes strongly that creation of self-designation makes it imperative that certification be expanded, so that the public will have the choice between lawyers who self-designate, and those who meet the higher standards involved in certification."<sup>128</sup> The Board of

121. *Id.*, s. III. 2(a), at 311.

122. *Supra* n. 115, s. 3(a)(2), at 317.

123. "An Evaluation and Report By the Board of Legal Specialization To the Board of Governors of the State Bar of California," Feb. 1976, on file with author, available from California Board of Legal Specialization.

124. *Id.*, at 7.

125. *Id.*, at 21-23. The Board stated at 22: "The new fields recommended at this time were selected because of their direct relationship to the legal needs of the general public."

126. *Id.*, at 16, 17.

127. *Id.*, at 19, 20.

128. "Memorandum to the Board of Governors," Supplement to Evaluation, *Supra* n. 123, at 3.

Governors of the California Bar, in June 1976, gave permission to the Board to develop plans for specialization in the four new fields suggested.<sup>129</sup>

While there may be differing opinions about its desirability, the California program has provided valuable experience in the setting of standards and in the administration of a program. Access to lawyers in the three fields may have become easier and the competency of lawyers in those fields may have been increased. However, the California Bar has over 50,000 members,<sup>130</sup> and any evaluation of the success of the program must take this factor into account. Of the standards used in California, the special education standards are perhaps the most questionable in terms of suitability for import to other jurisdictions. A Bar the size of California may have access to CLE programs and post-graduate university programs, which at least over time, may be truly geared to specialist education, not just basic education. Without such resources, is an *ad hoc* "approved educational program" approach to special education very meaningful? Even in California it may be asked whether, with an *ad hoc* approach, there can be adequate quality control of programs and individual planning of programs to provide some overall treatment of a field with an increasing depth of analysis.

Other questions dealing with education may be asked. Should there be specific full-time post-graduate educational programs at universities for the preparation of specialists? Should such programs provide one route to certification for younger lawyers, while another route is actual involvement over a longer period of time? Can educational programs deal adequately with clinical skills as well as substantive knowledge? Should there be any movement to specialist education at the pre-LL.B. level? Should CLE courses for specialists include testing and completion of assignments? For that matter, should special education be a primary focus of certification and recertification or are "objective" or "subjective" standards of substantial involvement more important to quality assurance? A jurisdiction with a substantially smaller Bar than California may view these questions as particularly important in the light of its educational resources.

#### Texas: Certification of Specialists

In July 1974, the Supreme Court of Texas approved a plan for the certification of specialists which generally resembles the California approach. The three areas chosen for the experimental program

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129. Minutes of the Board of Governors, June 24-25, 1976 Meeting. On file with author and available from California Board of Legal Specialization.

130. *Supra* n. 46, at 12.

were labour law, criminal law, and domestic relations.<sup>131</sup> Recently the Board of Directors of the Texas Bar approved the expansion of the program to three new fields — civil trial law, estate planning and probate law, and personal injury trial law.<sup>132</sup>

Mr. William J. Derrick, Chairman of the Texas Board of Legal Specialization, made the following comments about selecting criminal law and domestic relations:

We overlapped with California on Criminal on purpose. This was the urging of the ABA Committee who thought it would be a good idea if we had the two states doing the same field, treating it somewhat differently to see what happened . . . We selected Domestic Relations and Criminal law from the standpoint of public need; that the transient person, the unsophisticated client who does not know how to find a lawyer most often needs that kind of a lawyer, either a criminal lawyer or a divorce lawyer.<sup>133</sup>

The standards for certification, like California, are a combination of: references, period of law practice, substantial involvement, educational experience, written examination, and if determined by the Board, an oral examination.<sup>134</sup>

Unlike California, however, Texas allowed “grandfathering” only in labor law, and the three new fields do not allow “grandfathering” either.<sup>135</sup> Mr. Derrick commenting on the “grandfather” issue, stated:

We don't have grandfathers in the two fields, Domestic Relations and Criminal. The people in the field, the experts we got together in the Advisory Commission, didn't want it. I was surprised. I thought that the people who are already entrenched in the field would want it, but they did not. I think they very wisely decided that especially in those fields, you very often have people who spend almost a hundred percent of their time in Criminal law and are not qualified to be certified. They are not at that level of competence because some of those people do that kind of work because there is no other work available; some of them are courthouse hangers-on. The same thing happens in Domestic Relations. Involvement, even substantial involvement, does not necessarily mean special competence, and therefore, we should not have grandfather certification. Again, I think it depends on the field. Labor is a different animal there, and your particular field may be a different animal. . . .<sup>136</sup>

Another feature of the Texas plan, in comparison with California, is that an added standard of “good character and reputation” is

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131. *Texas Plan For Recognition and Regulation of Specialization In The Law*, on file with author, available from Texas Board of Specialization.
132. Information provided by Mr. Davis Grant, General Counsel, State Bar of Texas, Letter of February 2, 1978 to Professor D. Trevor Anderson, Director of Education, The Law Society of Manitoba.
133. W. Derrick, “Problems Encountered in Developing Existing Standards,” ABA Special Committee on Specialization, *Legal Specialization*, Monograph No. 2 (1976) 196.
134. “Public Hearing Set for Proposed Revised Standards for Legal Specialization” (1975), 38 Tex. B.J. 939.
135. Standards for new fields on file with author, available from Texas Board of Legal Specialization.
136. *Supra* n. 133, at 201.

required in addition to the "references" standard. For example, in criminal law the applicant must:

furnish satisfactory evidence of his good character and reputation. He shall also furnish a statement as to whether or not he is now or has ever been subject to an investigation, complaint, inquiry or other disciplinary proceedings by any segment of the Bar, including, but not limited to any local, state or district grievance committee of an organized bar; and if so, the details of such investigation, complaint, inquiry or proceedings including whether or not he has ever been reprimanded, suspended, disbarred or otherwise disciplined by any court or grievance committee.

The Board may deny certification on a finding of a grievance committee or a court that the applicant has been guilty of professional misconduct. However, the Board will consider the seriousness of the underlying fact of the grievance and will consider the passage of time since such discipline and applicant's conduct since that time. Failure to disclose such information is a material misrepresentation and may be cause for rejection.

Applicant shall furnish a statement as to whether or not he has ever been convicted, given probation or fined for a serious crime as hereinafter defined, whether the above resulted from a plea of guilty or nolo contendere or from a verdict after trial or otherwise and regardless of the pendency of an appeal. The term "serious crime" shall include any felony. It shall also include any lesser crime, a necessary element of which as determined by the statutory or common law definition of such crime, involved improper conduct of an attorney, interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy of solicitation of another to commit a "serious crime."

The Board may deny certification if applicant has been convicted, given probation or fined for a serious crime as defined in this section.<sup>137</sup>

Similar provisions appear in the standards for the other five fields. Thus, the formal regulation of specialization may be another way to achieve higher ethical standards by the denial of certificates to lawyers who have been guilty of unprofessional conduct.

Another helpful feature of the Texas plan is that it attempts to define generally what the scope of the fields are. For example, criminal law is defined in the following manner:

Criminal law is the practice of law dealing with, by way of definition not limitation, matters involving legal aspects of pretrial release; examining trial, indictment, information and complaint; change of venue; continuance; severance; discovery; speedy trials; jeopardy; immunity; confessions; search and seizure; identification; competency to stand trial and culpable mental state; jury voir dire; rules of criminal evidence (e.g. impeachment, extraneous offenses, etc.); procedure and rules of evidence at punishment hearings; law of sentences; legal aspects of plea bargaining and guilty pleas; motion for new trial, appeals, post conviction remedies; probation and parole granting; probation and parole revocation; executive clemency; substantive criminal offenses and defenses; and juvenile crimes.<sup>138</sup>

Each of the other five fields are defined in the standards. Such definitions may provide guidance to lawyers as to what might be expected

137. "Standards for Certification of a Criminal Law Specialist," *Supra* n. 134, s. I.H., at 942.

138. *Id.*, s. I.G., at 942.

on examinations and what educational activities might be approved, and also provides a framework to prevent overlaps in the future addition of fields to the scheme.

Arguably, however, what might be considered troublesome about the Texas plan (or advantageous, depending on your point of view) in comparison to the California plan, is that the substantial involvement standards and educational experience standards are defined much less specifically than in California, giving the Board more discretion and flexibility in the certification process. For example, in criminal law, while there is a minimum "25 percent of time within the last two years" standard,<sup>139</sup> the added test of actual performance simply states:

The applicant must show his substantial involvement and special competence in criminal law practice within the three (3) years immediately preceding application by providing *such information as may be required by the Board* regarding criminal law cases participated in by applicant in each of the following categories:

- a. State felony jury trials;
- b. county court misdemeanor jury trials;
- c. federal jury trials;
- d. state and federal non-jury trials;
- e. state and federal pleas of guilty;
- f. state and federal appeals;
- g. state and federal post-conviction remedies;
- h. juvenile proceedings;
- i. dismissals;
- j. grand jury no bills;
- k. cases decided on pre-trial motions where evidence was presented (such motions to suppress evidence);
- l. probations or parole revocations;
- m. others.<sup>140</sup>

"Such information as may be required" is not a standard that provides a great deal of guidance to the potential applicant as to where he or she stands in eligibility for certification.

The educational experience standards are equally unspecific. In criminal law, they read:

The applicant must demonstrate to the Board satisfactory educational experience within the three (3) years immediately preceding application by either:

1. Attendance at and completion of programs of study for criminal law specialists approved by the Board; or
2. Substantial involvement in continuing legal education in the broad field of criminal law through such activity as:
  - a. Teaching a course in criminal law;
  - b. completion of a course in criminal law;
  - c. participation as a panelist or speaker on a symposium or similar program in criminal law;
  - d. attendance at a lecture series or similar program, concerning criminal law, sponsored by a qualified educational institution or Bar group;

139. The standard is lower than the California standard.

140. *Supra* n. 134, s. II.B.(1), at 943.



- e. authorship of a book or article on criminal law, published in a professional publication or journal;
- f. active participation in the work of a professional committee dealing with a specific problem of substantive or procedural criminal law; and
- g. such other educational experience as the Board shall approve.<sup>141</sup>

The Rules and Regulations published by the Board do not add any more specific guidelines for substantial involvement or educational experience except to state that at least four hours at approved educational programs aggregated over three years are necessary.<sup>142</sup> That figure is much lower than the California standard. Recertification standards, recently prescribed by the Board in the original three fields are also less specific than in California.<sup>143</sup> In criminal law, for example, the substantial involvement standard reads:

The applicant must show his continuing substantial involvement and special competence in the practice of criminal law within the five-year period of certification by furnishing such information as may be required by the Board. The information required may include the following:

1. The percent of time practicing criminal law in Texas;
2. A list of cases participated in by the applicant during all or part of the five-year period;
3. The names of all judges before whom he has appeared in criminal law matters during the two (2) years immediately preceding application for recertification;
4. The names and addresses of such references as the Board may require to attest to the applicant's continuing substantial involvement and special competence in the practice of criminal law.<sup>144</sup>

Again, the question must be asked whether a lawyer has enough specific information about his or her eligibility for recertification.

The educational standards for recertification are somewhat more specific. For criminal law, for example:

The applicant must demonstrate to the Board satisfactory and substantial involvement in continuing legal education during the five-year period of certification by attendance at, or participation in (as a speaker or panelist), institutes, seminars or symposiums on criminal law subjects approved by the Board, for a minimum of fifty (50) hours (not more than twenty-five (25) hours in any one calendar year). In the discretion of the Board, other special educational experience may be considered as supplementing or satisfying the continuing legal education requirement.<sup>145</sup>

The 50-hours standard is higher than the 36-hours standard in California.

A recent survey on specialization notes that in 1977, the Board of Directors of the Texas Bar suggested that the Board of Legal Specialization should "experiment with the implementation of [even] more flexible standards so as not to otherwise exclude competent at-

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141. *Id.*, s. II.C., at 943.

142. "Rules and Regulations of Texas Board of Legal Specialization," on file with author, available from Texas Board of Legal Specialization. See, Section VI, Educational Experience.

143. "Recertification Standards" on file with author, available from Texas Board of Legal Specialization.

144. "Criminal Recertification Standards," s. II.B., *Id.*

145. *Id.*, at s. II.C.

torneys from participating in the program."<sup>146</sup> Thus, an important issue emerges in a comparison of the certification approach of California with that of Texas. How difficult should the standards be? Should standards be as objective and specific and inflexible as possible, or should there be room for discretion, flexibility, and subjectivity? Is a higher degree of individualization necessary because "grandfathering" is not permitted? Both Texas and California attempt to focus on quality assurance by setting a combination of standards to weed out those who do not deserve to be certified as specialists. Can this goal be achieved best with the more objective standards of California or with the more subjective standards of Texas? Which approach is the most fair for lawyers? For the general public?

#### New Mexico: Self-Designation

While the center of gravity in the California and Texas plans is on assurance of some degree of competence in a few fields, the New Mexico scheme is primarily directed at providing immediate information to the public about *de facto* "specialists" in as wide a number of fields of law as possible. The New Mexico scheme thus, does not help answer the questions raised about the education of specialists or about objective versus subjective standards, because no such standards exist in the plan. The New Mexico scheme does not attempt to measure any basic or special competence with standards and testing but rather simply allows lawyers who concentrate or limit their practice to hold themselves out as specialists. The plan, regulated by a nine-member Specialization Board, and a Disciplinary Board, was adopted on September 1, 1973.<sup>147</sup> A lawyer must certify by affidavit that he or she has spent at least 60% of his or her time practising a particular area of law during each of the five years immediately preceding application.<sup>148</sup> There is no recertification requirement, or CLE requirement, but the specialist must continue to spend at least 60% of his working time in the designated field. If the lawyer meets the requirements he or she may then advertise in the yellow pages and on professional cards and letterheads that he or she specializes in an area of law.

While lawyers obviously can specialize in only one area, young lawyers and others who may wish to build up practices to the 60% requirement, are allowed under the plan to advertise that their practice is "limited to" one to three areas or "primarily limited to" one to

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146. California Board of Legal Specialization, "Survey of Legal Specialization — August 1, 1977," on file with author, available from California Board of Legal Specialization.

147. "New Mexico Plan" (1974), 48 Fla. B.J. 169.

148. *Ibid.*

149. See, L. Pickering, "Why I Favor the New Mexico Plan" (1974), 48 Fla. B.J. 180.

three areas.<sup>149</sup> Once the lawyer announces that his or her practice is "limited," he or she must limit practice to only the area or areas listed. No such limitation, however, applies to the "primarily limited to" category.

The New Mexico Bar Association has placed a notice in the yellow pages disclaiming any attempt by the plan to measure competence.

#### NOTICE

*For the general information of the public*

Attorneys who have devoted 60% or more of their practice time to a certain specified and specialized area of the law for at least each of the immediate past 5 years and who continue to devote at least 60% of their practice time to such area of the law are permitted, if they so desire, to state that they "specialize" in such particular branch of law.

Such a listing means only that the attorney has had at least the required amount of experience in his specialty. It DOES NOT MEAN that anyone or any agency or Board has certified that such attorney is an "expert" in such field of law. Neither does it mean that such attorney is necessarily any more expert or competent than any other attorney.

Attorneys may also list themselves as "limiting" or "primarily limiting" their practice to particular branches of the law.

"Practice limited" means that such attorneys do not take or handle any legal matters except in the fields of law specified.

"Practice primarily limited" means such attorneys are primarily interested in handling cases in the referred-to fields of law, but that they also handle other types of legal matters.

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

This notice published by the State Bar of New Mexico, Tel. 842-3063 1117 Stanford, NE., Albuquerque, New Mexico 87131.<sup>150</sup>

Originally the plan listed 38 fields of law, including "General Practice," but this was raised to 62 fields in 1974.<sup>151</sup> The fields are listed in the following manner:

#### APPENDIX A—RECOGNIZED FIELDS OF LAW

As amended by order of September 1, 1974, effective October 1, 1974, Appendix A read: "Fields of law which may be listed by attorneys meeting the specialization qualifications or in which attorneys may state they 'limit' or 'primarily limit' their practice are listed below. The term 'and/or' within a listing means that attorneys may choose to list all parts of that listing, excluding only the '/or,' or that attorneys may list individual parts of the listing.

"The terms 'Law' and 'Practice,' or the lack of such terms, as used below are mere suggestions by the Specialization Board and each attorney may interchange, use, or delete such terms as he chooses.

"An attorney wishing to do so may use the term 'Litigation' following the substantive part of any listing. However, if that term is used it will be considered by the Specialization Board as descriptive of a litigation-oriented practice, and

150. L. Pickering, "The New Mexico Plan for Recognition of Specialization" (1974), 5 ALI-ABA CLE Rev. 5.

151. *Supra* n. 46.

certifications pursuant to Rule 2-105 (B) (2) of the New Mexico Code of Professional Responsibility must indicate the litigation orientation of the practice if the term 'Litigation' is to be used.

"The terms 'Copyright,' 'Patent,' and 'Trademark' are listed separately below, but any two or all three of them may be used together as a single listing.

Administrative Law	Landlord and Tenant Law
Admiralty Law	Legal Research for Attorneys
Agricultural Law	Legislative Practice
Antitrust Law	Livestock Law
Appellate Practice	Military Law
Arbitration Law	Mining Law
Atomic Energy Law	Mortgage Law
Aviation Law	Municipal Finance and/or
Banking Law	Municipal Bond Law
Bankruptcy Law	Negligence Law
Business Law	Oil and Gas Law
Civil Rights Law	Patent Law
Collections	Pension and Profit
Commercial Law	Sharing Law
Condemnation and/or	Personal Injury and
Eminent Domain Law	Property Damage Law
Constitutional Law	Probate Law
Consumer Law and/or	Products Liability Law
Consumer Protection	Professional Corporations
Copyright Law	Real Estate Law
Corporations and/or	Securities Law
Corporate Law	Social Security Claims
Creditors Rights	Taxation Law
Criminal Law	Taxation and Estate Planning
Divorce and/or Family Law	Timber and Logging Law
Entertainment Law	Trade Regulation Law
Environmental Law	Trademark Law
Estate Planning	Transportation Law
Federal Practice	Trials
Government Contracts Law	Wage and Price Control Law
Indian Affairs Law	Water Law
Insurance Law	Welfare and Poverty Law
International Law	Workmen's Compensation Law
Labor Law	Zoning Law" <sup>152</sup>

This list of 62 includes all of the original 38 fields of law, except that Environmental Law was added and Natural Resources Law and General Practice were dropped. Why the field of General Practice was included in the first place must be questioned. Does it make any sense to allow a lawyer to list himself as specializing in General Practice because he spends over 60% of his or her time in it? What does it mean to have a practice limited to General Practice? What is the definition of General Practice when it appears in a list of 38 supposedly separate areas of law? Perhaps because of these questions the field of General Practice was dropped.

152. *N.M. Stat. Ann.* 18-6-6 (rule 6, App A.) (Supp. 1975).

A problem remains, however, in a listing of this sort because no attempt is made to define the fields. Are there overlaps? Does it matter if there are? Can lines be drawn between Condemnation and/or Eminent Domain Law, Real Estate Law, Zoning Law, and Mortgage Law or could Real Estate Law be defined broadly enough to include aspects of the other fields? Other examples come easily to mind. Some fields are much narrower than others. Does this cause problems for the public in choosing a lawyer? Should a farmer envisaging a law suit, because he is having problems with his irrigation water supply due to a neighboring farmer's prior use of a stream, go to a lawyer listing Agricultural Law, Water Law, Personal Injury and Property Damage Law or Trials?

Whatever the inevitable difficulties are in dividing the practice of law into so many fields, the New Mexico scheme *may* be providing the public with information leading to more informed access to legal services. But is such a scheme desirable from a public policy standpoint or should the public have more assurance as to quality? Can an argument be made that spending at least five years of over 60% concentration in a field, is enough of a standard for specialist designation to assure quality in almost every case? But what about the other designations?

#### Florida: Self-Designation with CLE

The Florida approach to formal regulation is to drop the words specialization and specialist completely, and simply allow lawyers to list certain areas of law after their names if they meet certain designation standards. The plan includes at least some quality assurance, by requiring a mandatory number of hours of CLE for redesignation. Unlike New Mexico, where a lawyer in appropriate circumstances could list "John Doe, specialist in [field]," or "Practice limited to [field(s)]," or "Primarily limited to [field(s)]," Florida would simply allow "John Doe, [field (s)]," without any descriptive words or phrases. As in New Mexico, an appropriate disclaimer that designation does not necessarily constitute expertise would be published in the yellow pages.<sup>153</sup>

The plan was adopted in 1975 and the program began operations in 1976, under the administration of a Designation Coordinating Committee.<sup>154</sup> A Florida lawyer may achieve designation in up to three areas of law in addition to the area of general practice. For designation, the lawyer must have completed three years of practice and have substantial experience within each area of legal practice designated in his application. "Substantial experience" is undefined,

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153. See "Florida Plan" (1974), 48 Fla. B.J., 178, at 179.

154. *Ibid.*

however, although an Advisory Committee for each field may recommend definitions and standards for future designations.<sup>155</sup> As well, the three-year period may be waived if the applicant has specialized post-graduate education or concentrated specialized experience.<sup>156</sup>

Designation rights are granted for a three-year period and then to renew designation the lawyer must have spent at least 30 hours over the three-year period in approved CLE courses in each area for which renewal is sought, although the Florida Bar may waive all or any part of such requirement.<sup>157</sup>

The undefined nature of "substantial experience" is troublesome. Two members of the Designation Coordinating Committee, writing after one year of the plan's operation, simply stated that:

[t]he substantial experience needed as a basis for eligibility of a practitioner to designate an area of the practice of law is that kind and volume of representation of clients that after a period of three years gives the practitioner reasonable proficiency in the area. The volume of experience need not constitute more than one-third of the member's practice and may be less than one-third if it provides reasonable proficiency.<sup>158</sup>

The idea of reasonable proficiency as opposed to special competency, may be understandable given the fact that the plan is not considered a specialization program.

Initially the possible fields of law were not given. Rather the proposed plan proceeded on the following basis:

After detailed analysis and discussion, the consensus of the committee was that the areas of legal practice which might be designated should be left to the individual lawyer, so long as the designation be of a generally accepted area of legal practice, including general practice, and be phrased in a dignified and professional manner. In addition, the prior approval of The Florida Bar must be obtained.<sup>159</sup>

Since that time 23 areas of practice have been approved. These are:

Administrative and governmental law; admiralty; anti-trust and trade regulation law; appellate practice; aviation law; bankruptcy; consumer law; corporation and business law; criminal law; environmental law; estate planning and administration; family law; international law; immigration and naturalization law; labor law; patent, trademark and copyright; personal injury and wrongful death; real property law; registered general practice; securities law; taxation; trial practice; and workmen's compensation.<sup>160</sup>

New areas to be added to the list are under consideration.<sup>161</sup>

155. See, *Supra* n. 146.

156. *In Re. The Florida Bar* (1975), 319 So. 2d. 1, at 6. (Fla.S.C.).

157. *Id.*, at 7.

158. E. Hadlow and W. Henry, "Florida's Designation Plan After One Year" (1976), 50 Fla. B.J. 546, at 547.

159. *Supra* n. 153, at 178.

160. *Fla. Rules of Ct.*, By-laws Under the Integration Rules of the Florida Bar, Art. 17, s. 13, Sch. A.

161. *Supra* n. 158, at 548.

A potential confusion for the public is that one of the areas is called Registered General Practice which requires, as do the other 23 areas, that the lawyer has practised for three years before he or she can be designated in it. Thus, a lawyer could designate Registered General Practice and two other areas if he or she met the standards and was willing to take the required CLE hours. However, at the same time, there is a category called simply general practice, which is not one of the 23 areas or one of the three areas counted for designation limitation, and any member may designate general practice.<sup>162</sup> Thus, a lawyer could designate general practice and three designation areas, while another lawyer may simply have a designation Registered General Practice. This would be somewhat confusing to the public.

As of January 1977, of the approximately 12,000 actively practicing lawyers in Florida, about 8,000 are practicing under the plan.<sup>163</sup> Compared to the New Mexico program, does the Florida program achieve the goal of more informed access to legal services while still providing some quality assurance standards? Compared to California and Texas, should we properly call either the Florida or New Mexico plans formal regulation of specialization programs, or are they really advertising regulation programs, which include provisions for generalists as well as for *de facto* specialists?

Furthermore, are these plans in effect specialization regulation plans under the guise of advertising regulation, because of the effect of field designation on the public, despite disclaimers by the bar as to competency assurance?

#### Other States

As of August 1, 1977, California, Texas, New Mexico, and Florida were the only states with plans in operation. However, two states had programs ready for implementation, six states had programs in the approval stages, nine states were working on programs, and 23 states had the subject of specialization under active study. Only six states were not working on the issue.<sup>164</sup> Because these programs are not in operation and have not been evaluated or generally written about, they do not help much at this stage in responding to the questions raised thus far. What is interesting to note is the lack of uniformity that exists in regard to the formal regulation issue. Several basic approaches can be seen, although details vary within each approach.

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162. *Id.*, at 546.

163. M. Kahn and L. Kahn, "Specialization In Criminal Law" (1977), 41 *Law and Contemp. Prob.* 252, at 281 n. 173.

164. *Supra* n. 146.

### Certification Approach

Arizona and Washington have programs ready for implementation which take the certification approach of California and Texas. Arizona's pilot project is in the fields of workmen's compensation, criminal law, and tax, while the fields in Washington have not been fully established, pending consideration of a proposed revision to a two-tier plan.<sup>165</sup> While Washington follows what might be called the California "stringent standards approach," Arizona's plan, as well as the suggested plans in Missouri and Wisconsin, have been called "hybrid plans" because of their less stringent standards for certification:

These state plans reflect dissatisfaction with the rigid standards required by the California Plan, and equal disaffection with the liberality of the New Mexico pilot program. In choosing a middle road, these plans contain standards for certification stringent enough to insure the competence of specialists while reasonable enough to encourage specialization among attorneys.<sup>166</sup>

Three other states have prepared programs of the certification variety, but these programs have not yet obtained all approvals necessary for implementation — Colorado in taxation, securities, and labor law; New Jersey in bankruptcy, matrimonial law, criminal law, workmen's compensation, labor and tax; and South Carolina which has the unique feature of allowing no special "grandfather" standards in any of the fields.<sup>167</sup>

Other states working on plans which take the certification approach are Alaska, Illinois, Indiana, Missouri, Oregon, and Wisconsin. North Dakota was working on a plan involving trial practice, but this study appears to have been discontinued.<sup>168</sup>

### Self-Designation

Minnesota has under consideration a self-designation plan without any educational or minimum experience requirements which is not considered a specialization plan at all. Lawyers may simply identify in the yellow pages their availability to practice in up to three of seven specified areas of the general practice of law.<sup>169</sup>

While Oregon is working towards the eventual certification of specialists, the Bar in the meantime has established eighteen sections and a lawyer may join up to three of these sections. Under the proposal the Oregon Bar would maintain a list of section memberships

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165. *Ibid.* The Arizona plan is now in operation, see, "State Bars Lining Up Specialization Plans" (1978), A.B.A.J. 1486.

166. *Supra* n. 163, at 284.

167. *Id.*, at 273.

168. *Supra* n. 146.

169. *Ibid.*



available to the public upon request. The yellow pages would have an advertisement about the availability of this list.<sup>170</sup>

As noted earlier, plans purporting to be advertising regulation schemes and not specialization schemes, nevertheless may affect the issue of the formal regulation of specialization, if not immediately, then in the future. Will the public now or in the future be able adequately to distinguish a specialization scheme from a scheme involving an advertising of fields of law?

### Self-Designation with CLE

The Florida approach to the formal regulation of specialization appears to be very popular. Connecticut, Georgia, Idaho, Iowa, Louisiana, Michigan, Nebraska, Nevada, New Hampshire, and Oklahoma have plans at various stages of completion modeled on the Florida approach. Unlike Florida, some of these states are more specific about the substantial experience requirement. For example, Oklahoma would require at least a 25% time standard within the immediately preceding three years for designation.<sup>171</sup> The Nevada proposal is unlike the usual Florida approach, in that it would require some CLE for initial designation, not only for redesignation, and it would allow designation in only one field by a 60% time standard for substantial experience.<sup>172</sup>

### Two-tier Approach

A common observation made by commentators on the issue of specialization regulation is that the goal of informed access to legal services and the goal of improved quality of legal services by way of

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170. *Supra* n. 163, at 279 n. 168:

Eighteen sections were initially established:

- (1) Admiralty
- (2) Antitrust-Unfair Trade Law
- (3) Appellate Practice
- (4) Debtor-Creditor
- (5) Civil Rights
- (6) Business Law
- (7) Criminal Law
- (8) Estate Planning and Administration
- (9) Family and Juvenile Law
- (10) Zoning and Land Use Law
- (11) Labor Relations Law
- (12) Patent, Trademark and Copyright Law
- (13) Trial Practice
- (14) General Practice
- (15) Securities Regulations
- (16) Taxation
- (17) Workmen's Compensation Law
- (18) Consumer Law

171. *Supra* n. 163, at 282.

172. *Ibid.*

high competency standards for specialists, are in tension with each other, at least in the immediate situation.<sup>173</sup> The New Mexico and Florida approaches are almost immediately available after being adopted, to provide information to the public about a large number of lawyers and the areas in which they have at least some level of experience. Thus, accessibility is emphasized over competence. On the other hand, certification plans take time to develop, are usually only in a few fields initially, and do not likely involve the majority of lawyers.

Even within the certification camp, the survey of developments indicates different levels of standards in terms of difficulty, different approaches to the "grandfathering" issue, different approaches to the objective versus subjective standards issue, and so forth. These differences may be a result of a focusing on a different priority, or mix, of goals in setting up the program.

Because of the problem of the tension between goals, what might be called two-tier programs are under consideration in Virginia, New York, and Washington.<sup>174</sup> The New York plan, for example, would allow one tier of self-designation of up to three areas of practice in addition to general practice, thus gearing at more informed access to legal services; and then a second tier of full certification with California-type standards, geared at increasing the quality of legal services.<sup>175</sup> The State Bar would publish notices explaining the significances of identification and certification. The two tiers could exist permanently with some lawyers moving from one tier to the next, or the one tier might be phased out after a period of time when the second tier was more fully developed as a program. Perhaps the outcome of advertising changes made after *Bates*<sup>176</sup> will lead to a kind of *de facto* permanent two-tier system in many states.

Is this the best of both worlds? Will lawyers participate in the second tier in appropriate numbers if tier-one allows them the advantages of self-designation of fields for advertising purposes? What standards, if any, should exist for tier-one designation to achieve quality assurance? How will the fields be defined for tier-one in comparison to tier-two? Should tier-two be only in narrow specialized areas in such a system with very high standards to measure special competence, or should tier-two certification exist in all tier-one designation areas?

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173. *Supra* n. 56.

174. *Supra* n. 146. A more recent survey of state developments which was not available to the writer at the time this paper was prepared, notes that Iowa, Massachusetts, and Kansas have now moved to 2-tier proposals and Florida is moving in the direction of adding a certification tier. A.B.A. Survey, January 31, 1978.

175. *Supra* n. 146.

176. *Supra* n. 25.

Mr. David Brink, now chairman of the A.B.A. Standing Committee on Specialization, suggests that instead of the two-tier approach, states may face the reality of a four-tier approach because of the *Bates* decision and the changes in advertising rules made since that time:

What we really have since *Bates* is *four* tiers, or levels of telling the public what lawyers do. There are:

1. *Routine legal services* that can be advertised at a fixed fee under *Bates*.
2. *Fields of law practice* that are relevant to lawyer selection . . . but that imply no representation as to quality or competence of service.
3. *Recognized specialization based on designation* under a regulated state plan and offering some assurance of quality or competence. (This is Tier 1 specialization.)
4. *Recognized specialization based on certification* under a regulated state plan and offering substantial assurance of quality or competence. (This is Tier 2 specialization.)<sup>177</sup>

### Kentucky: Limiting Specialists to Their Areas

The proposal under consideration by the Kentucky Bar is unique in not following the A.B.A. guideline, that certified specialists should still have the right to practice in any field.<sup>178</sup> The program is a certification program but a specialist once certified would not be permitted to engage in the general practice of law, but would be required to confine his or her practice to no more than two specialty fields, while the general practitioner would continue to practice in any field, including the fields chosen as specialty fields.<sup>179</sup> As well, for two years following the establishment of standards in a field, a lawyer upon meeting certain standards could limit his or her practice to one or two specialty fields and practice in them only. However, the right to publicize such limitation would end after the two years, unless he or she achieved certification.<sup>180</sup> The assumed reason for the limitation is "to protect the general practitioner from any competitive disadvantage."<sup>181</sup> Would such a program, however, lead ultimately to a monopoly, as suggested by Professor Mindes?<sup>182</sup>

### *American Bar Association: 1977-1978*

In 1977, the A.B.A. Committee on Specialization issued a report<sup>183</sup> urging that all states should now begin programs regulating specialization, and that the A.B.A., through the Committee, should assist the states in this endeavor. While the Committee acknowledged

177. D. Brink, "Is Specialization Dead?" *Bar Leader*, Jan/Feb., 1978, at 21.

178. *Supra* n. 82.

179. The program is described by Robert Joe Turley, "A Realistic Route to Recognition of Specialization in Kentucky" (1976), 40 Ky. Bench & B. 9.

180. *Ibid.*

181. *Id.* at 32.

182. *Supra* n. 74.

183. *Supra* n. 46.

that empirical data is not available to affirmatively demonstrate that formal regulation results in increased access to higher quality legal services, the Committee concluded after its evaluation of the pilot program that formal regulation “is a partial answer to the need for easier access by all of our citizens to quality legal assistance.”<sup>184</sup> The evaluation of the pilot program by the Committee does not focus on each specific program, pointing out possible positive and negative factors; but rather the evaluation proceeds on a more abstract level, focusing on the general issue of formal regulation. No specific approach is endorsed although the reader may detect some leaning toward the certification approach, because the Committee emphasized quality assurance as one fundamental goal that states should strive for.

The evaluation of the state pilot projects by the Committee in an abstract way led to the following Committee conclusions:

1. The programs have demonstrated the ability of the legal profession to regulate specialization for both truthfulness and quality assurance.<sup>185</sup>
2. States have had difficulty pursuing access and quality objectives concurrently, but they have demonstrated the problems and have highlighted ways to overcome the difficulties in the future. With changes in advertising rules and with the California/Texas demonstration of preparing quality standards, future efforts may be even more successful.<sup>186</sup>
3. It is possible to define and apply law practice categories and quality assurance standards to identify lawyers with specialized competence as demonstrated by the California/Texas experience.<sup>187</sup> The Committee acknowledged that debate existed around what kind of standards are most accurate and effective; such as the objective or subjective standard experience debate, but concluded that: “Lawyers in California and Texas — with some exceptions — generally agreed during interviews with members of the committee that their programs had identified and certified most the lawyers in each field of practice who were respected by their peers for their competence.”<sup>188</sup>
4. Lawyer’s participation in available specialization programs has been relatively high.<sup>189</sup>
5. The costs of administering specialization regulation programs are reasonable.<sup>190</sup>

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184. *Id.*, at 4 (emphasis by Committee).

185. *Id.*, at 9.

186. *Id.*, at 10.

187. *Id.*, at 10,11.

188. *Id.*, at 11,12.

189. *Id.*, at 12.

190. *Id.*, at 13.

6. Two issues which have been the most controversial are "grandfather" provisions and the length of the minimum-years-of-practice requirements.<sup>191</sup>

In urging states to begin formal regulation programs, the Committee appeared to put less emphasis on the most often cited assumed positive goals of higher quality legal services, more informed access to legal services, and lower cost of legal services. Instead the committee assigned more importance to the need for controlled advertising as the primary goal for specialization regulation. The Committee noted that there is a loosening of restrictions on the information which lawyers may give to the public, but without the regulation of specialization, such loosening may lead to an undesirable situation where the public will not really be aided in finding lawyers with qualifications appropriate to their needs. The report stated:

The experience of operating specialization regulation programs in several states demonstrates that the organized bar can take effective steps, through specialization regulation programs, to provide the public with some of the information it needs about the work of individual lawyers and, while doing so, to encourage *truthfulness* of information about specialized law practice and *quality assurance standards* in the delivery of specialized services.

...

If information about lawyers and their practices cannot be accurate (and much of it cannot be no matter how good the intent, if commonly accepted labels, definitions and standards are not available), then communication of such information to the public can result in serious harm. Similarly without adequate standards to help identify specialized competence, lawyers should not be permitted to claim that they have specialized competence.<sup>192</sup>

By "commonly accepted labels, definitions and standards" the Committee did not mean commonly accepted throughout the nation, and the report does not favor a nationwide scheme. The report stated:

Because states are the primary regulators of the practice of law, they should be the primary regulators of legal specialization. States can prepare and administer labels, definitions, standards and methods of specialization regulation which respond to differences from state to state in size, urbanization, economic characteristics, customs and procedural or substantive laws. States can be responsive to the specific needs of their citizens.<sup>193</sup>

Based on these findings and the evaluation, the Committee made a series of recommendations directed at both state and A.B.A. involvement in the regulation of specialization. After some amendments, these recommendations were approved at the February 1978 A.B.A. Midyear Meeting in New Orleans. The amendments specifically include certification and designation and other types of programs as available options. The following recommendations were adopted:

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191. *Id.*, at 14.

192. *Id.*, at 5,6.

193. *Id.*, at 16.

RESOLVED, That the American Bar Association approves as a model for consideration by the states the following principles relating to the regulation of lawyer specialization, including certification, designation and other types of specialization regulation programs:

1. that the authority governing the practice of law in each state regulate the information provided to the public about lawyers' specialties, within the provisions of each state's rules of professional responsibility;
2. that such state regulation include measures to ensure truthfulness and quality assurance, and compliance by all lawyers with the regulatory standards;
3. that such state regulation include measures to provide broader access by the public to competent legal services by means of a designation plan, a certification plan, a combination of these, or by other methods;
4. that such state regulation be accomplished with the assistance of informed and concerned laypeople; and
5. that such state regulation permit lawyers to use reasonable and responsible means and forums to inform the public about their areas of specialized competence, consistent with truthfulness and quality assurance standards, and consistent with each state's rules of professional responsibility.

BE IT FURTHER RESOLVED, That the American Bar Association, through the Standing Committee on Specialization, assist the states in regulating specialization by identifying suggested labels for and definitions of law practice categories, preparing suggested quality assurance standards for each category, gathering and exchanging information about the operation of state regulatory programs, conducting public information programs, and establishing basic guidelines for state regulatory programs which incorporate adequate protection for general practitioners and other lawyers not engaged in specialized practice and the following specific features:

1. all lawyers in a single field of law within a state who seek recognition as specialists under any plan, whether a designation plan, a certification plan, or another plan, should meet equivalent standards specified in that plan;
2. participation by lawyers should be voluntary;
3. no lawyer should be denied the right, alone or in association with any other lawyers, to practice in any field of law;
4. certification or designation should be permitted in more than one field of law;
5. certified or designated specialists to whom clients have been referred for specialized purposes from another lawyer should not take advantage of their position to enlarge the scope of their representation;
6. safeguards to ensure the lawyer's continuing qualification as a specialist should be developed; and
7. financing of specialization regulation programs should be derived from its participants.<sup>194</sup>

The A.B.A. Standing Committee on Specialization produced a discussion paper in August, 1978 on 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 at page 5: "Without established categories of practice, no two lawyers may describe what they do in identifiably similar ways, thus frustrating the public's search for and ability to choose among lawyers and suggesting that the qualifications of each are unique." The Committee submitted the following list for discussion, and noted

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194. A.B.A. Summary of Action, 1978, at 10.

that brief, appropriate and accurate words of limitation or qualification may be used following a designation:

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

It is clear that a new era in the regulation of specialization in the United States has begun. Many questions may be asked. Are the principles suggested to the states far too vague about how to achieve measures to ensure truthfulness and quality assurance given that certification or designation or a combination of these and other methods are all specifically allowed as options? Can the work of the A.B.A. Standing Committee on Specialization lead to some basic uniformity in approach from state to state in achieving standards for truthfulness and quality assurance? Even granted the need for differences from state to state, is there too much "inconsistent and factionalized"<sup>195</sup> development?

#### **Formal Regulation: Canadian Developments**

While no formal regulation of specialization program is in operation in Canada, the issue has been under active consideration in several provinces.

##### *Alberta*

In the early 1970's a committee of the Alberta Law Society, although noting the problems involved, concluded that the formal certification of specialists was a desirable goal.<sup>196</sup> The Committee stated, however:

The major problem for The Law Society of Alberta in implementing specialist certification arises, in the Committee's view, from the relatively small size of the

195. *Supra* n. 85.

196. *Supra* n. 41.

Alberta Bar. The prospect of a Bar of less than 1,500 members, by itself, developing criteria for the education and experience of specialists, for testing them and for periodic recertification appears almost overwhelming. It would appear that co-operation of all of the Canadian legal governing bodies will be required.<sup>197</sup>

The Committee urged the establishment of a preliminary pilot program on a national basis involving two or three fields of primarily Federal jurisdiction.<sup>198</sup>

The Canadian Bar Association at its annual meeting in Vancouver in August 1973, passed a resolution favoring the certification of specialists but the resolution has not been seriously pursued by the National Executive.<sup>199</sup> In 1973, the Canadian Federation of Law Societies accepted a report which recommended that "the Federation should continue active study of certification of specialists with the view to implementing as soon as practicable a limited and to some extent experimental programme of certification of specialists in a limited number of specialty fields."<sup>200</sup> Action by the Federation has also stalled, however.

#### *British Columbia*

A special Joint Committee of the B.C. Branch of the Canadian Bar Association and the B.C. Law Society produced a report in 1975, which noted that some division existed within the Committee as to the desirability of formal regulation; but that all of the Committee members agreed that a pilot program was necessary so that pros and cons of formal regulation could be appraised realistically.<sup>201</sup> The Committee stated further:

The committee is aware of, and agrees with the general principle of national standards for certification of specialists; however, the march toward such national certification may have to be started in an individual province, and in an individual specialty.

. . .

While the ultimate success of the program will depend on its endorsement by the Federation of Law Societies of Canada, and as well by the Canadian Bar Association, it is not realistic to expect the Federation to initiate a national program, and the Canadian Bar Association does not have the jurisdiction to do so. The Committee has concluded, therefore, that the beginning must be made in one province, with the endorsement of the Federation and the co-operation of the Canadian Bar Association.<sup>202</sup>

Based on this finding, the Committee urged that another special committee should be established to design a pilot project for B.C.

197. *Id.*, at 91.

198. *Id.*, at 97.

199. *See*, Joint Committee on Competency and Specialization of the Law Society of B.C. and B.C. Branch of C.B.A., "Specialization Report," Oct. 31, 1975, (reporting on C.B.A. activity, at 7).

200. "Report of the Special Committee on Specialization in the Practice of Law," Federation of Law Societies, 1973, at 16.

201. *Supra* n. 199.

202. *Id.*, at 7.



In 1976, such a committee was established and in April 1977, the Special Joint Committee issued its report.<sup>203</sup> The report was endorsed at the Annual Meeting of the B.C. Branch of the C.B.A. on June 3, 1977,<sup>204</sup> but the report is still under consideration by the Benchers of the B.C. Law Society.<sup>205</sup> The report contains the most complete and detailed proposal in Canada to date for the certification of specialists and as such, the main features of the report are reprinted as an Appendix to this paper.<sup>206</sup>

In selecting the four areas of criminal law, family law, immigration law, and wills and trusts as the areas for the pilot project, the Committee noted what factors it considered relevant to the selection process.<sup>207</sup> The plan details the administrative structure for certification which includes a Standing Committee on Specialization with functions as outlined, and a Certification Committee in each of the areas, with the composition, appointments, functions, terms of office, and procedures, as outlined.<sup>208</sup> The plan then includes the criteria for certification in each of the four areas, noting that a lawyer shall not be certified in more than two areas.<sup>209</sup> In family law, wills and trusts, and immigration law, the criteria include length of practice, substantial involvement, and a written examination as mandatory standards and an educational requirement that *may* be required. The substantial involvement and educational standards are not specific, as they are in California.<sup>210</sup>

In criminal law the standards are very different.<sup>211</sup> A length of practice standard is followed by an experience assessment standard which is basically a letters of reference standard. A written examination or special education standard in criminal law may be required only if the information obtained by the experience assessment procedure does not satisfy the Committee.<sup>212</sup>

“Grandfather” standards are included for family law and wills and trusts, but not for immigration law or criminal law.<sup>213</sup> A five-year recertification provision, with, as yet, unspecified substantial involvement and educational standards is provided.<sup>214</sup> The plan then

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203. Joint Committee on Specialization, Report to the Law Society of B.C. and the B.C. Branch of the C.B.A. on a Pilot Programme For the Certification of Legal Specialists in B.C., April, 1977.

204. *C.B.A. National*, June/July, 1977, at 1.

205. Letter from G.G. Everitt, Assistant Deputy Secretary of the Law Society of B.C., to author, (July 5, 1978).

206. *Supra* n. 203.

207. *Id.*, at *Selection of Areas of Legal Practice for Certification*.

208. *Id.*, at Pt. I.

209. *Id.*, at Pt. II.

210. *Ibid.*

211. *Id.*, at Pt. II, D.

212. *Id.*, at Pt. II, D., 3.

213. *Id.*, at Pt. II.

214. *Id.*, at Pt. III.

gives details as to the procedures for certification and recertification, the consequence of certification, transitional provisions, and provisions on the duration and review of the pilot project.<sup>215</sup>

An important part of the report is the comment by the Committee on the approach taken to the setting of standards.<sup>216</sup> Clearly the B.C. plan is different from the objective standards approach in California and the amount of discretion given the certification committee appears to be even greater than in Texas. Moreover, the approach taken by the Committee appears to be more concerned with the identification of *de facto* concentration and the setting of moderate standards to test basic competence in the areas, rather than an approach aimed at the identification and *development* of a high degree of special competence. While an experimental program should arguably take a variety of approaches, and the B.C. plan does so with a different approach in criminal law, should there have been also in the plan one experimental area where specific objective mandatory standards are formulated relating to actual practice experience and educational achievement, as well as examinations, length of practice, and reference standards?

While controversy will undoubtedly surround the proposal, the B.C. Committee members have obviously put in a great deal of time and effort to achieve such a detailed and complete proposal. B.C. may be the first province in Canada to move forward with formal regulation.

### *Manitoba*

The Law Society of Manitoba Special Committee on Competence reporting in 1977, included in its recommendations that Manitoba should embark on a program to certify specialists.<sup>217</sup> No specific program was outlined in the report. The report notes that the committee was very divided on the issue. The recommendation was not approved by the Law Society, and on November 26, 1977, the Manitoba Branch of the C.B.A. passed a resolution opposing any program of certification of specialists.

Recently the Executive and Finance Committee of the Law Society of Manitoba agreed to draft a proposed amendment to the Advertising by Lawyers Rule. The amendment would allow advertising by lawyers of areas of preferred, concentrated, or restricted practice provided that they not use the words "specialist" or "specializing," or like words suggesting a recognized status or accreditation.<sup>218</sup>

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215. *Id.*, at Pt. IV.

216. *Id.*, at Pt. II, *Comment*.

217. *Supra* n. 16, at 39-40.

218. As reported in the minutes of the meeting of the Benchers of the Law Society of Manitoba, Nov. 30, 1978.

Will the public be misled by such a development in the absence of a concurrent specialization scheme? In my view, the developments in Manitoba illustrate that advertising and specialization are bound together and that policy changes in advertising should not be made without a detailed consideration of the present and future impacts of such change on specialization on the legal profession.

### *Ontario*

A special Committee on Specialization was appointed by the Law Society of Upper Canada in 1966 and submitted its report on November 17, 1972.<sup>219</sup> The Committee concluded that:

1. A plan should be adopted in Ontario to train, test and qualify specialists in certain areas of law.<sup>220</sup>
2. The training of specialists must be additional to general legal training.<sup>221</sup>
3. No more than two or three areas of specialization should be provided for at this time, and Criminal law, Bankruptcy, Admiralty and Labour Law would be suitable areas to start with because they are the subject of federal legislation.<sup>222</sup>
4. Specialists would not be limited to their areas and generalists could practice in all areas.<sup>223</sup>
5. "Grandfathers" should be provided for.<sup>224</sup>
6. There should be a five-year substantial involvement standard and a special education standard, and written and oral examinations.<sup>225</sup>
7. The facilities of the Bar Admission Course and the CLE programme should be developed to provide courses for certification applicants and certified specialists.<sup>226</sup>
8. There should *not* be recertification.<sup>227</sup>
9. Certified specialists could "hold themselves out" as such, subject to appropriate advertising provisions.<sup>228</sup>
10. The Committee noted finally, that it was "not unmindful of the possible impact on the law of professional negligence of the introduction of specialization standing in our profession."<sup>229</sup>

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219. Special Committee on Specialization in the Practice of Law, Report to the Benchers of the Law Society of Upper Canada, Nov. 9, 1972. Found in (1973), 39 Man. B. News 74.

220. *Id.*, at 75.

221. *Id.*, at 76.

222. *Id.*, at 77.

223. *Id.*, at 77-78.

224. *Id.*, at 78.

225. *Ibid.*

226. *Ibid.*

227. *Id.*, at 79.

228. *Ibid.*

229. *Ibid.*

This report was approved in principle by the Convocation of the Law Society of Upper Canada, but after circulation among the profession it met a great deal of negative reaction and was not pursued further, although the Special Committee was not dissolved.

In 1976, the Special Committee met again and then issued a report in February 1977.<sup>230</sup> According to the Committee:

The demand is now perceived to be to provide a way for the members of the public to be able to select a lawyer who is ready and able to handle their particular problems. The difficulty is that at present lawyers are not permitted to inform the public as to the areas of law they work in and in which they are reasonably competent. Average clients are not looking for lawyers highly qualified in narrow fields, who are the true experts or specialists. They simply want to find a lawyer who is competent and in fact practises in the field where their problems lie. The Society also recognizes the desirability of enhancing competence of the practising Bar generally and its duty to provide enlarged facilities for this purpose. . . .

Your Committee is of the view that it would be a better policy for the Society to initiate and maintain a program to accredit competent lawyers, with a view to informing the public of the areas of law in which they practise than it would be for the Society to promote a program to produce true specialists. Clearly in the public interest the need for the former is much more pressing than the latter.<sup>231</sup>

The Committee then proposed what it called an "accreditation" plan, resembling the "designation with CLE" Florida plan:

The standards a lawyer would be required to maintain to preserve his accreditation would be much lower than those required of a specialist. Also the areas of law should be broader and not too narrowly defined and, in particular, your Committee considers that general practice will form an area for accreditation. It is your Committee's opinion that general practice can be sufficiently clearly delineated to allow it to be recognized and your Committee considers this point to be of some importance.

Another point which your Committee considers to be of importance is that everything that can be done should be done to obviate confusion in the mind of the public between true specialization and accreditation. To this end it should be borne in mind in considering the details of your Committee's proposal that the word 'accreditation' would not be used on lawyers' letterheads, but rather accreditation by the Society would simply permit the lawyer to use such words as 'Practising in Family Law', 'General Practice', or as the case may be.<sup>232</sup>

The Committee then described a proposed "accreditation" plan in a general way, noting that it wished to receive comments from the profession before formulating any detailed proposal. The general proposal is as follows:

1. Practitioners seeking accreditation would file a statement that they have engaged in practice in a particular area of law to a stipulated extent, say more than 50% for a period of time, say 3 or 5 years. General Practice accreditation would be on a similar basis but without the emphasis on a specified category of law. It is not proposed that at this time there would be any examination or investigation of the applicants' qualifications as stated to the Society.

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230. Special Committee on Specialization, "Report to Benchers" Feb. 1977.

231. *Id.*, at 1, 2-3.

232. *Id.*, at 3.

2. To maintain accreditation in a particular area, practitioners would be required to attend a refresher course at least once in each successive two-year period following accreditation. Programs for the maintenance of accreditations would be presented in Toronto and other centres at frequent intervals, say every six months in each category, including of course the category of General Practice. The courses at the outset of the program would be of short duration, one or two days, but would be expected to become more intensive as the plan developed.
3. Examinations would not be required of those attending the refresher courses although it should not be ruled out as the plan matures that it may be found that an examination of some kind will be found to be desirable.
4. The categories in which accreditation is to be permitted should, if possible, embrace the whole range of the practice of law. Considerable care must be taken in determining the comprehensiveness of particular categories, for example, should Taxation form one category including personal and corporation income tax, customs and excise, provincial and federal sales taxes, and municipal tax, or should each of the several types of tax give rise to a specific separate category? The same question arises in many fields, for example, Real Estate or Land Law may be divided into several areas such as purchase and sale of land, valuation and assessment of land, land use and development, landlord and tenant and so on. Your Committee does not think it desirable to attempt at this stage to compile a definitive list of categories. It is expected that the profession's reaction to the general proposal would be helpful in doing so.
5. The plan should be widely published and every effort made to explain to the public that accreditation in no way constitutes a holding out by the Society that an accredited lawyer is an expert in his field of law but that its purpose is to enable lawyers to inform the public in what areas of law they have experience and at least minimum competence and to improve standards of practice.
6. Each category of accreditation should be under the supervision of a committee of knowledgeable practitioners, not all of whom need to be Benchers. Each committee will be responsible to the Legal Education Committee but would exercise general surveillance over the qualifications of the accredited group and would be responsible under the general direction of the Legal Education Committee for the content and delivery of the refresher courses.

The additional costs of the accreditation program would be met by fees payable by the accredited lawyers who take the prescribed courses, the amount of the fee to be determined after projected costs have been analysed.

8. The Society's present involvement in Continuing Education programs would not be diminished and, if anything, should be enlarged. Courses on selected topics of a more intensive nature than the recurring refresher courses would continue to be provided along the lines already established.
9. Your Committee has not fully explored the question of whether its proposal would require changes in the governing legislation.<sup>233</sup>

This accreditation proposal was circulated to the Ontario profession and the Special Committee received 253 letters commenting on it. In a November 1977 report, the Special Committee noted that about 60% of the letters were in favor of a scheme like the proposed ac-

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233. *Id.* at 4,5,6.

creditation scheme, but the Committee received many criticisms and decided not to put forward a detailed proposal at that time.<sup>234</sup>

Thus, the Ontario experience also indicates the tension of goals seen so clearly in the United States developments.

### *Quebec*

A 1974 Quebec Bar Committee on Specialization concluded that demands by the profession and the public did not justify the certification of specialists at that time.<sup>235</sup>

### **Conclusion**

The survey of developments indicates a lack of consensus on such matters as what the priority of needs are and what the priority of goals should be, what concept of specialization should be adopted, what kind of approach to formal regulation should be taken, what levels and kinds of standards should be formulated, and how fields should be defined. Such lack of consensus, however, does not mean that needs do not exist or goals cannot be furthered to meet those needs in part through the formal regulation of specialization.

The lack of consensus points to the need for comprehensive planning, including more study on just what the needs of the general public are in regard to the delivery of legal services, and how the many factors in the lawyering process bearing on access, quality, and cost cumulatively affect each other. Then, some planned responses to the questions raised in this paper would be possible.

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234. Special Committee on Specialization, "Report to Benchers" Nov. 1977. While the details of the proposal are not available to the author at this time, it was recently reported in the *C.B.A. National*, Nov. 1978, at 25-26: "All lawyers in Ontario will shortly be permitted to state his or *special area of expertise* on business cards and letterheads as well as in the yellow pages of telephone directories." (emphasis added).

235. *C.B.A. National*, Feb., 1977., at 10.

## APPENDIX

## REPORT OF THE JOINT COMMITTEE ON SPECIALIZATION TO THE LAW SOCIETY OF BRITISH COLUMBIA AND THE B. C. BRANCH OF THE CANADIAN BAR ASSOCIATION

*Background (omitted)*

*Approach*

The Committee considered that the purpose of a programme for the certification of specialists was not merely to identify those few who have attained unusual expertise in particular areas of legal practice. Rather, recognizing that specialization exists in fact, it was to enable the public to learn which lawyers specialize in certain areas, and to ensure that those who hold themselves out as specialists do have qualifications and experience to justify such a holding out. Thus the pilot programme had to be one that would readily identify those specializing within the chosen areas of legal practice and would set realistic standards of competency and experience to which they must attain.

In order to allow the profession to obtain a full understanding of the type of programme envisaged, it was also considered necessary to set out in the pilot programme, in as detailed a fashion as possible, all aspects of the programme, including the criteria that would have to be met by each individual seeking to obtain certification in an area of legal practice. In this way a decision on the desirability of the programme can be made with a reasonably clear awareness of the consequences of its implementation.

*Selection of Areas of Legal Practice for Certification*

Though the previous committee has recommended that a pilot programme be established "in an area of practice," this Committee considered that a fair evaluation of the certification of specialists could only be obtained through a programme that covered a selected number of areas of legal practice. In selecting those areas a number of factors were considered relevant. First, as it had been hoped by the previous committee that a pilot project would be suitable for implementation on a nation-wide scale it was felt desirable to include some areas of legal practice in which a certification programme could be duplicated nationally. Secondly, it was considered that areas should be selected that would involve a large number of members of the profession as well as areas of practice in which only a relatively small number were involved. Thirdly, it was felt desirable to choose an area that would involve litigation skills as well as an area that did not. Fourthly, the areas chosen had to be easily recognizable and have identifiable specialists practising in them. Fifthly, the areas selected had to be ones that the Committee considered would provide a cross-section of legal practice and hence be valid for a pilot project. Finally, since one of the major reasons for a specialization programme is to respond to a public need to identify those lawyers engaged in a particular area of legal practice, the areas chosen ought to be ones where that public need was perhaps greater.

Obviously there are a number of areas that would fulfill these requirements and the Committee was conscious that an ultimate selection may be arbitrary. In the result the following areas were selected for the pilot project: criminal law, family law, immigration law, wills and trusts.

The Committee now recommends that the pilot programme for the certification of specialists in selected areas of legal practice, set out below, be implemented:

**PLAN FOR THE CERTIFICATION OF SPECIALISTS IN BRITISH COLUMBIA**

*Part I — Administrative Structure for Certification*

**A. Standing Committee on Specialization**

**1. Appointment**

The Benchers shall appoint from among their members a Standing Committee on Specialization. . .

**2. Functions**

The functions of the Standing Committee shall be as follows:

- (a) to administer the pilot project for the certification of specialists;
- (b) to appoint Certification Committees for each designated specialty area of legal practice;
- (c) to oversee the activities of each Certification Committee;
- (d) to recommend to the Benchers amendments to the pilot project for the certification of specialists;
- (e) to recommend to the Benchers standards and requirements relating to education, experience, proficiency, and other relevant matters for each designated specialty area of legal practice;
- (f) to determine from time to time and to recommend to the Benchers areas of legal practice that are appropriate for designation as specialty areas of legal practice, or for deletion from the list of specialty areas of legal practice;
- (g) to recommend to the Benchers for certification as specialists those individuals who in the view of the appropriate Certification Committees have met the requirements for certification as specialists;

- (h) to consider appeals from applicants who are denied certification or recertification as specialists;
- (i) to delegate to the Certification Committees such matters as are deemed appropriate;
- (j) to perform such other functions and duties as may from time to time be assigned to it by the Benchers.

*Comment*

It is envisaged that the Standing Committee on Specialization would be the formal mechanism by which the Benchers are involved in the certification of specialists. The principal function of the Standing Committee is to appoint the certification committees and oversee their work. In this way the formal authority of the Benchers ultimately to grant certification is recognized, but practically each specialty would be administered by the certification committees.

**B. Certification Committees**

**1. Composition**

- (a) There shall be a Certification Committee composed of 4 members for each specialty area of legal practice appointed as herein provided;
- (b) The members of each Certification Committee shall be members in good standing of the Law Society of British Columbia;
- (c) No more than one member of each Committee may be a member of the Standing Committee on Specialization.

**2. Appointment**

The members of the Certification Committees shall be appointed by the Standing Committee on Certification in the following manner:

- (a) one member, who shall be a certified specialist in the area of legal practice of that Certification Committee, shall be appointed by the Standing Committee;
- (b) three members shall be appointed by the Standing Committee from a list of at least six (6) names provided by the sub-section of the B.C. Branch of the Canadian Bar Association concerned with that specialty area of legal practice. At least three of the names submitted shall be certified specialists in the area of legal practice of that Certification Committee. If no sub-section exists for an area of legal practice then the list shall be submitted by the Executive Committee of the B.C. Branch of the Canadian Bar Association.
- (c) The Certification Committees may co-opt as additional members certified specialists from particular areas of the Province when applications for certification from individuals practising there are being considered.

**3. Functions**

The functions of the Certification Committee shall be as follows:

- (a) to administer the procedures for the certification and recertification of specialists within each designated specialty area of legal practice;
- (b) to designate where appropriate, courses of study for those seeking certification in a specialty area of legal practice;
- (c) to receive applications from lawyers wishing to be certified as a specialist, or lawyers already certified as specialists who wish to renew their certification;
- (d) to conduct written examinations of applicants; where so required;
- (e) to adopt such other procedures as may be necessary, including where appropriate the holding of hearings, to determine that an applicant has fulfilled the requirements for admission to that specialty area of legal practice;
- (f) to recommend those candidates who have fulfilled the requirements for admission to a specialty to the Standing Committee on Specialization for formal certification as specialists;
- (g) to establish for its specialty area of legal practice the educational requirements for recertification and where appropriate require that all those certified as specialists attend specific educational programmes;
- (h) to review regularly practice within that specialty area of legal practice and after consultation with the appropriate sub-section of the B.C. Branch of the Canadian Bar Association to make proposals to the Standing Committee on Specialization for changes to the requirements for admission to that specialty;
- (i) to perform such other functions as are from time to time delegated to it by the Standing Committee on Specialization;
- (j) to report regularly to the Standing Committee on Specialization.

**4. Term of Office**

The members of the Certification Committees shall hold office for three years; provided that in the initial year of the project two members shall hold office for two years, and two members shall hold office for three years.



5. *Procedure for Certification Committees*

- (a) The Chairman of each Certification Committee shall be appointed by the Standing Committee on Specialization.
- (b) Subject to the requirements hereinafter provided each Certification Committee shall establish its own rules of procedure.
- (c) The deliberations of each Certification Committee shall be in confidence and the Committee shall use every endeavour to ensure the confidentiality of material submitted to it concerning each application for certification or recertification.

*Part II — Criteria for Certification*

A. *General*

1. Every applicant for certification as a specialist shall be a member in good standing of the Law Society of British Columbia.
2. No person shall be certified as a specialist in more than two areas of legal practice.

B. *Family Law*

1. *Length of Practice*

An applicant shall have been engaged in the practice of law in Canada for at least 5 years, and for three years prior to application engaged in the practice of law within British Columbia.

2. *Substantial Involvement*

Each applicant shall show to the satisfaction of the Certification Committee on Family Law that he or she devotes a minimum of 25% of his or her legal practice to matters relating to family law and has met the requirements set out in Annex I.

3. *Written Examination*

Each applicant shall complete a written examination to the satisfaction of the Certification Committee on Family Law. The examination shall be prepared under the authority of the Certification Committee.

4. *Educational Requirement*

Each applicant may be required to show attendance at educational programmes designated by the Certification Committee on Family Law.

5. *"Grandfather" Certification*

1. For a period of two years following the implementation of this programme the Certification Committee on Family Law may in its discretion relieve an applicant from the necessity of sitting a written examination or attending educational programmes provided that

- (a) the applicant furnishes the Committee with four letters of reference from practising lawyers or from judges attesting to the expertise of the applicant in the field of family law, and
- (b) the Committee is satisfied from its own knowledge and independent enquiry of the applicant's expertise. In making such an enquiry the Committee may solicit the views of practising lawyers or of judges.

2. An applicant denied certification under this provision may sit the written examination and fulfill any educational requirement for certification.

C. *Wills and Trusts*

1. *Length of Practice*

An applicant shall have been engaged in the practice of law in Canada for at least 5 years, and for 3 years immediately prior to application engaged in the practice of law within British Columbia.

2. *Substantial Involvement*

Each applicant shall show to the satisfaction of the Certification Committee for Wills and Trusts that he or she devotes a minimum of 25% of his or her legal practice to matters relating to wills and trusts and has met the requirements set out in Annex II.

3. *Written Examination*

Each applicant shall complete a written examination to the satisfaction of the Certification Committee on Wills and Trusts. The examination shall be prepared under the authority of the Certification Committee, and may deal with any of the areas set out in Annex II.

4. *Educational Requirement*

Each applicant may be required to show that he or she has attended educational programmes designated by the Certification Committee for Wills and Trusts.

5. "Grandfather" Certification

1. For a period of two years following the implementation of this programme the Certification Committee on Wills and Trusts may in its discretion relieve an applicant from the necessity of sitting a written examination or attending educational programmes provided,

- (a) the applicant has been engaged in the practice of law for at least ten years, and
- (b) the applicant furnishes the Committee with four letters of reference from practising lawyers attesting to the expertise of the applicant in the fields of wills and trusts, and
- (c) the Committee is satisfied from its own knowledge and independent enquiry of the applicant's expertise. In making such an enquiry the Committee may solicit the views of practising lawyers.

2. An applicant denied certification under this provision may sit the written examination and fulfill any educational requirement for certification.

D. *Criminal Law*

1. *Length of Practice*

An applicant shall have been engaged in the practice of law in Canada for a period of at least 5 years, and for 3 years immediately prior to application engaged in the practice of law within British Columbia.

2. *Experience Assessment*

- (a) Each applicant shall furnish the Committee with four letters of reference attesting to the applicant's expertise in the field of criminal law.
- (b) The letters of reference shall be from practising lawyers or judges.
- (c) The Certification Committee shall also solicit the views of lawyers and of judges.
- (d) At the expiration of two years from the implementation of this programme, letters of reference from lawyers shall be sought only from those lawyers who have been certified as specialists in criminal law, although the Certification Committee may in its discretion consider references from lawyers who have not been certified.

3. *Written Examination and Educational Requirement*

Where the Committee is not satisfied from the information obtained under 2 above that the applicant has the necessary experience or expertise it may require the applicant to attend designated educational programmes or to complete a written examination to the satisfaction of the Committee. The examination shall be prepared under the authority of the Certification Committee.

E. *Immigration Law*

1. *Length of Practice*

An applicant shall have been engaged in the practice of law in Canada for a period of at least 5 years, and for 3 years immediately prior to application engaged in the practice of law in British Columbia including active involvement in the field of immigration law.

2. *Substantial Involvement*

Each applicant shall show to the satisfaction of the Certification Committee for Immigration Law that he or she has met the requirements set out in Annex III.

3. *Written Examination*

Each applicant shall complete a written examination to the satisfaction of the Certification Committee on Immigration Law. The examination shall be prepared under the authority of the Certification Committee.

4. *Educational Requirement*

Each applicant may be required to show that he or she has attended educational programmes designated by the Certification Committee for Immigration Law.

*Comment*

An attempt has been made in devising the standards for the certification of specialists to provide a system that is relatively simple and straightforward. However, it was recognised after discussion with various individuals and groups that different approaches might be necessary for different areas of legal practice. Two considerations have, however, been paramount. First, the system ought to be able to identify clearly those who specialize in fact, and secondly, the criteria of experience or competency should be set at a reasonable level to ensure that certain minimum standards are being met but not to impose impossibly high standards.

An initial question to be dealt with was whether there ought to be provision for "grandfather" certification. There are two aspects to this problem. The first is how to select the initial members of the certification committee who then go about admitting the others to the specialty. This, it was decided, should be dealt with through special transitional provisions designed to get the programme go-

ing. The second, and perhaps more difficult, aspect of the "grandfather" problem was whether to allow certain individuals to qualify for certification without fulfilling all the requirements in recognition of their years of practice and experience in the field.

A "grandfather" qualification of this latter nature has been a controversial matter in most jurisdictions that have considered certifying specialists. California adopted grandfather provisions in their initial programme in order to gain as much support for the programme as possible. Their experience with the provisions has not been satisfactory and their Board of Specialization has recommended that no "grandfather" provisions be included in the additional areas of legal practice for which standards are being developed.

The argument for a "grandfather" provision rests upon the view that there are in every area of legal practice lawyers who would be generally regarded as specializing and exercising a degree of skill that would warrant calling them specialists. It would seem incongruous, therefore, if they were asked to undergo a process of testing to ensure that they are fit to be designated as a specialist in that area of legal practice. Indeed, such a requirement may discourage these lawyers from applying for certification as a specialist and hence the certification programme would suffer a loss of credibility. The counter argument is that it is difficult, if not impossible, to develop criteria that would allow the acknowledged specialists an automatic certification without letting in others whose only claim to that certification is length of practice. The inclusion of such individuals, where others less experienced in terms of years of practice but better qualified in other respects have had to go through formal procedures for certification, has led to resentment in other jurisdictions. This too can lead to a loss of credibility for the certification programme.

There was not a great deal of support found in the various individuals and sub-sections consulted with for a "grandfather" provision, the general feeling being that once those who were to form the basis of the initial certification committees were selected the problem would be of less significance. Moreover, it was felt by the Family Law Subsection that in that area "grandfathering" should be measured not by length of practice of law but through some assessment of the quality of service provided by the applicant.

The Committee's view of the desirability of a grandfather provision for each area was mixed. Generally it was felt that there was little justification for differential standards for certification within each area of legal practice, but that unless some provision of "grandfather" certification was included the programme may not get the wide acceptance it should. Thus, it was decided to include some provisions for "grandfather" certification but provisions that are closely circumscribed. In the case of Immigration Law it was considered that no "grandfather" provision was necessary. The number of individuals practising in that area are so few that the transitional provisions will probably eliminate any need for "grandfathering".

The standards for ordinary certification in each specialty area of legal practice have been developed with a view to determining what may be appropriate for that particular area. There is uniformity in requiring evidence of a minimum length of practice and substantial involvement in most areas; however, reactions to the requirement of a written examination have varied. In California there is great emphasis on the need for standards that are seen to be objective and can be administered objectively. Thus the written examination has become the principal component of the decision to certify. The reaction of a number of lawyers in British Columbia has been that the best way to identify those who specialize is to ask other lawyers. Moreover, there is a feeling that there would be less concern here about a system that gives a greater measure of discretion to the certification committees than is acceptable in California.

The Committee sees some difficulty with a system that would allow certification solely on the basis of lawyers' references. In California no one has even been refused certification on the basis of adverse letters of reference. Yet there may be some merit in the argument that letters of reference will be more revealing here, particularly where confidentiality can be guaranteed. Moreover, the Committee considers that in the criminal law area there are good reasons for attempting an alternative system. Written examinations can test substantive knowledge, but they are imperfect in testing skills of advocacy, and knowledge of substantive criminal law may only be one component of the criteria for a criminal law specialist. Also, in this area where skill in court will be a vital part of the requirements for certification it will be important to explore the role that members of the Bench might play in providing information on which a decision to certify could be based. In view of the fact this is a pilot project and thus alternatives ought to be tried the Committee thought it desirable to experiment with a different approach to measuring eligibility for certification in the criminal law area.

The procedures have also been designed to allow the certification committees a degree of flexibility; they may conduct oral hearings or designate the fulfillment of certain educational requirements, and it is envisaged that they will be able to mould the requirements of their specialty to suit the needs they see arising. Where written examinations are required the certification committees would be responsible for setting the examination or appointing an examiner. There is some cost in administering examinations and it may be necessary to offer the examination only once every few years or to

develop at an early stage a series of examinations from which one could be selected on a random basis to be administered individually to such applicant.

### *Part III — Recertification*

1. Every person certified as a specialist in an area of legal practice who wishes to renew his or her certification shall apply to the Certification Committee before the end of the fifth year since certification.
2. Each applicant for recertification shall show to the satisfaction of the Committee that he or she can still meet the requirement of substantial involvement for certification in that specialty area of legal practice. In the case of criminal law the individual shall have to comply with the provision for experience assessment.
3. Each applicant for recertification shall provide evidence that he or she has participated in those educational programmes designated by the appropriate Certification Committee as prerequisites for recertification in that specialty area of legal practice.
4. An applicant who is denied recertification shall be eligible to apply for certification to that specialty area of legal practice.

#### *Comment*

It is envisaged that once an individual has been certified as a specialist then the emphasis should shift from proving expertise to proving continuation of that specialization and participation in educational programmes. The programmes will have been specifically approved by the appropriate certification committee for those practising as specialists, and will be designed to update and keep the specialist in tune with recent developments. Hence, the requirements for recertification make no provision for a written examination but require a continued indication of substantial involvement and attendance at designated educational programmes, probably run through C.L.E.

The certification committee for each specialty area of legal practice should establish a requirement of participation in educational programmes through approving specific programmes, setting a requirement for the number of hours of programmes to be attended during the five year certification period, or perhaps designating specific programmes that must be attended by all specialists in order to renew their certification.

This part of the programme will involve some administrative tasks, such as keeping track of each specialist to ensure that the requisite number of educational hours are being complied with. It will also involve close collaboration with C.L.E. in order to ensure that adequate programming is available for each specialty area. Participation in educational programmes may involve mere attendance or it may involve being a leader or panelist at a C.L.E. programme, teaching in the tutorial programme, or teaching a course at a faculty of law.

### *Part IV — Procedures for Certification and Re-Certification*

#### *1. Application and Fee*

- (a) An applicant for certification or recertification as a specialist in an area of legal practice shall apply to the appropriate Certification Committee.
- (b) The application shall be in no particular form but shall set out the respects in which the applicant meets the requirements for certification or recertification as a specialist in that area of legal practice.
- (c) The application shall be accomplished by a fee of \_\_\_\_\_ dollars (\$) in the case of certification and \_\_\_\_\_ dollars (\$) in the case of recertification, or such other fee as may be from time to time designated by the Standing Committee on Specialization.

#### *2. Procedure Upon Receipt of Application*

- (a) On receipt of an application the Committee shall notify the applicant of the date and time at which the applicant may take any prescribed examinations.
- (b) The Committee may request from the applicant such additional information as it deems appropriate, or may request letters of reference from practising lawyers.
- (c) When the Committee is satisfied that the applicant has met the requirements for certification or recertification as a specialist in that area of legal practice it shall recommend to the Standing Committee on Specialization that the applicant be certified or recertified and shall so inform the applicant.
- (d) Where the Certification Committee considers that an applicant has failed to meet the requirements for certification or recertification as a specialist in that area of legal practice it shall so notify the applicant.
- (e) An applicant who has been notified that he or she has failed to meet the requirements for certification or recertification as a specialist may within 30 days of such notification appeal the decision of the Certification Committee to the Standing Committee on Specialization.

### 3. *Withdrawal of Applications*

- (a) An applicant may withdraw an application for certification or recertification at any time.
- (b) An applicant who withdraws an application shall be entitled to a refund of one half (½) of the application fee.

### *Part V — Consequences of Certification*

#### A. *Annual Fee*

Each certified specialist shall pay an annual specialist practising fee of \_\_\_\_\_ dollars (\$ \_\_\_\_\_).

#### B. *Rights of a Certified Specialist*

- 1. The rights of a certified specialist pertain to the individual so certified and do not extend to the law firm of which the individual is a member.
- 2. Any lawyer certified as a specialist in an area of legal practice shall be entitled to display or advertise that certification to the same extent that he or she is entitled to display or advertise the fact of being a lawyer.
- 3. Every certified specialist may practice in any field of law and shall not be restricted to the area of legal practice in which he or she has been certified as a specialist.

#### C. *Protection of Lawyers not Certified as Specialists*

##### 1. *Right of Practice*

Any lawyer may practise in any area of law whether or not he or she has obtained certification as a specialist in any particular area of legal practice. No lawyer shall be required to obtain certification as a specialist in order to practise in any area of law.

##### 2. *Protection on Referral*

A certified specialist shall not take advantage of his or her position to enlarge the scope of that representation. The lawyer certified as a specialist shall not represent a referred client in matters beyond those contained in the referral without first referring the client back to the lawyer who made the referral and so notifying that lawyer.

#### D. *Termination of Certification*

The certification of an individual as a specialist in an area of legal practice shall terminate:

- 1. if the programme for the certification of specialists is ended in accordance with the provisions below;
- 2. if the certification is not renewed by recertification in accordance with the above;
- 3. if the individual ceases to be a member of the Law Society of British Columbia;
- 4. if the Benchers consider in their discretion that the certification should be revoked.

### *Part VI — Transitional Provisions*

#### A. *Appointment of Certification Committees*

1. In the initial year of operation of the programme the members of the Certification Committees shall be appointed as follows:

- (a) the Standing Committee on Specialization shall appoint one member of each Certification Committee who in the view of the Standing Committee would meet the requirements for certification as a specialist in that area of legal practice;
- (b) the Standing Committee on Specialization shall appoint three members of each Certification Committee from a list of at least six (6) names provided by the sub-section of the B.C. Branch of the Canadian Bar Association concerned with that specialty area of legal practice. At least three of the names submitted shall be of individuals who, in the view of the sub-section, would meet the requirements for certification as a specialist in that area of legal practice. If no sub-section exists for a specialty area of legal practice the list of names shall be submitted by the Executive Committee of the B.C. Branch of the Canadian Bar Association.

2. The individuals appointed in accordance with this provision shall hold office for either two or three years as agreed between the appointing bodies.

#### B. *Automatic Certification of Appointees*

Individuals appointed under the above provision shall by virtue of their appointment be deemed certified as specialists in the area of legal practice with which their Certification Committee is concerned, unless in the view of the appointing body the individual appointed would not meet the requirements for certification as a specialist in that area of legal practice.

#### *Comment*

After considering various alternatives the Committee concluded that the only way to solve the problem of certifying the first specialists was simply to allow the appointing bodies to designate the

first specialists, who would then be responsible for administering the procedures for the certification of other specialists. This places a limit on the number to be certified by an open-ended "grandfather" provision and thus avoids some of the abuses referred to above.

However, if one of the sub-sections decides to propose someone who is not specializing in fact in that area of legal practice but is engaged in the general practice of law provision is made so that such an individual would not receive automatic certification.

*Part VII — Duration and Review of Programme*

A. *Duration*

1. The programme for the certification of specialists shall run for a period of five (5) years from the date of its inception.
2. The duration of the programme may be extended by the Benchers of the Law Society of British Columbia for any further period they deem appropriate.

B. *Review*

1. At the end of the fourth year of the programme the Standing Committee shall undertake a review of the programme.
2. This review shall be undertaken in consultation with the Certification Committees for each specialty area of legal practice.
3. The review shall involve an appropriate survey of the legal profession and of the general public.
4. Prior to the end of the fifty year of the programme the Standing Committee on Specialization shall recommend to the Benchers of the Law Society of British Columbia whether the programme should be extended, made permanent or terminated.
5. If the Benchers decide to terminate the programme then no further persons shall be admitted to any specialty area of legal practice, but those already certified shall retain their rights as a certified specialist for a further year.

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The Committee has concluded that the above represents a feasible pilot programme for the certification of specialists in the selected areas of legal practice that, if implemented, would enable a fair assessment of the viability of the certification of specialists in British Columbia. It therefore asks that its report be received.

Respectfully submitted,

Paul D. K. Fraser,  
Co-Chairman

H. Allan Hope,  
Co-Chairman

April 29th, 1977.

*Annex I*

*Substantial Involvement: Family Law*

Each applicant shall show to the satisfaction of the Certification Committee on Family Law that over the past three years he or she has represented a sufficient number of clients to gain a thorough knowledge of the law and practice, as it applies to family law, resulting from the following:

B.C. Supreme Court Rules  
Children of Unmarried Parents Act  
Criminal Code  
Divorce Act  
Divorce and Matrimonial Causes Act  
Equal Guardianship of Infants Act  
Evidence Act  
Family Relations Act  
Infants Act  
Juvenile Delinquents Act  
Legitimacy Act  
Marriage Act  
Married Women's Property Act  
Partition Act  
Protection of Children Act  
Unified Family Court Act  
Wife's Protection Act

*Areas for Written Examination: Family Law*

The written examination may deal with the provisions of any of the following, in so far as they relate to the area of family law:

- Administration Act
- Age of Majority Act
- Change of Name Act
- Community Care Facilities Licensing Act
- Divorce Rules Federal Court Act
- Families Compensation Act
- Homestead Act
- Income Tax Act
- Marriage Act (Can.)
- Municipal Act
- Official Guardian Act
- Provincial Court Act
- Public Schools Act
- Testator's Family Maintenance Act
- Trustee Act
- Variation of Trusts Act
- Veterans Land Act
- Vital Statistics Act

*Annex II**Substantial Involvement: Wills and Trusts*

Each applicant shall show to the satisfaction of the Certification Committee on Wills and Trusts that over the past three years he or she has represented a sufficient number of clients to gain a thorough knowledge of:

- (a) probate actions;
- (b) general insurance law;
- (c) the common law rules relating to situs;
- (d) valuation of assets;
- (e) ownership of assets;
- (f) drafting wills and trusts;
- (g) estate administration;
- (h) the law relating to buy-sell agreements;
- (i) estate planning.

*Areas for Written Examination — Wills and Trusts*

The written examination may deal with the provisions of any of the following, in so far as they relate to the area of Wills and Trusts.

- Administration Act
- Adoption Act
- Companies Act
- Equal Guardianship of Infants Act
- Evidence Act
- Infants Act
- Insurance Act
- Land Registry Act
- Laws Declaratory Act
- Official Guardian Act
- Partnership Act
- Patients' Estates Act
- Probate Fees Act
- Probates Recognition Act
- Survivorship and Presumption of Death Act
- Testator's Family Maintenance Act
- Trust Companies Act
- Trustee Act
- Variation of Trusts Act
- Wife's Protection Act
- Wills Act
- Income Tax Act
- Canada Pension Plan Act
- Probate Rules

*Annex III**Substantial Involvement: Immigration Law*

Each applicant shall show to the satisfaction of the Certification Committee on Immigration Law that over the past three years he or she has represented a sufficient number of clients to gain a thorough knowledge of:

- (a) the practice and procedure of a Special Inquiry;
- (b) the practice and procedure before the Immigration Appeal Board;
- (c) the practice and procedure of the Federal Court (Trial Division) on motions for a prerogative writ;
- (d) the practice and procedure on motions pursuant to section 28 of the Federal Court Act in the Appeal Division;
- (e) the practice and procedure relating to claims to refugee status under the United Nations Convention;
- (f) the admission requirements for entry into Canada as a landed immigrant;
- (g) the practice and procedure relating to charges under the Immigration Act for which imprisonment or a fine may be imposed.