

A Concise Guide to Lawyer Specialty Certification

Presented By:
The ABA Standing Committee on Specialization

The views expressed in this guide are those of the authors and do not necessarily represent the policies of the American Bar Association. The contents of this publication have not been approved by the ABA House of Delegates and do not constitute ABA policy.

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Concise Guide to Lawyer Specialty Certification
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The Concise Guide to Lawyer Specialty Certification

Chapter I – Introduction

The ABA Standing Committee on Specialization has compiled this guide primarily to help legal specialty groups explore the development of lawyer specialist certification programs. However, we hope it will also be useful to bar groups, the courts, individual lawyers and consumers in understanding the role of board certification in enhancing the professional credentials of lawyers and making available to the public information on the sources of specialized legal services.

The Guide will provide you with some background material on why certification has become important in the legal profession, what the benefits and limitations are, what the experience has been over the last decade and what you need to know to get up and running if you choose to go ahead.

Most of the material in the Guide is based on the Standing Committee's experience in dealing with the accreditation of certification programs under the ABA Standards for such programs. As such, the features and requirements we describe assume a program will be designed to substantially meet the Standards, whether ABA Accreditation is eventually sought or not.

Many state jurisdictions that approve or accredit programs either accept the ABA Standards or use their own standards that contain similar requirements. Note, however, that lawyers who become certified by a program may not be able to advertise or otherwise publicly disclose that fact unless state standards and disclaimer requirements are met.

A. Background

Formal board certification of lawyers as specialists is a fairly recent phenomenon. Its genesis was a perceived need for the regulation of public claims of special competence and for assurance that, in the wake of liberalized advertising rules, such claims are not made in a manner that misleads the public.

There has long been widespread de facto specialization in the legal profession; still, most state disciplinary rules have for the past several decades prohibited lawyers from holding themselves out as specialists. The ABA Model Code of Professional Responsibility and, until August 1992, the Model Rules of Professional Conduct also recommended this approach.

1. Legal Basis

The first United States Supreme Court decision to unsettle this regulatory environment was *Bates and O'Steen v. State Bar of Arizona*, 433 U.S. 350 (1977). In *Bates*, the court ruled states may regulate advertising by lawyers only to the extent necessary to prevent "false, deceptive or misleading" communication. One result was the sharp increase in lawyer advertising we see today, including claims of experience in particular fields of law.

The proliferation of lawyer specialty advertising led twelve states to adopt state-sponsored certification plans in the late 1970s and the early 1980s. They are Arkansas, Arizona, California, Connecticut, Florida, Louisiana, New Jersey, New Mexico, North Carolina, South Carolina, Texas and Utah. Although adopted in 1983, the Utah plan was never implemented and exists in name only.

A second major factor in the growth of board specialist certification programs for lawyers was the *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990). In *Peel*, the Court ruled states may not constitutionally impose a blanket prohibition on a truthful communication by a lawyer that he or she is certified by a bona fide organization as a specialist.

The *Peel* decision disallowing a ban on communications of lawyer certification forced states to reevaluate their positions on the issue. Most states had disciplinary rules that were invalidated by the decision, and the ABA amended its Model Rules of Professional Conduct to allow disclosure of certification by lawyers who were so designated through programs that met certain criteria.

2. Certification Sources

Lawyer specialist certification programs have flourished in this new regulatory environment. They certify those lawyers who are found to possess a certain level of skill and expertise in a specialty, as evidenced by results on special examinations, peer references, experience and continuing legal education requirements. The certification programs are voluntary. No lawyer is prohibited from practicing in a specialty field, and certified lawyers can practice outside their field of certification.

The majority of lawyers who have been certified have been granted their credentials by traditional state-sponsored programs administered by state supreme courts and state bar associations on the court's behalf. As of this writing, state-sponsored board certification is available to lawyers in Arizona, California, Connecticut, Florida, Idaho, Indiana, Louisiana, Minnesota, New Jersey, New Mexico, North Carolina, Ohio, South Carolina, Tennessee, and Texas.

The *Peel* decision also gave impetus to the development of national programs sponsored by private legal speciality groups. In 1993 the ABA adopted "Standards for Accreditation of Specialty Certification Programs for Lawyers" and delegated to the Standing Committee on Specialization the task of developing and conducting a process to accredit programs sponsored by private national legal organizations. In most states these private programs must be accredited by the ABA, approved by state regulatory authorities, or both before lawyers may publicize their certification.

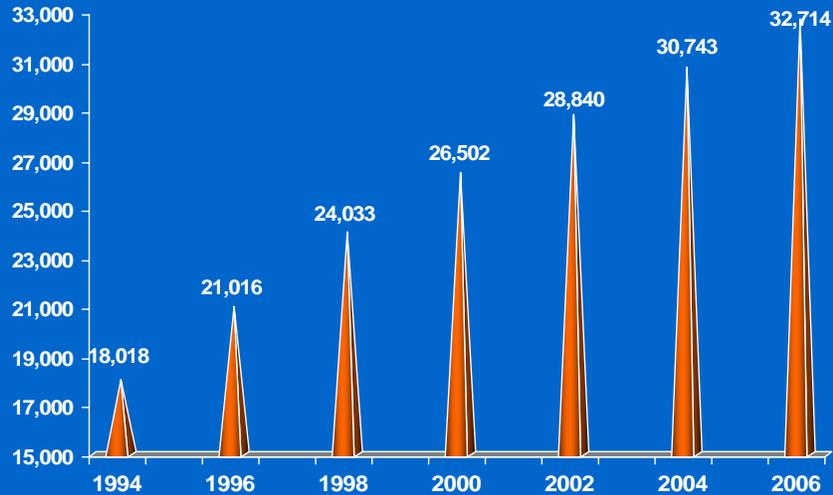
Since 1993, the ABA has accredited 14 certification programs conducted by seven different private organizations. A current list of state and private certification programs can be found at www.LegalSpecialists.org.

3. Statistics

The 2006 data reveals that the number of lawyers to whom specialty certificates have been issued continues to grow steadily. There are now 32,714 holders of specialty certificates in the legal profession, which represents a 6% increase over 2004. The number of certified specialists has increased by 81% since the Standing Committee began keeping statistics in 1994.

National Totals

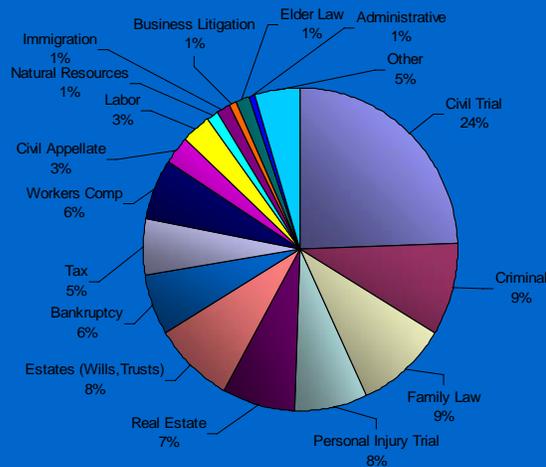
Cumulative Growth in Certified Specialists



The mix of specialties in which certification is available has changed little over last year. Civil trial advocacy continues to be the largest area in which specialty certification is sought, accounting for 24% of the total number of certificates that have been issued to date. The combined category of criminal law and criminal trial advocacy is tied for second most common area, with family law each having 9%, and will, trusts and estates and personal injury trial practice with 8%.

National Totals

Certified Specialists by Practice Area – 2006



Growth rates for different specialties vary widely, but for 2006, the rates mirror the patterns reported over the past five years. Areas growing faster than average include workers' compensation, elder law, labor law and health law. Balancing these high growth areas are more "traditional" practice areas in which certification is available. Programs in these areas, including criminal practice, family law, real estate and tax law, are older and more established.

B. Basic Requirements

In general, a certified specialist is a lawyer who devotes a substantial portion of her practice to a specialty and has been recognized by a certifying organization as having an enhanced level of experience, skill and expertise in that specialty. Certification programs require a lawyer to demonstrate special training, experience and knowledge to insure the lawyer's recognition as a certified specialist is meaningful and reliable.

Under a typical certification program, a lawyer must

- Be admitted to practice and be in good standing in one or more jurisdictions;
- Provide evidence of substantial involvement in the specialty area, usually measured by time in practice, the percentage of the practice devoted to the specialty (usually at least 25%), and demonstrated participation in certain activities;
- Obtain favorable peer references from lawyers and judges in the jurisdiction;
- Pass a written examination in the substantive and procedural law and ethics in the specialty area; and
- Demonstrate he or she has completed a minimum amount of continuing legal education in the specialty area in the period preceding the lawyer's application for certification.

In order to maintain the certification credential, most programs require re-certification every three to five years, with the certification subject to revocation if the lawyer fails to continue to meet the program requirements or is sanctioned by a disciplinary authority.

C. Why Board Certification

The initial efforts to develop legal specialist certification programs reflected a process for complying with ethical rules relating to lawyer advertising. But as more experience with these programs has been gained and as more certified specialists have become involved in bar and law firm leadership positions, board certification is becoming an accepted measure of professionalism and commitment to specialty practice. There is ample evidence demonstrating that certification of specialists can have a beneficial impact on practicing lawyers, clients and the legal profession.

1. Improving Competence

A fundamental goal of all professions is to improve competence of practitioners and quality of service. Many qualities are necessary to be a competent professional, and many of these qualities cannot be quantified or measured. Accordingly, board certification is not considered a warranty of competency.

However, certification has been shown to facilitate the fulfillment of this goal in other professions by recognizing professional achievement, and board certification is now common in almost all professions and many businesses. There is ample evidence from other professions,

and from surveys of consumers regarding lawyers, demonstrating certification of specialists can have a beneficial impact on practicing lawyers, clients and the legal profession.

Certification provides an incentive for the improvement of the skills and knowledge of lawyers, in turn leading to improving the quality of legal services. To meet the rigorous standards set by certifying organizations, a lawyer must achieve an enhanced level of experience and knowledge in the specialty field. Recertification requirements include substantial involvement and continuing education, thus providing further incentive for lawyers to maintain their enhanced level of competence in the specialty.

2. Identifying Specialists

Professional ethics codes generally restrict the kind of information lawyers may make available to the public about their specialty practice. While large business and other institutions may rely on major law firms with established reputations in specialty areas to do their work, there is increasing demand by the general public for information that can help prospective clients find a “good” lawyer who is qualified to handle specific matters. According to a study by the ABA Section of Litigation, consumers find legal services among the most difficult services to buy. The prospect of doing so is rife with uncertainty and potential risk. When hiring a lawyer, consumers feel uncertain about how to tell a good lawyer from a bad one.

While advertising may be somewhat useful in assisting consumers in finding a lawyer, it can also lead to misunderstanding and confusion about the lawyer’s skill and expertise. The proliferation of lawyer advertising has created an even greater need to objectively identify those with the requisite degree of skill.

A certification credential addresses a genuine public need for better information on the qualifications and capabilities of lawyers. Survey results indicate consumers find information about a lawyer’s specialty expertise useful. Indeed, the American public is so accustomed to certification of specialists, particularly professional specialists, that some people now believe any lawyer who has a specialty practice is board certified.

This phenomenon was demonstrated by a 1995 study conducted by the University of Tennessee. Sixty-one percent of the respondents said they would be more likely to use a certified lawyer, and the majority of those using lawyers (52%) assumed the lawyer was certified in the area of law involved.

In issuing the order that approved Florida’s certification program, the state’s supreme court declared to “firmly believe that the Florida Bar and this court must responsibly move forward to assist the public in determining those individuals who are qualified specialists and not leave that role to the telephone directory editors, voluntary professional groups, or to entrepreneurs with high sounding specialty certificates and advertising techniques.”

3. Professional Development

Certification provides a framework for professional development in legal specialties and offers lawyers incentive to improve their skills and knowledge. Certification by an independent, recognized authority conveys real meaning to prospective clients, professional peers, and institutions regarding the professional capabilities of legal specialists. Continuing legal education and training is encouraged and rewarded with formal recognition, and it is better focused.

4. Referral Source

A somewhat overlooked but important benefit of certification is to provide lawyers with a credible way to make their expertise known to other lawyers. According to state certification plan administrators, directories of certified specialists are widely used by lawyers who need to refer a specialized matter to competent counsel. This is especially true where the referring lawyer is not familiar with the local bar.

5. Benefits to Sponsors

Direct involvement in the design and sponsorship of certification programs can enhance the value of the sponsoring group to its members and other constituents. Participation in the development and sponsorship of a program is a challenge and reward for the members of those entities, who include many of the most experienced and knowledgeable practitioners in their fields of law.

For those legal groups with a strong continuing legal education program, certification can become an integral part of the structure of CLE programming; the incentive to obtain and maintain specialty certification can become a feature of CLE program selection and content.

Chapter II - Certification Program Components in Brief

A. Definition of the Specialty

The essence of “specialization” is the concentration of a lawyer’s practice within one, or at most a few, fields of law. Self-selection or de facto specialization has been around as long as the telephone directory.

When an organization representing lawyers in a given specialty wishes to set up a specialty certification program, it must first articulate a precise definition of the specialty so it may develop the requirements for certification. The Standing Committee has found through the process of administering the accreditation program that when certifying organizations have a well-defined specialty, the rest of the requirements build on that definition.

A proposed specialty definition must be meaningful. The specialty can be a broad category, such as Real Estate; one more narrowly focused, such as Residential Real Estate; it may be one even more sharply defined, such as Condominium Law. If an area of practice is so broad that a consumer will have trouble searching for someone with relevant expertise among all those certified in the area, then one of the purposes of certification is thwarted.

For an organization beginning the ABA Accreditation process, the Governing Rules require that the definition of the specialty be approved by the Committee before a formal application for accreditation may be filed. Under the ABA Standards the area must be one in which significant numbers of lawyers regularly practice, the definition must be understandable to potential users of such legal services, and the specialty must be defined in terms that will not lead to confusion with other specialty areas.

To demonstrate a significant number of lawyers regularly practice in the area, it is useful to refer to surveys conducted by bar associations or other organizations of lawyers and to the number of lawyers listed under the specialty in legal directories such as Martindale-Hubbell.

B. The Sponsoring Organization **1. Organization and Governance**

The sponsoring organization might be the state supreme court, a state-supported entity ultimately reporting to the state supreme court, a bar association entity or a private certifying organization. If the practice area is national in scope, such as immigration, tax, or bankruptcy, a national specialty bar association may wish to establish its own certification program, it might sponsor the certification program, or it might approach an existing private certifying organization to administer a specialty certification program.

For a group starting out in a state, one source of sponsorship support is the state bar association’s section in an area of specialization. State bar sections in Minnesota, Ohio and Indiana sponsor specialty certification programs in their states. The sections are then accredited by a supreme court commission to certify lawyers as specialists. For states where the supreme court is the approving entity, there must be an organization of some sort to administer the program; again, a bar association section or local specialty bar would be a logical choice. In Idaho, for example, the trial practice specialty certification is administered by the Idaho Trial Lawyers Association.

The sponsoring organization will need to establish a governing board or committee which, along with subsidiary committees, can provide independent decision-making in such important aspects of the specialty certification program as standards, all phases of the written examination from development of the questions through grading and appeals, rules and procedures and administration of all appeals.

The certification board or committee should include lawyers who are themselves certified in the specialty area or who would qualify as certified specialists if a certification program already existed. The ABA standards require this, as do those of the National Commission for Certifying Agencies (NOCA) and nearly every state accrediting agency. The members of the application committee must understand the tasks required in the specialty area; the most effective way to assure that understanding is for the committee to be comprised of “specialists.”

The certification board or committee need not be separately incorporated, as long as it has independent authority over all activities of the certification program and that, in the case of a multi-disciplinary specialty such as tax or estate planning, its purview is restricted to certifying lawyers.

2. Administration

A new certifying organization will need staff, contractors, and consultants to administer the program, support board and committee functions, and assure implementation of the policies and procedures set up by the Certification Boards. The organization will need staff for financial management, marketing, and communications, applicant processing, exam administration and customer service. It may require consultants to develop examinations, install and support computer applications, and perform legal and accounting functions.

To ensure that the certification program will have value to lawyers who must comply with state regulation of certification disclosure, the organization should consider applying for accreditation with the states requiring same and the ABA.

3. Financial Plan

The sponsoring organization must have the financial resources to support effective and thorough certification and recertification activities. The ABA requires three years of audited financial reports from organizations currently operating, or three years of projected financial reports from organizations with new certification programs. Accrediting entities at the state level have similar requirements.

The financial plan should cover the costs of staff, accreditation, development and administration of the examinations, and a computer-based applicant processing system. The organization will need to plan for fixed expenses, such as personnel, exam maintenance, phone, computers, forms, postage, supplies, Certification Board support, sales and marketing expenses, and general and administrative expenses.

There will need to be a revenue projection as well. Plan on high initial demand, lawyers like to be “first on the block” to be certified by the program. The organization can expect revenue from application fees, examination fees, and certificate fees. In future years, additional revenue comes from examination fees, annual fees, as well as certification and recertification fees.

C. Certification Requirements or “Standards”

The key to program accreditation, whether by the ABA or a state entity, is the degree to which the program requirements and the certification rules conform to the accreditation standards. Model standards for twenty-four areas of law are available from the Standing Committee. Forty-seven specialties have been defined by state or national programs, and they have standards in print.

1. Experience and Involvement

The experience and involvement standard is one of the cornerstones of lawyer specialty certification. How long must a lawyer practice? How long must he or she practice in the specialty field? At what tasks must he or she be proficient to demonstrate he or she is a specialist, and how many experiences with each task show proficiency in the specialty? These questions will spark debate regardless of what standards the certification program settles on. The answers can come from a survey of lawyers in the specialty area, a job analysis or an examination of the requirements of similar programs in other states.

The ABA and the state accrediting entities all require at least 3 years of practice before an attorney may apply for certification. This gives the practitioner time to accomplish all the tasks required by the standard that the organization has set for the specialty area.

Defining the tasks that demonstrate proficiency in a given area can be tricky; sometimes they are a moving target. Take, for example, the trial experience requirement in litigation specialties. When the earliest programs began in the mid 1970's, lawyers could expect to get to court and try cases. It is becoming more difficult to get a case to verdict. Some programs are exploring whether other skills should replace some of the trial requirements.

The experience and involvement requirements should reflect true specialization in a field. Consider doing a job analysis to provide quantifiable evidence of what specialists really do, and what an applicant for certification ought to be doing. The job analysis will then serve as the basis for developing the most appropriate type of examination (e.g., multiple-choice, essay, oral exam, practical exam). A more detailed explanation of what a job analysis entails is offered in Chapter 3.

2. Peer References

Peer references come from lawyers and judges who have expertise in the specialty area and are familiar with the applicant's work as a lawyer. When drafting this requirement, eliminate from consideration any peer references from persons related to or practicing with the applicant. Think about the number of references to ask for, as well as the source. The requirement should address whether the certifying program may collect references other than those offered by the applicant.

The standard should set out the content of the reference forms. The forms should inquire into the referring lawyer's area of practice and his or her familiarity with the specialty area and the applicant. The referring lawyer should note his or her length of practice and how long he or she has known the applicant. Finally, the form should inquire about the applicant's qualifications in various aspects of the practice and, if pertinent, the applicant's dealings with judges and opposing counsel.

The forms should be sent by the certifying program, not by the applicant, and returned directly to the certifying program. The policies should address what happens if not all of the references are returned. In addition, written policies should set out the confidentiality of the references and guidelines on positive, negative and neutral references.

3. Examination

Most, if not all, accrediting entities require that applicants pass a written examination for specialty certification. To be accredited by the ABA, a certifying organization must administer a written examination of suitable length and complexity to evaluate the applicant's knowledge of the substantive and procedural law in the specialty area. The exam must also test professional responsibility and ethics as related to the specialty area.

The job analysis should lay out the skill and knowledge sets that need to be tested. To some extent the nature of the specialty practice will dictate the appropriate type of exam, be it essay, multiple choice or a practical skills demonstration. Consider tapping current experts in the field to serve as the drafting committee for the first examination. Another option is to work with a professional test development firm to create, administer, update and grade the exam for the program.

Policies and procedures will need to be established to ensure reliability and validity of each form of the examination. Reliability refers to the consistency of test results, and whether the results can be replicated. Validity is the extent to which the subject matter addressed by the examination reflects the knowledge and skills an experienced practitioner in the specialty area needs. The exam must be reviewed periodically to insure it remains relevant and accounts for changing laws. The program must establish and follow appropriate measures to protect the security of all exams.

4. Continuing Education

The program will need a standard concerning continuing legal education. The ABA requires a minimum of 36 hours of CLE in the specialty area over the three years preceding the application for certification, regardless of whether the lawyer practices in a state where CLE is mandatory.

The organization should consider including alternatives to attending CLE courses. Possibilities include teaching courses in the specialty area, writing and publishing books or articles concerning the specialty area, or pursuing an advanced course of study, such as an LL.M at an accredited law school. To ensure the quality of the programs, the organization may want to have guidelines for approval of CLE programs and reporting of CLE requirements.

5. Disciplinary Record Review

The program will need a standard to ensure it certifies only lawyers licensed to practice law and in good standing in one or more states or territories of the United States or the District of Columbia. The application form should require the lawyer to list all current admissions to the bar, along with registration numbers. Other requirements should include permission to review disciplinary records and annual reports from the certified lawyers verifying they remain in good standing and disclosing any informal or formal disciplinary actions or malpractice claims.

D. Appeal Process

The program must also maintain and publish a policy providing an impartial appeal procedure. Any applicant must be able to challenge the decision of the persons who review and pass upon applications for certification. The policy must allow the applicant to present his or her case to an impartial decision-maker in the event he or she is found ineligible or denied certification.

The impartial decision-makers may include persons associated with the certifying program, but may not consist of the same committee that denied the certification. Some programs use ad hoc appeals committees consisting of committee members who were not involved with the initial application.

E. Rules, Procedures and Fees

These standards will be the “black letter law” of the program. Underlying these standards are rules and procedures to explain and provide examples for each standard and to provide a framework for the certification process. The rules will need to be published, fair, and applied consistently. The fees will also need to be published. They should enable the program to be self-sufficient within 3-5 years, but must not be so high that no lawyers are willing to pay that amount for a specialty certification.

F. Recertification Process

Certification is not a life appointment. If a program is to remain accredited by the ABA, it must be reaccredited every 5 years. So too, must the certified lawyers be recertified periodically. For most programs, the interval is 5 years. Under ABA standards, a lawyer’s specialty certification may not be granted for longer than 5 years. The recertification should measure continued competence. The requirements should be at least as stringent as those for initial certification in the areas of substantial involvement, peer review, educational experience and good standing. There is no need for another written examination, but a lawyer who was granted certification before a written examination was required, must pass a written examination for recertification. The recertification process must also have an appeals procedure.

Finally, each program must have a procedure for revocation of certification, including a requirement that a certified lawyer report his or her disbarment or suspension from the practice of law in any jurisdiction.

Chapter III A Few Elements in More Detail

A. Defining the Specialty

Properly defining a specialty is important not just to the specializing lawyer, but also to the public. When prospective clients have adequate information about what a specialty is, they can more efficiently obtain the representation they require.

The specialty area should not be too broadly or narrowly defined. For example, a tax law specialty may be acceptable, but tax litigation might not; such litigation would likely be practiced by only a few individuals. For a specialty certification to be successful there must be a large enough pool of potential specialists to support the specialty. Lawyers have to be able to identify a benefit in order to be motivated to become specialists. However, there is also a school of thought that lawyers who practice in very specific areas of law should not be excluded from being “specialists” simply because their practice area is small.

The area also has to be specifically defined so a lawyer may determine whether he or she fits within that specialty. For example, estate law may include many different practice areas: wills, trusts, estate planning, will contests, elder law and other matters. A lawyer who devotes 25% of his or her practice to elder law may not wish to be listed as a specialist in “estate law.” That description does not contribute to public awareness of the nature of that lawyer’s practice. A specialty of elder law, on the other hand, does inform the public what that specific lawyer does.

Whether a program is national or state-sponsored, certifying bodies must consider the financial consequences of adding more specialties. It is difficult to economically sustain and manage programs with few specialists. It may be viewed as better not to start a program at all than to have it fail.

1. ABA Standard as a General Model

To be qualified as a specialist under the ABA guidelines, a lawyer must spend at least 25% of his or her time in the specialty area. Many lawyers, even sole practitioners, practice one type of law more than another. For example, a lawyer may find he or she is accepting more and more family law matters because of referrals and word of mouth, even if that lawyer did not set out to specialize in family law. The nature of the evolving practice has led that lawyer to specialize. A lawyer’s ability to notify the public that he or she is a specialist in a certain area benefits the public.

2. Doing a Job Analysis to Determine the Specifics

One method for a program to develop task and experience requirements for a specialty is to conduct a job analysis. A job analysis is a systematic study of a job to identify activities, tasks and responsibilities associated with the job.

There are numerous methods for conducting a job analysis, including: observation, where a trained observer observes the lawyer, recording what he or she does, how the work is done; interview, where a trained job analyst interviews the lawyer, utilizing a standardized format; diary, where the lawyer records activities and tasks in a log as they are performed; checklist, where the lawyer checks items on a standardized task inventory that applies to the specialty; questionnaire, where the lawyer identifies tasks related to the specialty and answers

open-ended questions; and technical conference, where experts in the specialty collaborate to provide information about the tasks related to the specialty in conjunction with a job analyst.

By gathering information on the tasks and responsibilities of several established experts in an area, the program can develop the task and experience standards for the specialty area.

B. Designing and Administering the Examination

The initial ABA plan for specialization did not include a written examination; however, surveys showed that the public expected a board certified lawyer to have passed an examination. With few exceptions, all programs administer written, oral, practical and or interactive examinations to demonstrate competence in the specialty area.

Some lawyers perceive the examination as an obstacle to certification; many lawyers, after taking their state's bar examination, vow never to take another test of any kind. There are other disadvantages, including the expense and a concern that the examination may be used to exclude certain segments of the bar. However, a specialty examination is not like a bar exam, which tests knowledge of a wide range of areas. Instead, it is specific to a particular area of practice and is prepared by lawyers who are specialists in that area.

Most specialty examinations are written and use a variety of questions including essay, true-false, and multiple-choice. In at least one program the applicant must present a mock oral argument on a particular topic. An oral component of a specialty examination is time-consuming, but presents intriguing possibilities.

The examination measures a lawyer's knowledge of substantive and procedural law in a specific area, but does not test in any objective way the lawyer's skill, preparation, or ability. Oral exams, oral arguments and interactive exams address that shortcoming.

1. Test Development and Revision Process

A primary consideration is who will prepare and grade the examination. The examination should be prepared and graded by recognized specialists in that particular area of law. But designing examination questions involves art, as well as science, so it is important to have input from content specialists and test-development experts.

A testing consultant, or psychometrician, is now viewed as essential in ensuring the examination fairly measures the lawyer's proficiency. That expert helps determine the right mix of essay, true-false, and multiple-choice questions, and also consults regarding validity and reliability, as well as the pass rates of the examination.

The program must consider logistics. The program will need to find test sites and proctors. The exam and exam site security measures are vital, as are clear instructions for the lawyers taking the exam.

The grading of the examination is crucial to the program's success. If the lawyers lack confidence in the grading scheme, it will be difficult for the program to achieve acceptance and success. It is important to the integrity of the program that the grading be objective and there should be procedures to prevent arbitrary grading. A panel of specialists may consider these matters. Having more than one person read and grade the answers to the test questions is preferable, as it may relieve concerns about perceived "hard" graders.

The program should provide for review of marginal scores, and there must be an appeal process so an unsuccessful lawyer may protest his or her examination grade. The appeal process might include an independent review of the failing lawyer's examination.

The examination is widely viewed as vital to the certification process, but that is not the only view. Some believe an examination does not usefully test a lawyer's competence or knowledge of a subject area. Some believe peer reviews and reports on a lawyer's work experience should be sufficient to ensure that lawyer is qualified as a specialist in a particular area. Testing procedures, however, are constantly being upgraded, especially to take advantage of technological advances that make it possible for examinations to produce accurate and useful information for evaluating lawyers who seek certification in specialty areas.

C. Program Administration and Financing
1. Program Staffing and Administration
a. Who Runs the Show?

Specialty certification is a joint effort between the specialist lawyers and the administrative staff who carry out the operations of the program. In the typical certification program, a board of directors sets overall policy. The makeup of the board of directors varies. Specialist lawyers usually play a significant role on the board of directors, but many boards have non-lawyer members.

b. Professional Administrator

An executive director or program manager who supervises the administrative staff and oversees the daily operations usually provides day-to-day leadership and management of the program. This manager must be skilled at managing and operating a business on budget. He or she must have a thorough understanding of the certification process and the procedures for granting, maintaining, and terminating or revoking certifications.

c. Administrative Staff

Obviously, the size of the administrative staff will depend on the size of the specialization program and where the program is in the development cycle.

Initially, staff support will be needed to formulate and distribute the applications, receive and process the applications and fees, and deal with other such items. Much of the staff support needed at this stage is clerical but there is also a need for accounting support. Not all functions need full-time staff. Accounting work might be performed by a part-time employee or an outside service, and it may be possible to handle peaks in workflow with temporary workers.

The program will also need staff to support the process of creating examination questions, administering and grading the exam, and notifying applicants of the results. Factors to consider in assessing staff needs for this area include the size of the exam design group, whether the group will meet in person or only electronically, and the degree to which staff will facilitate the interaction between a testing consultant or grading company (see section (d) below) and members of the design group. The frequency and location of the examination offerings will also affect staffing needs.

As certified lawyers begin to come up for renewal, the size of the renewal population and the renewal requirements will be important. Often, marketing renewal to those lawyers who are

already certified is vital to the continuation of the program. One significant component of renewal review is evaluation of continuing legal education requirements. Forty-three jurisdictions require lawyers to take mandatory continuing legal education (MCLE) courses in order to practice law within that particular jurisdiction. The reports generated by the MCLE jurisdiction (or records kept by the lawyers) will help determine compliance with certification requirements. However, few MCLE states maintain sufficiently detailed accreditation records to allow easy and accurate assessment of the extent to which a particular course relates to an area of specialization. Sometimes the connection is apparent: "Trying the Automobile Accident Case" is obviously relevant to a "Civil Trial" or "Personal Injury" certification. But what of a two-and-a-half day seminar entitled "Annual Review"? In many cases, staff must look beyond the "MCLE accredited" label to the content of the sessions. This is time consuming and demands an informed, knowledgeable evaluation.

d. Testing Company or Consultant

Most programs rely on specialist lawyers as part of an Examination Committee to formulate the questions and the answers used to test lawyers applying for specialist certification. Generally, specialist lawyers also grade the examination.

A number of specialization programs hire a company or consultant to assist them in the testing process. The testing company or consultant can review the questions to ascertain whether they are likely to be properly understood by the lawyers taking the test. They can also work with the program to develop grading procedures that will enhance consistency in grading examination questions. The testing company or consultant can perform a mathematical analysis of the grades on different test questions to determine whether a particular question is yielding an inconsistent or otherwise problematic result. For example, if test takers who score highly on most questions are consistently scoring poorly on a particular question, there may be a problem with that test question. But the analysis of the nature and extent of the problem and the appropriate response requires professional judgment.

Some testing companies also grade multiple choice questions, so that option is available to those programs that prefer professional grading.

2. Financing a Specialization Program

Specialization programs are typically self-funded. A fully functioning program should be able to pay its expenses from the fees it receives from applicants and certified specialists. Generally, specialization programs charge a nonrefundable application fee, an examination fee, an annual certification fee and a recertification application fee. Some state bar-sponsored certifying programs charge lower fees for members of the bar. Some programs include the exam fee in the application fee; there are as many fee schedules as there are programs. Each program attempts to balance the need to be self-funding with the recognition that specialty certification is voluntary and these additional fees are on top of annual licensing fees and bar dues.

a. Startup Costs

How startup costs are funded depends on the structure of the organization starting the specialization program. If an existing organization, such as a bar association is starting a program, it can perform many of the startup activities using its own staff and other resources. If the specialization program is being started by an independent for profit or nonprofit entity, that entity must gather sufficient funds to be able to commence and continue operations until it

begins to receive revenue from operations sufficient to cover its expenses. Care should be taken not to overestimate application rates. Certification organizations that have already traveled the start-up road can help predict the rate of initial applications and the reduced rate thereafter. The initial processes will be more expensive than subsequent cycles: at startup, staff and volunteers have yet to become familiar with the program and develop efficient procedures, and the initial cycle is likely to be affected by unforeseen implementation issues.

The following will provide guidance for the types of expenses to expect and income needed if the specialization certification process consists of 1) application processing by non-lawyer staff administrator(s), 2) review and handling of appeals, examination drafting and grading, by a board or commission of lawyers knowledgeable in the specialty, and 3) IT support and other appropriate tasks carried out by administrative staff.

Expenses can be classified into three categories: overhead, variable costs, and mixed costs that include both overhead and variable costs. Overhead costs are those associated with the administration of the specialty program or that may vary with the number of specialists in the program. Overhead includes staff salaries, volunteer travel, meeting room rental, catering at meetings, and office rental (including associated costs such as janitorial service, parking, etc.) computers and software, consultants, and fees to accrediting entities.

Variable costs include utilities, postage, stationery supplies, printing, delivery services, etc.

Mixed costs are mostly labor costs that include staff salaries, payroll tax and fringe benefits.

Based on estimates of these costs, a program can determine the number of specialists needed for a financially viable program. For example, one program that handles all aspects of certification in its state estimates that 100 certified specialists are needed if the program is to be financially viable.

b. Cost Estimates for a Variety of Activities for an Established Certification Program

One way to make operation cost estimates more accurate is to define the activities necessary for various aspects of the certification process. Key elements of initial certification include:

- Receipt and Review of the Initial Application: If staff does the initial review, slightly higher staffing levels will be necessary. If volunteers perform all review, there will be higher meeting and logistical costs.
- Peer Review Costs
 - Photocopy
 - Mail
 - Postage
- Exam Costs
 - Development
 - Administration
- Meeting Costs
 - Number of meetings
 - Volunteer and staff travel
 - Catering, room rental, etc.

- Exception processing costs
 - Denial reviews
 - Appeal Process
- Annual Fee Assessment and Collection Costs

c. Marketing - More Expensive than You Think

Despite the optimistic expectation of some volunteers that “If we build it, they will come,” the experience of established programs is that money and time must be allotted to marketing. Without a regular, ongoing, sustained marketing plan, most programs will not maintain an adequate flow of applicants. Key components of a cost-effective marketing program include:

- Logo
- Web presence
 - Design
 - Development
 - Maintenance
- Brochures
 - Design
 - Printing
 - Mailing
- Advertising (bar journals, etc.)
 - Copywriting
 - Art
 - Design
 - Evaluation programs
- Certificates for specialists and other recognition programs
- Newsletters, digests, or other for specialists-only communication
- Professional communications/marketing consulting
- Industry events
 - Exhibits
 - Staff time
 - Brochures only
 - Give-aways

In planning a certification program, there should be separate marketing budgets for the start-up phase and for ongoing operations.

D. A Business Plan is a Good Idea

1. Developing a Business Plan

Before starting a certification program, most organizations will need some form of proposal so they can secure financial and organizational support. A certification program is a business enterprise -- it has expenses and it needs revenue to support its operations.

Even before it starts operating, a new program will need startup funding, staff and volunteer resources, and professionals to bring it to the stage where it is ready to open for business and accept applicants.

Nonprofit organizations use a variety of proposal and budget formats in developing their programs, but certification program developers should consider a formal business plan. This

document will lay out all the elements of the program, including how it is to be funded and governed; how lawyers will be encouraged to apply for certification; and how the program will be administered and managed so it can operate on a break-even basis over the long haul.

A business plan can be as elaborate or as simple as its authors wish to make it. But it should be detailed enough to address concerns that will inevitably be raised by governing boards and sponsoring organizations. It should also guide the plan developers in working out the details of program elements. Some significant questions a business plan might address are:

- Why are we starting a certification program and what is it designed to accomplish?
- What are the benefits to lawyers, our members, clients, the public and our organization?
 - Is the program feasible? How do we know? What conditions must be met before we can expect the program will succeed?
 - How will the program be organized? Will a separate board be created or will the program be governed by the board of directors of a parent organization? Who will decide which applicants to certify?
 - What body will set standards and develop examinations? What kind of support from staff and consultants will be required initially and on a continuing basis? To whom will those people report?
 - How will the program be financed? What will be the source of startup funding and ongoing support of operations? What provisions are there to amortize the cost of startup funding and support ongoing operations? Will a continuing subsidy from the parent organization be required?
 - What legal and regulatory requirements will the program and its certified lawyers have to follow? What effect will the regulatory scheme have on the demand for certification?
 - How will the program be marketed? What provisions are there for an ongoing marketing effort after the initial push? What is the expected response to the marketing effort each year for the first five years -- *i.e.*, how many lawyers will apply for certification and follow through to completion?

2. Plan Components

There are many ways to put a business plan together, but the following outline might be helpful in creating or adapting one for a proposed certification program.

a. Executive Summary

This section should lay out the proposal in summary form and set the stage for the detailed sections to follow. Keep in mind that many of the people who will be asked to consider this proposal will read only the executive summary. Therefore, to be most effective the summary should tell the complete story and give readers a pretty good notion of what is being proposed, identify the issues that are expected to arise, and explain how those issues will be dealt with.

b. History and Purpose of the Undertaking

Many business plans do not include this section. But in a nonprofit organization setting, many decision-makers are volunteers who rotate on and off various committees and boards. For them, a bit of history leading up to a clear statement of purpose will help set the stage for the rest of the proposal. Writing this section will no doubt stimulate a worthwhile discussion of

what really is the purpose of starting a certification program and will ensure there's enough commitment to the idea to justify moving forward.

c. Mission, Vision, and Goals

This section is also optional, but it will be expected in many organizations where mission and goal setting are part of the normal program development process. A vision statement is useful in providing targets for the long haul. Many commercial enterprises find a vision statement helpful as a focal point for management, governing boards and funding sources.

d. Organizational Overview

This section sets out in broad terms how the program will be organized and governed. It should specify whether a separate organization will administer the program, what relationship that organization and its governance will have to the sponsoring group, the composition of various boards and committees and the organizational structure of management. This section should detail what functions will be performed by which organization, and what staff and consultant resources are contemplated.

e. Regulatory Analysis

This section should address state and federal statutes, rules and case law that will affect the undertaking. An examination of the laws affecting certification will reveal antitrust, Americans with Disabilities Act (ADA) and consumer protection issues. There will be claims by applicants who are denied certification that the process was not applied in a fair and consistent manner. There might also be claims by consumers that the certifying entity was negligent in certifying an applicant as an expert.

The limitations on the use of the certification designation by lawyers as outlined in ethics and court rules in many state jurisdictions amount to indirect regulation of certification programs to the extent they require certain standards, filing of applications and disclosures and payment of fees. These regulatory requirements cost the certification program both time and money, and need to be factored into the business plan. In addition, there may be situations where demand for certification is influenced by the degree to which regulatory requirements stifle interest in becoming certified.

f. Market Analysis and Plan

Here is your opportunity to do something many certification program sponsors either omit from their planning or do to only a minimal extent. The market analysis and plan should provide the tools to realistically estimate how many lawyers can be expected to apply for certification, both initially and on an ongoing basis. It should examine things like the estimated number of specialists in a field, the competitive effect of other programs that certify lawyers in the same specialty, the extent to which clients accept certification in a particular specialty, and the sales tools and strategies that might be used to market the program effectively.

A key element of the market analysis will be the estimate of the number of lawyers that will apply for certification in the first year and beyond. Boards and exploratory committees tend to grossly overestimate the number of lawyers who will apply for certification. The initial estimates are usually based on anecdotal evidence and on the results of membership surveys to elicit opinions as to whether certification is a good idea.

A more accurate estimate is likely to come from a survey that asks a more direct question: whether a lawyer would apply for certification given certain requirements and fees at a certain level. This survey would allow a more realistic estimate of whether a lawyer who is interested in principle would in fact follow through with an application and pay the fee.

Finally, this section of the plan should include a risk analysis that enumerates both market risks and independent risks the program will face. Market risks are those all certification programs face, while independent risks are risks that only the specific program under consideration will face. The plan should lay out how the proposed program will deal with each type of risk.

g. Operational Plan

This section of the plan should explain in some detail how the program will be started, what steps will have to be taken to get up and running, and what the operation will look like once the program has been established. The content should include a timeline starting from the approval of the program's formation through the time it certifies the first applicants.

The timeline should include establishment of the program as a legal entity, appointment and activation of a Board of Directors, recruitment and selection of management and professional staff, acquisition of physical facilities and equipment, selection and contracts with professional advisers, purchase and installation of hardware and software needed to manage the program, design and installation of financial controls, and marketing, administrative, applicant processing and customer-service procedures. This section is the place to describe key management and staff needed to run the program and to delineate some duties and relationships with consultants, committees and the governing board.

h. Financial Projections

This important section of the plan lays out for all concerned the assumptions, goals and detailed projections of all financial aspects of the enterprise over the first five years. Estimates of revenues will ideally be based on what the marketing plan has predicted as the number of applicants who will pay certification fees both initially and over time. Expenses should be derived from the description of the governance structure and the operational plan, and should include startup costs and ongoing operational expenses. If loans will be needed to subsidize the program in its initial years, the financial plan should specify how they will be repaid from surplus operating revenues.

3. Getting the Plan Done

A business plan is only as good as the data, thought and judgment that go into it. The way to get the best of all three elements is to include people who are enthusiastic about starting the program in the business plan development process. Divide the tasks among the supporters of the proposed program. You may need to conduct surveys, gather financial information and explore the regulatory environment prior to drafting the plan.

Don't be in a rush. Spending substantial time planning before making the political and financial expenditures needed to get a program going will benefit everyone involved. You might construct a very convincing case to move ahead, which your organization will accept. Or, you might discover that starting a certification program as you initially conceived it is not realistic; if that is the result your planning will have saved everyone much time, expense and disappointment.

E. Stimulating Acceptance and Demand for Your Program

Communication plays an important role in building understanding of and support for certification of lawyer specialists. A successful strategic communication campaign can build public awareness and appreciation of lawyer certification. Within the profession it can increase the perceived value of certification.

All certification programs – established or new – can benefit from public relations, advertising and other marketing tools to raise awareness of the program. Most strategic communication plans will have similar goals, for example to:

- Encourage the growth of specialist certification by demonstrating its value to consumers, lawyers, employers, and referral sources,
- Educate consumers of legal services about lawyer certification so they can make more informed choices when choosing counsel, and
- Explain the value of standards for certification of lawyer specialists so the Bar and Supreme Court will consider them in implementing certification programs.

Before setting communications goals, it is wise to conduct a thorough situational analysis to identify basic information about your program and its potential growth. This will help identify target audiences and the messages that will best reach them.

Surveys of lawyers, other professionals and the public can play an important role in developing communications goals. One national survey says fifty percent of Americans select lawyers from the Yellow Pages. That indicates consumers need guidance when hiring counsel.

Research ideas include 1) a survey of certified lawyers to determine their key motivations for seeking board certification; 2) a survey of non-certified lawyers to find out why they have not sought certification; 3) an analysis matching Bar membership start dates and certifications awarded to determine when lawyers typically seek certification; and 4) a review of promotional materials used in other states.

1. Getting the Word Out

a. Target Audiences

Your situational analysis should point you toward groups who will be receptive toward your message: consumers, lawyers, influencers/employers and referral sources. Target audience lists might be expanded as follows:

i. Consumers of Legal Services

Sophisticated and unsophisticated individual clients, i.e. “Yellow Page consumers”
Business clients
Organizations that refer consumers to lawyers (law firms, AARP, etc.)

ii. Lawyers

Certified specialists
Potential certified specialists (lawyers with 6 – 16 years of Bar membership or range most likely to seek board certification in a particular specialty area; also should include special outreach to female and minority Bar members)

iii. Influencers

Judges
Legal employers
Insurers
Media
Research organizations
Law schools (faculty, faculty advisors, and students)

iv. Voluntary Bar Associations

Members
Potential members
Section members
Staff
Bar leadership

2. Key Messages

a. Simplicity of Message – Consistency Delivery.

Most communications campaigns develop a number of key messages based on their target audiences and methods of outreach, i.e. billboard advertising, newspaper articles or public speaking engagements. Messages should be consistent and repeated with as much frequency as possible. Here are some examples:

- Board certification recognizes attorneys' special knowledge, skills and proficiency in various areas of law and professionalism and ethics in practice.
- Board certified lawyers: specialists who meet our state's high legal standards.

b. Emphasizing Benefits

Certification perks are important. Programs should plan on outreach to non-certified lawyers to clearly communicate "what's in it for them."

One state's display advertising at major Bar functions reads:

"Prove You're An Expert" – Become Board Certified. Here's Why:

- *Identified as "Board Certified," "Specialist" or "Expert" in your field of practice*
- *Personal pride, peer recognition and professional advancement*
- *Malpractice insurance discounts*
- *Separate listing in The Bar directory issue*
- *Incentive to maintain high standards in practice area*

3. Don't Forget Good Customer Service

Despite the fact that most certified lawyers earned the status for professionalism reasons, they definitely like to be recognized and appreciated for the distinction. Create special awards, receptions/events and communications tools, i.e. newsletters that allow your certified lawyers to "stand out from the crowd." Offer lapel pins, name badge ribbons, luggage tags, calendars, notepads and the like at all Bar functions and section meetings. Promote these extras as benefits that make certified lawyers know they are appreciated.

4. Using Endorsements

Testimonials can be powerful advertising. Ask a distinguished member of your state's

Supreme Court or your current Bar president for a quote related to the professionalism aspects of board certification.

- Use the quote to create a postcard or letter to non-certified lawyers
- Encourage certified lawyers to use the quote in public speaking engagements
- Post the quote on your Web page
- Run Bar newspaper ads that include the quote

5. The Bar should be Your Friend

A key component of the evaluation of lawyers seeking board certification is their professionalism – judged by peer review and reputation.

Bar associations whose leadership is not board certified can be convinced to encourage the promotion of board certification because its professionalism aspects – and the outstanding reputations of certified lawyers – reflect positively on all lawyers. Former Florida Supreme Court Chief Justice Harry Lee Anstead eloquently expressed this concept: “Judges, lawyers, leaders of the Bar, mentors, and law firms must be committed to the standards and ideals of professionalism, excellence, and service that we cherish for our profession and our justice system. Let us keep the jewels of certification and professionalism brightly polished so they shine for all to see.”

Chapter IV - Conclusion

Lawyer Specialty Certification benefits lawyers, consumers of legal services and the legal profession. Expanded choices in the area of lawyer specialty certification programs will increase access to legal services by identifying specialized expertise needed by consumers, will improve competence of lawyers by recognizing professional achievement, and will provide lawyers with a credible way of making their expertise known to other lawyers. By carefully evaluating whether creating a program is feasible, an interested entity can save time and money. We hope this Concise Guide will set entities on the path toward that evaluation.

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