

Session 1

Materials for

**Specialization 101 –  
“New Administration”**

Standing Committee on Specialization  
*Annual Roundtable*

San Francisco, CA

March 31-April 2, 2011

**Speaker: Mike Ferguson, Ferguson & Berland, PC**

**2011 ABA SPECIALIZATION ROUNDTABLE**  
**CREATING A SPECIALTY CERTIFICATION PROGRAM**

**I. BRIEF HISTORY OF SPECIALTY CERTIFICATION (California Perspective)**

***A. The 1970's***

1. In the early 1970's California became the first state to establish a system for certifying legal specialists--designed to identify lawyers having a "demonstrated level of *proficiency*" in certain defined areas of practice for:
  - a. The **general public** (in an effort to enhance consumer confidence) and
  - b. Other **members of the Bar**
2. In 1972, the Cal. Sup. Ct. adopted a Pilot Program to certify specialists in the fields of
  - a. *Criminal Law*
  - b. *Taxation Law*
  - c. *Worker's Comp. Law*
3. *Family Law* was added as a recognized specialty under the Pilot Program in 1979

***B. The 1980's***

1. Despite some concerted opposition (generally from young lawyers who didn't think *they* would qualify; older attorneys who didn't want to take another test; and other attorneys who variously objected that the program was "elitist" and/or unnecessary), the California program prospered and became economically self-sufficient

2. Effective May 20, 1985, the Calif. Sup. Ct. made the Pilot Program permanent and directed that the program be administered by the Bar's Board of Legal Specialization ("BLS")

--Thus slightly more than ten years after the program began as an experiment in specialty certification, it proved sufficiently successful to become a permanent fixture of the Bar

3. *Immigration Law* was added as a specialty in 1986
4. *Probate Estate Planning and Trust Law* was added as a specialty in 1988
5. By the end of the 1980's the BLS had certified something in excess of 2000 lawyers as specialists

### C. *The 1990's*

1. *Small Business and Personal Bankruptcy Law* was added as a specialty in 1992--bringing to seven the number of specialties formally recognized by the State Bar
2. In 1995 *Appellate Law* (offering certification for both criminal and civil appellate specialists) was added as the 8th area of practice with a recognized specialization program--and has thrived ever since.
3. California now has advisory groups developing standards for the addition of specialty certification programs in the areas of: (i) *Real Estate Law*; (ii) *Labor Law*, and hopes to appoint an advisory group to develop certification for specialists in *Personal Injury Law* in the near future. Certification should be offered in some (and with any luck, all) of these areas within the next couple of years
4. The specialization movement received a tremendous boost in February, 1993, at the Spring Meeting of the *ABA*, when the Association's

## House of Delegates approved Standards for ABA Accreditation of Legal Specialty Certification Programs

- a. This means that the ABA has put its considerable weight behind the drive toward the specialty certification of lawyers
- b. Since adoption of the ABA Program, several organizations have been granted accreditation for Programs to certify lawyers in a number of areas, including:
  - i. Civil Trial Law
  - ii. Criminal Trial Law
  - iii. Business Bankruptcy Law--with a debtor orientation
  - iv. Personal Bankruptcy Law--with a creditor orientation;
  - v. Estate Planning and Administration;
  - vi. Elder Law;
  - vii. Medical Malpractice;
  - viii. Legal Malpractice; and
  - ix. Accounting Malpractice
  - x. DUI Law;
  - xi. Juvenile Law; and soon
  - xii. Social Security Law
- d. The ABA may receive applications to accredit certifiers in the fields of:
  - i. Franchise Law;
  - ii. Governmental Law; and (perhaps)
  - iii. Gambling Law
- e. It's possible that several of the ABA's practice sections will seek accreditation for specialty certifications in their areas of practice--especially the Litigation; Health Law; Family Law; and Real Property & Estate Planning Sections

- f. At least twelve States (Alabama; Ca; Del; Fl; Id; Me; N.J.; N.C.; S.C.; S.D.; Tenn.; and Wisc.) recognize specialists certified by ABA accredited organizations--and several more are likely to do so shortly
- g. It's interesting to note that the ABA Standing Committee on Specialization has defined 24 different practice areas that it thinks may be appropriate areas for specialty certification

#### **D. *The 2000's***

1. ***Franchise and Distribution Law*** was added as a specialty in 2008--bringing to nine the number of specialties formally recognized by the State Bar--and adding a specialty certification that is unique to California
2. ***Maritime and Admiralty Law*** and ***Legal Malpractice*** were added as Specialty Areas in November of 2008 and expect to give their first exams in August of this year. These two specialty areas bring to 11 the total number of specialties recognized in California.
3. It thus appears that legal specialization, after 30 years of quiet experimentation, has finally reached critical mass and will become both increasingly popular and important in the 21<sup>st</sup> Century
4. At least Twenty-three States have adopted formal certification programs of various kinds and several more states have Committees formally studying such programs
5. The California, Florida and Texas plans are generally considered the most advanced. Between them, these States certify more than 16,000 specialists
6. In addition to sponsoring its own certification programs (administered by the BLS), California, New Jersey and Texas have all followed the

ABA lead and adopted programs to Accredited Organizations to certify specialists within their respective states. Thus the number and variety of accredited certification programs in these three will likely grow rapidly over the next several years

7. As of 3/1/09 there were more than **4,235** BLS certified specialists practicing in California [Per the Board's 23<sup>rd</sup> Annual Report]

**--Although less than 3% of all active Calif. Lawyers are certified, a 1991 survey of California lawyers indicated that from 15% to 20% of lawyers who devote more than half of their practice to one of the seven specialties *then* recognized had obtained certification as specialists in their chosen fields of practice**

## **II. ADVANTAGES OF SPECIALIZATION**

A. The stated objective of the certification program is the identification of "*proficient practitioners*" for the general public

1. The term "*proficient practitioners*" is used advisedly. In designing the California program the Board of Governors was responsive to concerns about establishing an "elitist" program for "superspecialists" only and wished to make sure that the certification program was broad enough to include all lawyers who practice regularly and "competently" in a given area of the law. Thus the standards for certification are intended to encourage as broad a participation as possible.
2. Thus one of the primary, albeit *altruistic*, benefits of the specialization program is identification of "proficient" practitioners for the general public

B. Benefits to Specialists

1. Listing in the *BLS Annual Directory of Certified Specialists* (circulated to all Specialists and most libraries--and now on the Internet as part of the California State Bar's entry onto the World Wide Web)

2. Discounts on malpractice insurance rates
  - a. The Florida BLS has negotiated a 10% **discount** on insurance rates for its certified specialists
  - b. The California BLS recently negotiated a 10% **credit** with the State Bar's approved malpractice carrier on insurance rates for its certified specialists
  - c. It has been observed (by Ron Mallen) that certified specialists are sued less often for malpractice (because they tend to make fewer "bonehead errors"--such as missing deadlines), **but** malpractice suits when brought tend to be much more complex and for larger amounts (because they usually involve alleged "errors in judgment," which are much harder to litigate and tend to involve more significant financial consequences)
3. Certification has become a good source of referrals--both from other lawyers (who report feeling greater confidence in making referrals to certified specialists) and the general public (which seems to be using certification as a primary test in selecting attorneys)
4. Courts are increasingly recognizing the merits of certified specialists by both: awarding fees more easily to such specialists and awarding higher fees to such specialists
5. Public agencies (such as Public Defender Offices in drawing up their "conflicts lists") and law firms are beginning to make certification a criterion for advancement
6. Young lawyers are seeking certification as a means of expediting their professional advancement
7. Large firm lawyers have found it helpful to become certified as a means

of differentiating themselves from CPA as the latter have started making incursions into fields that have traditionally been dominated by lawyers.

8. Martindale-Hubbel has reportedly decided to add a Listing of “Certified Specialist” to its annual directory explanations of the significance of certification
9. The ability to advertise yourself as a “certified specialist” in your chosen area of practice--a distinction that becomes ever more important as the number of certified specialists increases and the public becomes more aware of the significance of certification

--According to the 1991 Calif. State Bar Survey, Certified Specialists tend to make more money than non-certified lawyers (but this could be misleading, because Certified Specialists also tend to be older and have more experience than non-certified lawyers)

9. Last, but by no means least, it makes practitioners *feel good* to know that they have qualified as a “certified specialist”

--Anecdotal experience indicates that this is one of the primary reasons practitioners obtain (and maintain) certification

### **III. GENERAL REQUIREMENTS FOR CERTIFICATION**

- A. If you wish to get on the specialty bandwagon at the beginning of what looks likely to be its 21<sup>st</sup> Century roll, you should act now.
- B. The BLS more or less continuously revises its rules (and standards for certification) to streamline and unify the program.
- C. It's *easy* to *start* the certification process
  1. One can enroll for the certification exam by filling out a *very short* one

page) Registration form.

--You need not fill out the “long form” certification application until *after* you *pass* the exam. After you pass the exam, you will need to submit the actual certification application. You will have 18 months after the date of the examination to submit the “long form” application and to satisfy the task and experience and special education requirements. The “long form” application is much easier to complete, and more user friendly, than you would expect.

#### ***D. Requirements for Certification***

1. You must meet the ***Task and Experience*** requirements set forth in the Standards for Certification within the Specialty of your choice. These requirements vary from specialty to specialty and are unique to each specialty field. The specific requirements for each of the areas in which certification is presently offered can be found in the Standards for each such area attached to the new BLS rules handed out at this meeting.
  - a. In most fields, you need not detail the qualifying tasks on your application for certification. A simple confirmation that the requisite tasks have been performed is, in most cases, sufficient. The various specialty Commissions are inclined to believe the applicants--although the Commissions can (and occasionally do) ask for details if it has questions about an Application.
2. You must pass a ***Written Exam***
  - a. This requirement, more than any other, probably discourages people from seeking certification
    - i. Few want to go through the ordeal of “another” Bar Exam type exam
    - ii. Many fear the embarrassment of failing

- b. 'Tho there are no guarantees, it's really not so bad
  - i. Exam applications and results are confidential. No one has to know if you take (and fail) the test!
  - ii. The pass rate of the specialization exams has generally been high
  - iii. The exams are written so that anyone who regularly practices in the area should be able to pass the exam without having to do any significant and/or special studying
  
- c. Demystifying the Exam process
  - i. Exam formats vary
  - ii. All exams are six hours
  - iii. Most typically, the exams are bar exam style essay exams, divided into two, three-hour sessions, although some specialties use multiple choice questions for a portion of their exams.
  - iv. In most cases, the exams are written and graded by current and former Commission members--so you can be assured that the person who grades your exam will be a competent, experienced practitioner familiar with not only the issues in the exam, but the standard of practice in the field of specialization. In some instances, exam preparation and grading are contracted out--but when that is done, the Commission involved carefully supervises preparation and grading of the exam.
  - v. Exams are graded like the Bar Exam, on a scale of 0 to 100--with an average of 70 req'd to pass
    - (aa) Each grader will initially grade only one question--so that on the first evaluation of the exams, each applicant's answers will be read by several different readers.

- (bb) If you average 70 or more on all questions, you pass without more.
- (cc) If you average between 65 and 70 on the questions answered, all of your answers will be “reread” as a group by up to three Commission members, the concurrence of any two of whom will be sufficient to pass or fail the applicant.
- (dd) An average below 65 on the questions answered will result in a failure on the exam

- vi. ***Issue spotting is generally more important than answering “correctly”*** It is acceptable to identify an issue and acknowledge that you don’t know the answer, but can look it up! If you are right about the issue, you’ll get credit for it. Of course, if you’re wrong . . .
- vii. The variety of “correct” responses to the exam questions is impressive, and in some instances amazingly creative
- viii. Complete copies of the essay questions (but not the multiple choice questions--which are reused) on past California specialization exams ***as given*** may be obtained from the Office of Certification (Phone: [415] 538-2120)

d. In sum, the Exam isn’t so bad. It won’t hurt you, and it might even be fun!!!

- 3. You must pass through an ***Independent Inquiry and Review*** process--with favorable written evaluations from not less than five persons required before an applicant can be approved. The process begins with the Applicant’s nomination of at least three references. Each such reference will be asked to submit two additional references.
  - a. In ***Court based*** specialties the Standards for individual specialties tend to require references from persons familiar with the appli-

cants work product--including combinations of judges, opponents and others who have seen the applicant in practice

- b. Because the references are generally self-selecting, and because in the *office based* counseling specialties (where other attorneys rarely get to look closely at your work), I. I. & R. seems so far to have gone relatively unchallenged
4. You must satisfy the *Special Education* requirements set forth in the Standards of your chosen specialty--which means that within the three years prior to application, you must have completed a total of not less than 45 hours of education endeavors, at least some of which must focus on specific subjects. The Education requirement is often not much more stringent than existing MCLE requirements