What is a Passing Grade, Anyway?
Should the Opinions of an Applicant’s Practitioner Peers Matter to Specialist Certification Programs?

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2012 National Specialization Roundtable
Tampa, Florida
Friday, March 30
10:15am
Bayshore East
What is a passing grade, anyway? Should the opinions of an applicant’s practitioner peers matter to specialist certification programs?
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Role of certifying entity

Doe v. Fla. Bar, 630 F.3d 1336, 1344 (11th Cir. Fla. 2011):

... the Florida Bar's certification program:

seeks to honor and identify to the public the most exceptional attorneys practicing in their chosen field. A denial of certification, at most, denotes that the candidate, in the eyes of the Florida Bar, does not fall within this select group, nothing more. Surely not all can claim the vestiges of the elite.

...The lack of certification in a field of specialty simply means that an attorney is, like the vast majority of attorneys, not certified in that field. The failure to convey a badge of distinction is not stigmatizing. ...there is nothing in the record to suggest that the Florida Bar publishes the names of attorneys who have been denied certification or recertification, or the reasons why. The fact that Zisser's application was denied apparently became public only because she appealed that denial and filed this lawsuit.
Who are the legal specialists?

“...the number of lawyers to whom specialty certificates have been issued continues to grow steadily. There are now [in 2006] 32,714 holders of specialty certificates in the legal profession....”


In mid-2010, about 35,453 lawyers were certified by state or national programs. Some are certified by both (e.g., Bovitz).

The State Bar of California Board of Legal Specialization program has more than 4,235 certified specialists.

The American Board of Certification program has more than 800 certified specialists.
<table>
<thead>
<tr>
<th>Specialty Areas</th>
<th>Subspecialties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative</td>
<td>Criminal Trial Advocacy</td>
</tr>
<tr>
<td>Admiralty &amp; Maritime</td>
<td>DUI Defense</td>
</tr>
<tr>
<td>Adoption</td>
<td>Education Law</td>
</tr>
<tr>
<td>Antitrust</td>
<td>Elder Law</td>
</tr>
<tr>
<td>Appellate Law</td>
<td>Environmental Law</td>
</tr>
<tr>
<td>Aviation</td>
<td>Estate Planning</td>
</tr>
<tr>
<td>Bankruptcy</td>
<td>Estates, Wills, Trusts</td>
</tr>
<tr>
<td>Business Bankruptcy</td>
<td>Family Law</td>
</tr>
<tr>
<td>Business Litigation</td>
<td>Family Law Trial Advocacy</td>
</tr>
<tr>
<td>Child Welfare</td>
<td>Farm &amp; Ranch Real Estate</td>
</tr>
<tr>
<td>City/County/Local Govt.</td>
<td>Federal Indian Law</td>
</tr>
<tr>
<td>Civil Appellate</td>
<td>Franchise &amp; Distribution</td>
</tr>
<tr>
<td>Civil Trial Advocacy</td>
<td>Health Law</td>
</tr>
<tr>
<td>Commercial Real Estate</td>
<td>Immigration</td>
</tr>
<tr>
<td>Construction Law</td>
<td>Intellectual Property</td>
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<tr>
<td>Consumer</td>
<td>International Law</td>
</tr>
<tr>
<td>Consumer Bankruptcy</td>
<td>Juvenile Law</td>
</tr>
<tr>
<td>Creditors Rights</td>
<td>Labor</td>
</tr>
<tr>
<td>Criminal</td>
<td>Legal Prof. Liability</td>
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<tr>
<td>Criminal Appellate</td>
<td>Medical Prof. Liability</td>
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<td></td>
<td>Natural Resources</td>
</tr>
<tr>
<td></td>
<td>Oil, Gas &amp; Mineral</td>
</tr>
<tr>
<td></td>
<td>Personal Injury Trial</td>
</tr>
<tr>
<td></td>
<td>Real Estate</td>
</tr>
<tr>
<td></td>
<td>Residential Real Estate</td>
</tr>
<tr>
<td></td>
<td>Social Security Disability</td>
</tr>
<tr>
<td></td>
<td>State/Federal &amp; Admin.</td>
</tr>
<tr>
<td></td>
<td>Tax</td>
</tr>
<tr>
<td></td>
<td>Workers Compensation</td>
</tr>
</tbody>
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Who certifies?

“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. ... Since 1993, the ABA has accredited 14 certification programs conducted by seven different private organizations.”


California was the first state to establish a system for certifying legal specialists (those with a “demonstrated level of proficiency”). The first fields (1972) were criminal law, taxation law, and workers’ compensation law. The next field (1979) was family law. Personal and small business bankruptcy law (now bankruptcy law) was added in 1992.
Certification helps clients

For consumers, specialization helps them find a proficient lawyer to handle their 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. ... 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.’”

STAND OUT FROM THE CROWD

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
• Excellent referral network

• Separate listing in The Florida Bar Journal directory issue
• Incentive to maintain high standards in practice area
Peel (ground rules)


In evaluating petitioner's claim of certification, the Illinois Supreme Court focused not on its facial accuracy, but on its implied claim "as to the quality of [petitioner's] legal services," and concluded that such a qualitative claim "might be so likely to mislead as to warrant restriction." 126 Ill. 2d, at 406, 534 N.E.2d, at 984 (quoting In re R. M. J., 455 U.S., at 201). This analysis confuses the distinction between statements of opinion or quality and statements of objective facts that may support an inference of quality. A lawyer's certification by NBTA is a verifiable fact, as are the predicate requirements for that certification. Measures of trial experience and hours of continuing education, like information about what schools the lawyer attended or his or her bar activities, are facts about a lawyer's training and practice. A claim of certification is not an unverifiable opinion of the ultimate quality of a lawyer's work or a promise of success, cf. In re R. M. J., 455 U.S., at 201, n. 14, but is simply a fact, albeit one with multiple predicates, from which a consumer may or may not draw an inference of the likely quality of an attorney's work in a given area of practice.
We must assume that some consumers will infer from petitioner's statement that his qualifications in the area of civil trial advocacy exceed the general qualifications for admission to a state bar. Thus if the certification had been issued by an organization that had made no **inquiry into petitioner's fitness**, or by one that issued certificates indiscriminately for a price, the statement, even if true, could be misleading. ... We find NBTA standards objectively clear, and, in any event, do not see why the degree of uncertainty identified by the State Supreme Court would make the letterhead inherently misleading to a consumer. A number of other States have their own certifications plans and expressly authorize references to specialists and certification, but there is no evidence that the consumers in any of these States are misled if they do not inform themselves of the precise standards under which claims of certification are allowed.

[496 U.S. at 102-103 -- citing to "Cal. Rule Ct., Policies Governing the State Bar of California Program for Certifying Legal Specialists (1990)" and rules of 14 other programs]
We do not ignore the possibility that some unscrupulous attorneys may hold themselves out as certified specialists when there is no qualified organization to stand behind that certification. A lawyer's truthful statement that "XYZ Board" has "certified" him as a "specialist in admiralty law" would not necessarily be entitled to First Amendment protection if the certification was a sham. States can require an attorney who advertises "XYZ certification" to demonstrate that such certification is available to all lawyers who meet **objective and consistently applied standards relevant to practice in a particular area of the law**.

[496 U.S. at 109]
Ibanez (commercial speech)


Petitioner Silvia Safille Ibanez, a member of the Florida Bar since 1983, practices law in Winter Haven, Florida. She is also a Certified Public Accountant (CPA), licensed by respondent Florida Board of Accountancy (Board) to "practice public accounting." In addition, she is authorized by the Certified Financial Planner Board of Standards, a private organization, to use the trademarked designation "Certified Financial Planner" (CFP). Ibanez referred to these credentials in her advertising and other communication with the public. She placed CPA and CFP next to her name in her yellow pages listing (under "Attorneys") and on her business card. She also used those designations at the left side of her "Law Offices" stationery. Notwithstanding the apparently truthful nature of her communication -- it is undisputed that neither her CPA license nor her CFP certification has been revoked -- the Board reprimanded her for engaging in "false, deceptive, and misleading" advertising. Final Order of the Board of Accountancy (May 12, 1992) (hereinafter Final Order), App. 178, 194.
The record reveals that the Board has not shouldered the burden it must carry in matters of this order. It has not demonstrated with sufficient specificity that any member of the public could have been misled by Ibanez' constitutionally protected speech or that any harm could have resulted from allowing that speech to reach the public's eyes. We therefore hold that the Board's decision censuring Ibanez is incompatible with First Amendment restraints on official action.

[512 U.S. at 138-139]
The Board correctly acknowledged that Ibanez' use of the CPA and CFP designations was "commercial speech." Final Order, App. 186. Because "disclosure of truthful, relevant information is more likely to make a positive contribution to decision making than is concealment of such information," Peel v. Attorney Registration and Disciplinary Comm'n of Ill., 496 U.S. 91, 108, 110 L. Ed. 2d 83, 110 S. Ct. 2281 (1990), only false, deceptive, or misleading commercial speech may be banned. Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 638, 85 L. Ed. 2d 652, 105 S. Ct. 2265 (1985), citing Friedman v. Rogers, 440 U.S. 1, 59 L. Ed. 2d 100, 99 S. Ct. 887 (1979); see also In re R. M. J., 455 U.S. 191, 203, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982) ("Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. . . . Misleading advertising may be prohibited entirely.").

[512 U.S. at 142]
Commercial speech that is not false, deceptive, or misleading can be restricted, but only if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest. 7 Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y., 447 U.S. 557, 566, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980); see also id., at 564 (regulation will not be sustained if it "provides only ineffective or remote support for the government's purpose"); Edenfield v. Fane, 507 U.S. 761, 767, 123 L. Ed. 2d 543, 113 S. Ct. 1792 (1993) (regulation must advance substantial state interest in a "direct and material way" and be in "reasonable proportion to the interests served"); In re R. M. J., 455 U.S. at 203 (State can regulate commercial speech if it shows that it has "a substantial interest" and that the interference with speech is "in proportion to the interest served").

[512 U.S. at 142-143]
Beyond question, this case does not fall within the caveat noted in Peel covering certifications issued by organizations that "had made no inquiry into petitioner's fitness," or had "issued certificates indiscriminately for a price"; statements made in such certifications, "even if true, could be misleading." 496 U.S. at 102. We have never sustained restrictions on constitutionally protected speech based on a record so bare as the one on which the Board relies here. See Edenfield, 507 U.S. at 771 (striking down Florida ban on CPA solicitation where Board "presents no studies that suggest personal solicitation . . . creates the dangers . . . the Board claims to fear" nor even "anecdotal evidence . . . that validates the Board's suppositions"); Zauderer, 471 U.S. at 648-649 (striking down restrictions on attorney advertising where "State's arguments amount to little more than unsupported assertions" without "evidence or authority of any kind"). To approve the Board's reprimand of Ibanez would be to risk toleration of commercial speech restraints "in the service of . . . objectives that could not themselves justify a burden on commercial expression." Edenfield, 507 U.S. at 171.

[512 U.S. at 148-149]
What are certification requirements?

“...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 recertification every three to five years....”

California program

“In order to be identified as a ‘certified’ specialist in California, an attorney must be certified either by the State Bar of California Board of Legal Specialization or an organization whose certification program has been accredited by the State Bar of California. (Such an organization must have requirements for certification that are at least equal to those of the State Bar of California's program.)

California attorneys certified as specialists must:

Pass a written examination in their specialty field.

Demonstrate a high level of experience in the specialty field.

Fulfill ongoing education requirements.

Be favorably evaluated by other attorneys and judges familiar with their work.”

[http://ls.calbar.ca.gov/LegalSpecialization.aspx]
“The Legal Specialization program is a Supreme Court approved method of certifying attorneys as specialists in particular areas of law, and operates pursuant to the following regulatory structure:

• Rule 9.35, adopted by the Supreme Court, which contains a provision authorizing the State Bar to adopt rules to establish and administer a program to certify legal specialists;

• Rules Governing the State Bar of California Program for Certifying Legal Specialists (‘Rules’), adopted by the Board of Governors, which contain the details for operation of the program; and

• Standards for Certification and Recertification in each specialty area, adopted by the Board of Governors.”

[23rd Annual Report, California Board of Legal Specialization (May 2010), p. 1]
“The requirements to become a certified specialist are as follows:

• passage of a written examination in the specialty area;

• participation in continuing education activities in the specialty area;

• demonstration of experience in the specialty area based on performance of a variety of activities related to that area; and

• favorable evaluation by other attorneys and judges familiar with the attorney's work in the specialty area.

Certification is valid for a five-year period, during which time specialists must continue to meet task and education requirements similar to those for certification in order to qualify for recertification.

Costs of the program are entirely paid for by annual fees, as well as certification, recertification, education provider, and accreditation fees. The Rules mandate that specialization be self-supporting.”

[23rd Annual Report, California Board of Legal Specialization (May 2010), p. 1]
Florida certification program

"There are five (5) different qualifications a Florida attorney must meet before that attorney can be certified by the BLSE. Four of the five qualification areas are objective and one area is subjective. The objective requirements are: (a) a minimum of five years in the practice of law; (b) a satisfactory showing of substantial involvement in the field of law for which certification is sought; (c) a passing grade on the examination in the certification area; and (d) satisfaction of the certification areas continuing legal education requirements. There is one subjective area that an attorney must satisfy. The applicant must, in the opinion of nine (9) unpaid volunteers, receive satisfactory peer review in the areas of competence, character, ethics and professionalism in the practice of law."

[Linde, WHAT IS THE BEST WAY TO COLLECT AND PROCESS PEER REVIEW?, pp. 3-4]
Substantial involvement -- California

“An applicant must demonstrate that, within the five years immediately preceding submission of the written application, he or she has been substantially involved in the practice of bankruptcy law. Substantial involvement in the area of bankruptcy law would be shown if he or she had principal responsibility for representation of, and has personally appeared on behalf of, a client or clients in 100 or more chapter 7, 11, 12, or 13 bankruptcy cases, contested matters, and/or adversary proceedings under the Code.”

[The Standards For Certification And Recertification In Bankruptcy Law, Rule 2.0]

“Applicants practicing Bankruptcy Law at least three years may be eligible to sit for the exam provided the task and experience requirements will be met within 18 months following the exam.”

[http://ls.calbar.ca.gov/LegalSpecialization/LegalSpecialtyAreas/BankruptcyLaw.aspx]
"The applicant must make a satisfactory showing of experience through substantial involvement in the practice of bankruptcy law. Substantial involvement shall mean both (1) that the applicant has devoted a minimum of thirty percent of practice time to bankruptcy law during each of the three years immediately preceding the date of the Long Form Application, and (2) that the applicant has devoted a minimum of 400 hours to the practice of bankruptcy law during each of the three years immediately preceding the date of the Long Form Application.

In addition, the applicant must satisfy one of the following requirements:
(1) Applicants seeking certification in Consumer Bankruptcy Law must have substantially participated in at least thirty adversary proceedings or contested matters (as defined in Federal Rules of Bankruptcy Procedure 7001 and 9014) in cases involving individual debtors, with no more than five of any such matters being of a single type.
(2) Applicants seeking certification in Business Bankruptcy Law must have substantially participated in at least thirty adversary proceedings or contested matters (as defined in Federal Rules of Bankruptcy Procedure 7001 and 9014) in cases where the debtor had been engaged in business prior to filing a petition in bankruptcy, with no more than three of any such matters being of a single type."

[http://www.abcworld.org/rules]
“Substantial involvement is not necessarily limited to court appearances, but may include briefing, argument, interrogation of witnesses, negotiation of settlements or workouts, or drafting. The activity must relate to an adversary proceeding or contested matter and must have been substantial in relation to the total efforts devoted to the adversary proceeding or contested matter. The substantial involvement requirements shall be applied to all applicants, including but not limited to private practitioners, government lawyers, professors of law, United States Trustees, Bankruptcy Administrators, Assistant United States Trustees, or Trial Attorneys for United States Trustees; but shall be waived for an applicant who has served as a full-time judge (but not as a magistrate judge, administrative law judge, commissioner or special master) of a federal court during at least three of the five years immediately preceding the application. Service as a professor of law does not constitute the practice of law for the purposes of this sub-section.”

[http://www.abcworld.org/rules]

“The Applicant must be engaged in the continuous practice of law, for at least the five-year period ending on December 31 of the calendar year in which the applicant files the Long Form Application.”

[http://www.abcworld.org/rules]
Examination issues

Who writes the examination? Practitioners or professors?

Who "quality checks" your examination for format and the "call" of essay questions (e.g., Karen Barbieri)?

Do you publish past examination questions for your applicants to review in advance of the test? (California does.)
Sample Question [California, bankruptcy]

Joseph, a professional with a salary of $10,000 a month from his corporation, comes to see you about filing a bankruptcy to reorganize his tax debt. He has over $100,000 in a 401(k) and $50,000 equity in his house. The stock in Joseph’s business is all owned by him and has been valued at $75,000. The value of all his other personal assets is $15,000. The IRS has filed a personal tax lien for $100,000. In addition, the IRS and the Franchise Tax Board have priority tax claims of $45,000. Joseph has a $550,000 unsecured bank loan and he owes $15,000 to his divorce attorney. Both of these debts are dischargeable.

Joseph’s average monthly expenses include $2,000 in child support and $1,500 to his unemployed former spouse on a marital equalization judgment of $75,000. His other ordinary and necessary living expenses average $5,000 a month.

Joseph is certain that his former spouse will object to the dischargeability of the marital equalization judgment.

Discuss the options Joseph may have under chapters 7, 11 and 13 and the advantages and disadvantages of each option.
Richard comes to see you the day after his first meeting of creditors in his chapter 7 bankruptcy case. He filed to discharge a large judgment against him resulting from his negligence in an auto accident while he was uninsured. He wants to retain you as his bankruptcy counsel. He filed his case in pro per after studying about bankruptcy on the Internet. Based on your interview with Richard, you discover the following irregularities with his bankruptcy schedules:

a. Richard is married. His wife did not file bankruptcy. He did not list any assets which were titled in his wife’s name, although several may be community property. These include a leased car, a timeshare in Cabo San Lucas, clothing, a $10,000 bank account, and the community property residence.

b. Richard receives social security as his only income. It is not listed on his Schedule I. His wife’s income from her ERISA qualified retirement plan of $10,000 per month is not listed.

c. Numerous creditors are not listed, including credit cards, family members and taxing agencies who are creditors of Richard. He intended to pay these entities and thus did not list them.

At yesterday’s meeting of creditors, the trustee learned about the facts in paragraph a. The trustee told Richard that a criminal investigation might be instituted against him based on concealment of assets. Assume that you take Richard’s case and that it remains a chapter 7 case.

What actions should you advise Richard to take and why?
Sample Question [California, bankruptcy]

David and Cindy were married for five tumultuous years. After the police had been to their home for the second time to break up a physical brawl, Cindy filed for divorce. She and David were able to agree on a property settlement pursuant to which David gave Cindy a Promissory Note for $30,000 bearing 7% per annum interest, amortized over five years with monthly payments of $594.04. The final decree required David to pay $2,000 per month in spousal support to Cindy.

Until a year before the divorce, David had been a manager at a fast food restaurant, earning less than $45,000 a year. He recently became an automobile salesman working on commission. He was doing quite well. During the 10 months prior to the divorce, he had made as much as $10,000 per month, although he averaged $5,000 per month. During the two months after the divorce decree had been entered, David’s income appeared to be averaging $7,000 per month.

After David and Cindy separated, but before the final divorce decree was entered, David used his own charge cards to buy expensive jewelry and take exotic vacations. Two months after the divorce, he had accrued $170,000 in credit card debt.

<continued on next page>
Also while the divorce was pending, Cindy filed suit against David in state court seeking to recover $200,000 in medical costs, plus emotional distress damages and punitive damages arising from David having allegedly assaulted her during the final fight that led to the divorce. Three months after the divorce decree had been entered, but before Cindy’s state court action had been decided, David filed a chapter 13 bankruptcy. David’s budget submitted with the plan showed a monthly income of $7,000 per month and expenses of $4,000 per month, which included $2,000 a month in spousal support payments to Cindy. The note to Cindy is listed as a general unsecured debt which, under David’s plan, will receive 18 cents on the dollar.

Cindy filed a claim for $3 million based upon her state court action and objected to confirmation of the plan.

What issues should Cindy raise to defeat confirmation of David’s chapter 13 plan? Discuss.
More examination details

Do you use written essays? How long does the applicant have to read and write the answer?

Short essay? 10 minute questions?

Multiple choice questions? How do you vet the "best" answers?

Oral examinations? Video segments?

How often do you give the examination?

How do you keep your examination confidential before the test?

How do you administer the test? Offer private testing for an additional fee? Tag along with the "baby bar" in California or another examination?

Fees for taking the examination? Reduced fee to take it again?
Open book examination? If so, who supplies the book(s)?

"Typing" (Exam Soft)? Mixing writers and computer test takers?

Handling test interruptions (e.g., the big stink from the broken pipe, the singers next door).

What can the students bring into the testing room? No cell phones, "electronic gizmos," watches, bottles, glasses cases, purses, wallets (new for 2012), paper, hearing aids, blue tooth devices?

Bathroom monitors?

If you find a violation by a test taker, what are the penalties (e.g., automatic grade of zero for this segment or the whole test, moral character issue for applicant)?

What are your instructions to proctors?

Verifying identification (who is the test taker)?
Grading

Is the test written and graded by competent and experienced professionals? (Practitioners or law professors?)

On the essay questions, is issue spotting and analysis more important than the “correct” answer?

Re-reading "close" examinations. What is the process?

What is the passing grade (e.g., 70%)? How do you grade "proficient" attorneys? Can everyone pass?

Reporting test results. When?

Do you show test questions and answers to the failed applicant?

Do you allow failed applicants to copy the examination?

What is the appeal process for those who fail?

Do you report the pass/fail ratio by testing area or by the overall examination (all areas)?
Examination professionals

Do you run the examination answers by graders for "calibration" like California does on the bar examination?

Do you consult with a psychometrician (e.g., Dr. Steven Klein) to review your examination results to confirm validity? ("A psychometrician is a person who practices the science of measurement, or psychometrics. The term psychometrics refers to the measurement of an individual's psychological attributes, including the knowledge, skills, and abilities a professional might need to work in a particular job or profession." [www.proftesting.com/test_topics/pdfs/psychometrician.pdf])
Examinee background information

Do you keep track of details on your applicants? Race, academic history, LSAT scores, law school grades, or anything else? If so, do you analyze or report these details to anyone? If so, is this public information, available to anyone who asks for the details?

Are you subject to Freedom of Information Act requests? California Public Records Act?

Does it matter if the party who seeks the information is going to use it for a good purpose?

Plaintiff Nasrin Morrowatti, an unsuccessful applicant for admission to the State Bar of California (the State Bar), sued among other defendants the State Bar, its Committee of Bar Examiners, and the State Bar's senior executive for bar admissions, Gayle Murphy (hereinafter collectively referred to as the State Bar). Morrowatti's complaint alleged that she suffers various physical and mental impairments and disabilities, that the testing accommodations granted to her by the State Bar were inadequate, and that she should be awarded damages and declared to have passed the February 2004 general bar exam.

The trial court sustained without leave to amend the State Bar's demurrer on several grounds and dismissed the action. Because the Supreme Court has exclusive jurisdiction over matters involving the admission of attorneys (Bus. & Prof. Code, § 6066), we affirm.
As alleged in her complaint, Morrowatti suffers from physical and mental impairments requiring special accommodations. These disabilities include arthritis, asthma, allergies to mold and mildew, attention deficit disorder, and an unspecified vision problem affecting the fast reading of testing material. After Morrowatti graduated from law school, she applied to take the February 2004 California bar exam, informed the State Bar of her disabilities, and asked the State Bar for accommodations. ...

She alleged, among other claims, causes of action for violation of the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.; hereinafter, ADA) and the Unruh Civil Rights Act (Civ. Code, § 51; hereinafter, Unruh Act), premised on the refusal to accommodate her disabilities, and claims of negligence, intentional infliction of emotional distress, breach of contract, battery, unjust enrichment, misrepresentation, violation of privacy rights, and res ipsa loquitor. Morrowatti's complaint asserted that she should be awarded damages and declared to have passed the February 2004 general bar exam.
Enyart (ADA issues)

Stephanie Enyart v. National Conference of Bar Examiners, __ F. 3d.__, 2011 WL 9735 (9th Cir. (Cal.) 2011):

Enyart registered to take the March 2009 administration of the MPRE and wrote to ACT requesting a number of accommodations for her disability: extra time, a private room, hourly breaks, permission to bring and use her own lamp, digital clock, sunglasses, yoga mat, and migraine medication during the exam, and permission to take the exam on a laptop equipped with JAWS and ZoomText software. JAWS is an assistive screen-reader program that reads aloud text on a computer screen. ZoomText is a screen-magnification program that allows the user to adjust the font, size, and color of text and to control a high-visibility cursor. ACT granted all of Enyart's requests with the exception of the computer equipped with JAWS and ZoomText. ACT explained that it was unable to offer this accommodation because NCBE would not make the MPRE available in electronic format. In lieu of Enyart's requested accommodation, ACT offered her a choice between a live reader or an audio CD of the exam, along with use of closed-circuit television for text magnification. Enyart sought reconsideration of ACT's denial of her request to use JAWS and ZoomText, asserting that the options offered would be ineffective because they would not allow her to synchronize the auditory and visual inputs. After ACT denied Enyart's request for reconsideration, Enyart cancelled her registration for the March 2009 MPRE. ...
After these repeated denials of her requests to take the MPRE and MBE using assistive technology software, Enyart filed this action against NCBE, ACT, and the State Bar of California, alleging violations of the ADA and the Uhruh Act, California's civil rights law. Enyart sought declaratory and injunctive relief. ...

Congress enacted the ADA in order to eliminate discrimination against individuals with disabilities. See 42 U.S.C. § 12101(b). The ADA furthers Congress's goal regarding individuals with disabilities: “to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals[.]” 42 U.S.C. § 12101(a)(8). The ADA contains four substantive titles: Title I relates to employment; Title II relates to state and local governments; Title III relates to public accommodations and services operated by private entities; and Title IV relates to telecommunications and common carriers. See generally Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 and 47 U.S.C. §§ 225, 611.
42 U.S.C. § 12189, which falls within Title III of the ADA, governs professional licensing examinations. This section requires entities that offer examinations “related to applications, licensing, certification, or credentialing for ... professional, or trade purposes” to “offer such examinations ... in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.”

Pursuant to its authority to issue regulations carrying out the provisions of Title III, the Department of Justice has adopted a regulation interpreting § 12189. This regulation defines the obligations of testing entities:

Any private entity offering an examination covered by this section must assure that ...
For the foregoing reasons, we affirm the district court's February 4, 2010 and June 22, 2010 orders issuing preliminary injunctions requiring NCBE to permit Enyart to take the MBE and MPRE using a laptop equipped with JAWS and ZoomText.
Do you publish study guides?

Should you publish or identify study materials?

Should you produce or identify a good study course (like the bar examination preparation course)?
California examination details

“Examinations take place in...odd-numbered years. The examinations in all specialty areas were administered to 673 attorneys on August 9, 2009, in San Francisco and Los Angeles. The overall pass rate was 71.8%.”
[23rd Annual Report, California Board of Legal Specialization (May 2010), p. 1]

“Each exam consists of 75 multiple-choice questions and eight essay questions. There are no optional questions; each examinee is expected to answer all questions on the exam. ... A passing score is 70 percent.”
[http://ls.calbar.ca.gov/Certification/ExamInformation.aspx]

California allows some publications (e.g., a clean copy of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure) at the examination. “Publications must be unannotated and free of any stray marks. Handwritten notations (other than underlining or highlighting) will not be allowed. The use of ‘post-its’-type tabs to mark specific book sections is acceptable, but the tabs must not have writing on them.”
[http://ls.calbar.ca.gov/Certification/ExamInformation.aspx]
More California exam details

“The Bankruptcy Law Examination consists of a combination of essay and multiple-choice questions. It is designed to verify the applicant’s knowledge of and proficiency in the usual legal procedures and substantive law that should be common to specialists in the field as represented by the skills listed below. We recognize that these skills are interrelated, which may require that you apply several skills in responding to a single exam question. Also, the order of the skills does not reflect their relative importance, nor does the skill sequence represent an implied order of their application in practice. Your answers to the exam questions should reflect your ability to identify and resolve issues, apply the law to the facts given, and show knowledge and understanding of the pertinent principles and theories of law, their relationship to each other, and their qualifications and limitations. Of primary importance for the essay questions will be the quality of your analysis and explanation.”

[California Examination Registration & Preparation Packet]
American Board of Certification exam

“The exams consist of three sections -- the multiple-choice, ethics and sub-specialty essay sections. The pass rate tends to range between 75-80%. ... To receive a passing score, an examinee must correctly answer 30 out of the 50 [multiple choice] questions correctly.”

[http://www.abcworld.org/faq/]

“A copy of the Bankruptcy Code, pencils, answer booklets are provided on site. You may bring your own copy of the Bankruptcy Code (not annotated) and Creditors' Rights Examinees may bring the Uniform Commercial Code, the Federal Rules of Civil Procedure, the Fair Debt Collection Practices Act and the Uniform Enforcement of Judgments Act. You may also bring a calculator, although the math computations on the exam are basic (points are not deducted for incorrect math calculations).”

[http://www.abcworld.org/faq/]
Peer review issues

A well-written and thought provoking discussion of peer review is attached to your materials at this Roundtable:

WHAT IS THE BEST WAY TO COLLECT AND PROCESS PEER REVIEW?
Just because we can do it, does that mean that we should?

by
Matthew Alan Linde
Doe v. Fla. Bar, 630 F.3d 1336, 1338 (11th Cir. Fla. 2011):

The goal of the Florida Bar's certification process is to recognize in various fields of specialization exceptional attorneys, meaning those who stand out from others in all of the ways that make an attorney outstanding. To ensure that certification achieves its purpose, the Bar has established a body of rules and procedures, including a confidential peer review process, so that an attorney certified in an area of practice truly is "somebody" in that field. Without such rules and procedures, the process, the decisions it produces, and the resulting recognition would not amount to much. Under the Florida Bar's rules, if an applicant successfully completes all the requirements for certification in the chosen field, including receiving satisfactory peer reviews, she is board certified as a "specialist" in that field for a period that lasts no longer than five years. See R. Regulating Fla. Bar 6-3.5 & 6-3.6(a). After that time, she may apply for recertification and, if she does, the process includes another round of confidential peer review. Id. at 6-3.6. The Bar offers certification in some twenty-five different areas of specialization, but in every case the process is a wholly optional one. Id. at 6-3.4(d). Certification is not required as a prerequisite for practicing law in any field. Id. at 6-3.4(b).
Carolyn Zisser was initially certified by the Florida Bar as a marital and family law specialist in 1985. She successfully applied for recertification in 1990 and 1995, but her application for recertification in 2000 was denied on the basis of unsatisfactory peer reviews. Zisser filed an appeal...Due to the passage of time, both the Florida Bar and Zisser stipulated to the dismissal of her appeal without prejudice, and Zisser was allowed to file an entirely new application for recertification in 2005. The Bar's "Marital and Family Law Certification Committee" considered that application and notified her in March of 2006 that it intended to recommend to the "Board of Legal Specialization and Education" that her application be denied, again on the basis of adverse peer review. According to a letter the Committee sent to Zisser, she had received peer ratings of "below average to poor" in a number of categories of assessment. The letter continued:

Apart from the ratings provided by your peers and the judiciary, the committee also considered the supplemental commentary. The unvarying assessment is your tendency to over litigate your cases disproportionate to their size and to overcharge on your fees, resulting in excessive costs creating a financial hardship for clients and a disservice to opposing counsel, the judiciary, and the legal system. Many find your knowledge in the area of family law to be exceptional, but your professional judgment poor. Discourtesy to opposing counsel and instances of unnecessary scheduling difficulties were cited.

[630 F.3d at 1338]
At the hearing before the Board in March 2007, Zisser was accompanied by counsel. The Certification Committee was represented by one of its members, who reiterated the Committee's reasons for recommending that Zisser's application for recertification be denied:

There were numerous—and not isolated, but numerous people who have responded that Ms. Zisser should not be recertified. And as a committee member, I was there witnessing the deliberations, going over the responses, reviewing the responses, and it was—to answer some of Ms. Zisser's concerns, the people that responded to the peer review are preeminent family law attorneys in Jacksonville, there are people who responded who are not preeminent family law attorneys in Jacksonville, and there were judges or judicial officials that responded. It was a very broad range process, and there were numerous, numerous people who responded that Ms. Zisser should not be recertified. Following the hearing, the Board voted to deny both recertification and Zisser's motion to remand.

[630 F.3d at 1339]
Zisser then filed in federal district court this lawsuit against the Florida Bar. She asserted as-applied and facial challenges to the confidential peer review part of the Bar's certification rules, seeking injunctive and declaratory relief under the Due Process Clause of the Fourteenth Amendment. See 28 U.S.C. §§ 2201-02; 42 U.S.C. § 1983. Following a bench trial on a stipulated record, the district court issued an order in March 2010 denying relief and dismissing the case. ... The court concluded that it did not have subject matter jurisdiction to consider Zisser's as-applied challenges to the confidential peer review rules because they were barred by the Rooker-Feldman doctrine. ... As for her facial challenges, the court found that Zisser had failed to satisfy the first element of a procedural due process violation because she had not been deprived of a constitutionally protected property or liberty interest.

[630 F.3d at 1340]
...the facts of the Feldman decision are quite similar to those of this case. The two plaintiffs in Feldman petitioned the District of Columbia Court of Appeals to waive its requirement that bar applicants have graduated from a law school accredited by the American Bar Association. ... The Court reaffirmed its earlier decision in Rooker that federal district courts lack the authority to review final decisions of state courts. Zisser's as-applied challenges to the Florida Bar's rules regarding confidential peer review are clearly barred by Rooker-Feldman.

[630 F.3d at 1340-1341]
Zisser's amended complaint also includes a facial challenge on due process grounds to the Florida Bar's rules requiring confidential peer review as a part of the recertification process. ... Zisser specifically contends that the Bar's rules allowing an applicant to be denied certification or recertification solely on the basis of undisclosed peer review comments deny procedural due process because they do not provide an applicant with sufficient notice as to the content of the statements or the identities of the persons who made them. As a result, an applicant cannot meaningfully challenge an adverse finding based on the peer review process. "A § 1983 action alleging a procedural due process clause violation requires proof of three elements: a deprivation of a constitutionally-protected liberty or property interest; state action; and constitutionally inadequate process." Cryder v. Oxendine, 24 F.3d 175, 177 (11th Cir. 1994). The state action element clearly exists, but Zisser's claim fails because neither certification nor recertification in a field of legal specialization amounts to a cognizable property or liberty interest.

[630 F.3d at 1341-1342]
In Zisser's case, neither the Florida Bar rules, nor any other part of that state's law, create a "legitimate claim of entitlement," Roth, 408 U.S. at 577, 92 S.Ct. at 2709, or a "mutually explicit understanding["]," Perry, 408 U.S. at 601, 92 S.Ct. at 2699. Certification is contingent on a number of factors, including favorable results from a confidential peer review. ... every applicant for certification acknowledges that in a waiver she signs. The waiver Zisser signed stated as follows:

I further understand that the peer review process is unable to serve its purpose unless the individuals from whom information is requested are guaranteed complete confidentiality. By applying for certification, I expressly agree to the confidentiality of the peer review process and expressly waive any right to request any information obtained through peer review at any stage of the certification process.

... For present purposes, the effect of that waiver as a waiver of any federal constitutional rights does not matter. What matters is that the existence of that language reinforces the fact that certification is not an entitlement but instead is contingent on the result of the peer review process, and it reinforces the fact that the identity of the peers doing the reviewing will be kept confidential insofar as state law is concerned. The combination of the rules and the waiver language in the application form operates to preclude any "legitimate claim of entitlement" under state law, ... and any "mutually explicit understanding["], ... that Zisser was entitled to certification without favorable peer review or to know the identities of the peer reviewers. It might be different if an attorney could not practice law without being certified.

[630 F.3d at 1343]
“4.1 An applicant shall submit the names and mailing addresses of the following:

4.1.1 Three lawyers who practice in the same geographic area as the applicant, and one judge of the United States Bankruptcy Court or District Court, chosen by the applicant before whom the applicant has appeared as an advocate in bankruptcy proceedings within the five years immediately preceding application; and

4.1.2 Two different opposing counsel in two contested or adversary proceedings conducted by the applicant within the five years immediately preceding application, if any; and

4.1.3 One bankruptcy trustee whom the applicant has represented in a bankruptcy proceeding within the five years immediately preceding the application; or one bankruptcy trustee or one trustee's attorney in a case in which the applicant represented the debtor within the five years immediately preceding application.

4.2 The Commission may select from among the names of judges and lawyers who practice or preside in the same geographical area as the applicant for further evaluation of the applicant's proficiency in the practice of bankruptcy law.

4.3 References may be asked to submit the names of additional references familiar with the applicant's proficiency.”

[Rule 4.0]
Handling negative peer review

"...California specifically requires that the committee chair “designate one member of the Commission to investigate significant negative responses to assure the responses are related to proficiency and not personality conflicts or other factors.” Arizona requires that any negative information in peer review must be corroborated or substantiated or it will not be used. Under Section III, B of the Texas Attorney Rules and Regulations peer review comments are limited to three years prior to the application and significant negative responses must be investigated to make sure the negative references are related to special competence and not personality conflicts or other factors irrelevant to special competence. However, Florida requires peer review for professionalism, ethics and reputation for professionalism and there is no time or other restrictions on the use of information collected." [footnotes omitted]

[Linde, WHAT IS THE BEST WAY TO COLLECT AND PROCESS PEER REVIEW?, pp. 1-2]
Peer references -- ABC

“The applicant must make a satisfactory showing of qualification in the specialty area through peer review by providing nine references by lawyers familiar with the competence and qualification of the applicant in the specialty area. Four of the lawyers providing references must be bankruptcy or creditors’ rights lawyers and must be familiar with the applicant’s practice (‘Attorney Reference’). Five of the lawyers providing references must have handled a bankruptcy or creditors’ rights matter against the applicant within the three years immediately preceding the application (‘Opposing Counsel Reference’). None of the persons submitting references may be related to the applicant by blood, marriage, or civil union, a current partner or current associate of the applicant, a current member of the ABC Board, or a bankruptcy judge. The applicant may use as references persons who previously applied for certification and used the applicant as a reference (each, a ‘Reciprocal Reference’), provided that in order for the applicant to be considered eligible for certification, at least one reference that is not a Reciprocal Reference must be returned with a positive recommendation, as determined by the Standards Committee, regarding the applicant. ABC may contact any reference to clarify any ambiguity or statement made in the reference. In the event that three or more references are returned with negative recommendations as determined by the Standards Committee, the application shall be denied.”

[http://www.abcworld.org/rules]
"The Internet is great--and it is terrible. Regardless of the way it makes you feel, the Internet has given a pulpit to every preacher, a podium to every politician and a microphone to everyone with an opinion. The age of restaurant reviews and mystery shoppers has also come, at last, to lawyers. ... At the ABC, an applicant supplies as references the names both of attorneys familiar with his or her practice, and of opposing counsel. The ABC's staff then requests each peer's response to a brief questionnaire about the applicant. In addition to questions you would expect about felony convictions, professional misconduct and moral turpitude, most are focused on knowledge and ethics. Do you know of any incidents that reflect a lack of skill, knowledge, proficiency or professionalism in the practice by the applicant (in the specialty field)? Do you recommend the applicant for certification based on the following criteria? (yes, no or insufficient information) (a) knowledge of practice area; (b) advocacy skills (preparation, presentation and consideration of client's interest); and (c) adherence to the ethical standards of practice area attorneys in the community. Do you recommend the applicant for certification (in the specialty field)?"

[Bettie Kelley Sousa, Chair, American Board of Certification, The Benefits of Positive Peer Review, 30-8 ABIJ 92 (Oct. 2011)]
"While no one negative reference necessarily sinks an application, each reference is given weight initially by a 'reader team' of certified lawyers, and then by the Standards Committee as a whole, which is comprised of even more certified lawyers. ...

Psychologists tell us that there are many benefits to making nice. If we act hateful to our adversaries, we are feeling hate with every email, letter, motion hearing, trial and appeal. If we get to know our adversaries, we are less inclined to write off their ideas and compromises as unworkable. We enjoy our jobs better and do a better job when are not pulling punches, and in return, our peers may reward us in a way that matters--with positive peer review."

[Bettie Kelley Sousa, Chair, American Board of Certification, The Benefits of Positive Peer Review, 30-8 ABIJ 92 (Oct. 2011)]
Florida peer review process

"Under the current procedure in Florida, nine unpaid volunteers are appointed to what is identified as an area committee...by the president of the Florida Bar, and each applicant must be a licensed attorney certified in the subject area where the attorney is serving. In the application for certification (the 'Application') the applicant is required to list five attorneys familiar with the applicant. The volunteers then send a Confidential Statement of Reference (CSR) to the attorneys (hence a 'reviewer') identified by the applicant. The CSR requests that the reviewer also list additional attorneys who may be in a position to provide information on the applicant. ... In addition to sending CSRs to the five attorneys identified by the applicant, the AC must solicit information from at least two attorneys identified within the CSRs. However, the AC can collect as much information as it wants on any applicant from any source. A statement within a CSR may come from someone who has personal knowledge of the applicant. However, if one attorney states another attorney knows the applicant, then the AC has no way to know to what extent that statement is true. In other words, the extent of any reviewer’s involvement with the applicant other than the five attorneys listed by the applicant is totally dependent on the reviewer. The AC will not know whether the reviewer spent fifteen minutes with the applicant six years ago or sees the applicant every other week."

[Linde, WHAT IS THE BEST WAY TO COLLECT AND PROCESS PEER REVIEW?, pp. 5-6]
"Inherent protectionist interest"

"When secret peer review was added to the certification plan in 1989, Florida Supreme Court Justice Shaw dissented to this process stating:

I have no quarrel with the general principle that the Bar should be in a position to inform the public of lawyers who have special training and who have demonstrated special competence in a particular field of the law. ... The proposed plan places in the hands of a relatively few certified lawyers, and those able to obtain certification through various waiver provisions, the discretionary power to deny certification to the great mass of practitioners who will no doubt seek to acquire this coveted status. One does not have to be a cynic to realize that there could very quickly develop an inherent protectionist interest in limiting the number of acceptable applicants. Even if we assume that those exercising this discretion will not be influenced by their own interests, the appearance of such is unacceptable." [emphasis omitted]

[Linde, WHAT IS THE BEST WAY TO COLLECT AND PROCESS PEER REVIEW?, pp. 4-5]
Improving peer review?

[More from Linde, WHAT IS THE BEST WAY TO COLLECT AND PROCESS PEER REVIEW?]

Require "time reference" on peer answers. [p. 7]

Avoid "lack of specificity in the questions on Florida Confidential Statement of Reference." [p. 7]

Bring peer review process out in the open (no secret peer review) to avoid "routinely denied certification because of non-falsifiable generalizations." [pp. 7-8]

"Asking attorneys to provide secret information when those providing the information have an inherent conflict of interest because those attorneys are competing for clients in the same market fosters inaccurate and misleading information." [p. 13]

"... review any negative information concerning a litigator as fundamentally suspect." [p. 9]

A "committee that receives negative information" should "verify the information or determine whether the information is related to proficiency." [p. 9]
Allow applicant to address an adverse recommendation from the advisory commission by appearing before the full board and presenting evidence on all issues. This could include longer hearing times, presentation of new or supplementary evidence, representation by counsel, and application of a "preponderance of the evidence standard." [p. 9-10]

Require entire board of certification to review advisory committee recommendation and the entire advisory committee record on the applicant. [p. 9-10]

Permit meaningful judicial (and appellate) review of board of legal specialization determinations. [p. 10]

Consider whether "deeming a minority of negative peer reviews as qualitatively more persuasive than a majority of positive peer reviews is wrong." [p. 13]

Watch out for poison pen peer reviews. "Soliciting information from attorneys who have demonstrated extreme incompetence or gross unprofessionalism in a litigated case against an applicant and then denying that applicant board certification because of that distorted information is wrong." [p. 13]
Thank you!
WHAT IS THE BEST WAY TO COLLECT AND PROCESS PEER REVIEW?

Just because we can do it, does that mean that we should?

Matthew Alan Linde

I. INTRODUCTION.

The history of lawyer specialization in the United States has been reasonably well documented.1 Any litigator who has spent time practicing can discuss the need to improve the technical skills of the members of the bar.2 Several states directly certify licensed attorneys in various specialties.3 While peer review is a component of the state programs, there are significant differences concerning how the peer review information is collected and processed.4

Recently, Zisser v. The Florida Bar, 630 F.3d 1336 (11th Cir. 2011) and Petersen v. The Florida Bar, 720 F.Supp.2d 1351 (M.D. Fla. 2010) have been portrayed as positive developments.5 However, there is much less discussion about whether the peer review procedures implement good policy. When searching Westlaw or Lexis under “legal specialization” and “peer review,” no results from any state other than Florida appear.6 Could the amount of litigation in Florida be related to how Florida collects and processes the peer

3 A list of the various state programs is available at: http://www.americanbar.org/groups/professional_responsibility/committees_commissions/specialization/resources/resources_for_lawyers/sources_of_certification.html
4 Compare §9.0 of the Rules Governing the State Bar of California Program for Certifying Legal Specialists, Section §8 of the Rules and Regulations of the Louisiana Board of Legal Specialization, Section III.B. of the Texas Board of Legal Specialization Attorney Rules and Regulations and Section VI.I. of the Arizona Rules and Regulations of the Arizona Board of Legal Specialization with §2.08 of the Florida Standing Policies of the Board of Legal Specialization and Education and Fla. Bar Reg. R. 6-3.5(c)(6). Exhibit A.
5 See U.S. 11th Circuit upholds constitutionality of certification peer review, The Florida Bar News March 1, 2011; available at: http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/cb53c80c8f0d4b49d85256b5900678f6c/dd39cebb0f8b74d8525783e004a4419!OpenDocument&Highlight=0.zisser*
6 See Zisser v. Florida Bar, 630 F.3d 1336 (11th Cir. 2011); Petersen v. Fla. Bar, 720 F. Supp. 2d 1351, (M.D. Fla. 2010); John Doe v. the Florida Bar, Case No. SC10-1328 (Fla. 2010); Jane Doe v. The Florida Bar, Case No. SC08-904 (Fla. 2008); Fla. Bar. v. Coleman, 936 So.2d 566 (Fla. 2006); The Florida Bar Re: Raymond A. Haas, Case No. SC00-1382 (Fla. March 19, 2001); Fla. Bar. V. Ash, 701 So.2d 552 (Fla. 1997).
review data? For example, California specifically requires that the committee chair “designate one member of the Commission to investigate significant negative responses to assure the responses are related to proficiency and not personality conflicts or other factors.” Arizona requires that any negative information in peer review must be corroborated or substantiated or it will not be used. Under Section III, B of the Texas Attorney Rules and Regulations peer review comments are limited to three years prior to the application and significant negative responses must be investigated to make sure the negative references are related to special competence and not personality conflicts or other factors irrelevant to special competence. However, Florida requires peer review for professionalism, ethics and reputation for professionalism and there is no time or other restrictions on the use of information collected.

The annual report of the Florida Board of Legal Specialization and Education (hence “BLSE”), states that the BLSE is “constantly seeking to improve and enhance the programs it oversees.” This paper discusses specific changes that the BLSE can make to improve the peer review component of the Florida Board Certification process, reduce the litigation in Florida, increase the number of certified attorneys and increase the quality of legal services provided to members of the public. This review will assist other state administrators who are considering improvements to the way peer review information is collected and processed.

II. FLORIDA BOARD CERTIFICATION PROCEDURE FOR COLLECTION AND ANALYSIS OF PEER REVIEW.

The Florida certification process was initially established in 1981 by the Florida Supreme Court. An attorney in good standing with the Florida bar may apply to become board

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7 See Section 9.0 of the Rules Governing the State Bar of California Program for Certifying Legal Specialists.
8 See Section VI.1.4. of Rules and Regulations of the Arizona Board of Legal Specialization.
9 See Fla. Bar. Reg. § 6.3-5(c)(6).
11 See The Florida Bar Re: Amendment to Integration Rule (Certification Plan) 399 So.2d 1385 (Fla. 1981). Two years earlier the Florida Supreme Court disapproved a certification plan in part because “a lawyer who has special training or has in some measurable way demonstrated special competence in a particular field of law should be able to properly advise the public of that fact. In developing the method to do this, however, we must avoid the pitfalls of protectionism, and we must avoid, in particular, a procedure that might allow unfair advantage to one segment of the legal profession. Certification of special competence in a designated field of law requires a fair way to measure this special competence. The measuring or testing technique to determine competency for certification requires lawyers, in most instances, to subjectively judge one another's ability. This, in itself, may lead to a
certified in one or more of twenty-four (24) different areas of law. Only board certified Florida attorneys are permitted to identify themselves as “board certified,” “specialist” or as an “expert” in a given area of law. The rules governing board certification for Florida attorneys are listed in Chapter 6 of the Rules Regulating the Florida Bar.

There are five (5) different qualifications a Florida attorney must meet before that attorney can be certified by the BLSE. Four of the five qualification areas are objective and one area is subjective. The objective requirements are: (a) a minimum of five years in the practice of law; (b) a satisfactory showing of substantial involvement in the field of law for which certification is sought; (c) a passing grade on the examination in the certification area; and (d) satisfaction of the certification areas continuing legal education requirements. There is one suspicion that lawyers who have been accepted within a specialty are using their inside position to foreclose the entry of newcomers.” Emphasis added. See The Florida Bar Re: Amendment to the Integration Rule (Certification Plan); No. 54,081 at page 4. This decision (No. 54,081) was vacated by the Florida Supreme Court when the Florida Bar’s motion for rehearing was granted. See 399 So.2d at 1389.

12 When the certification plan was initially implemented in Florida there was no need for peer review and the minimum requirements for board certification were as follows:

(1) A minimum of five years in the practice of law on a full-time basis. The "practice of law" means full-time legal work performed primarily for purposes of rendering legal advice or representation. Service as a judge of any court of record shall be deemed to constitute the practice of law. Employment by the government of the United States, any state (including subdivisions of the state such as counties or municipalities) or the District of Columbia, and employment by a public or private corporation or other business shall be deemed to constitute the practice of law if the individual was required as a condition of employment, to be a member of the Bar of any state or the District of Columbia.

(2) A satisfactory showing of substantial involvement in the particular area for which certification is sought during three of the last five years preceding the application for certification.

(3) A satisfactory showing of such continuing legal education in a particular field of law for which certification is sought as set by that area's standards, but in no event less than the minimum required under the Florida Designation Plan.

(4) Passing a written and/or oral examination applied uniformly to all applicants to demonstrate sufficient knowledge, skills and proficiency in the area for which certification is sought and in the various areas relating to such field. The award of an LL.M. degree from an approved law school in the area for which certification is sought within eight years of application may substitute as the written examination required in this subsection.

(5) Current certification by an approved organization in the area for which certification is sought within five years of filing an application may, at the option of the certification committee, substitute as partial equivalent credit, including the written examination required in subsection (c)(4). Approval will be by the certification committee with an appeal from denial to the Board.

See The Florida Bar. In re Amendment to Integration Rule (Certification Plan). 414 So.2d 490, 493-494 (Fla. 1982)
subjective area that an attorney must satisfy. The applicant must, in the opinion of nine (9) unpaid volunteers, receive satisfactory peer review in the areas of competence, character, ethics and professionalism in the practice of law. Under the Standing Policies of the BLSE\(^{13}\) (hence “Policy”) Policy 2.13(b), “if a preponderance of the evidence establishes that the applicant meets the requirements for certification, the area committee will recommend approval of the applicant.”

To begin the process, an attorney must complete an initial application for certification and send the application to the Florida Bar with the appropriate fee during a set time period each year.\(^{14}\) As part of the application, the BLSE requires the applicant to agree to the following statement:

\[
\text{I FURTHER UNDERSTAND THAT THE PEER REVIEW PROCESS IS UNABLE TO SERVE ITS PURPOSE UNLESS THE INDIVIDUALS FROM WHOM INFORMATION IS REQUESTED ARE GUARANTEED COMPLETE CONFIDENTIALITY. BY APPLYING FOR CERTIFICATION, I EXPRESSLY AGREE TO THE CONFIDENTIALITY OF THE PEER REVIEW PROCESS AND EXPRESSLY WAIVE ANY RIGHT TO REQUEST ANY INFORMATION OBTAINED THROUGH PEER REVIEW AT ANY STAGE OF THE CERTIFICATION PROCESS.}
\]

However, Fla. Bar Reg. R. 6-3.12 states the following:

All matters including but not limited to applications, references, tests and test scores, files, reports, investigations, hearings, findings, and recommendations shall be confidential so far as consistent with the effective administration of this plan, fairness to the applicant, and due process of law.

When secret peer review was added to the certification plan in 1989, Florida Supreme Court Justice Shaw dissented to this process stating:

I have no quarrel with the general principle that the Bar should be in a position to inform the public of lawyers who have special training and who have demonstrated special competence in a particular field of the law. My problem is with the method by which the Bar seeks to accomplish this altogether commendable goal. I must assume that the overriding objective of certification is to measure the technical competency of lawyers seeking to be certified in a given specialty. If this be the purpose, then an objective test for each area of certification, applicable to all persons seeking certification, would be the

\(^{13}\) Created by the BLSE pursuant to Fla. Bar Reg. 6-3.1(j). This area was added to the certification plan in 1989.

\(^{14}\) Question I.C. requires the applicant to identify what happened to previous applications. Given that after one year the application is confidentially destroyed, what acceptable purpose is there to require the applicant to inform the AC that a previous application has been rejected because of peer review? This practice should be discontinued.
ideal. The proposed plan places in the hands of a relatively few certified lawyers, and those able to obtain certification through various waiver provisions, the discretionary power to deny certification to the great mass of practitioners who will no doubt seek to acquire this coveted status. One does not have to be a cynic to realize that there could very quickly develop an inherent protectionist interest in limiting the number of acceptable applicants. Even if we assume that those exercising this discretion will not be influenced by their own interests, the appearance of such is unacceptable.

In 1979 we disapproved a certification plan submitted by The Florida Bar because, in our view, it did not avoid the "pitfalls of protectionism." The Fla. Bar Re Amendment to the Integration Rule (Certification Plan), No. 54,081 (Fla. Sept. 6, 1979). The proposed plan harbors the same appearance of protectionism that we found unacceptable in the 1979 plan.

I am also uneasy with the procedure whereby the Board of Legal Specialization and Education may find a lawyer ethically ineligible to practice law as a certified lawyer, while at the same time he remains ethically eligible to practice as a non-certified lawyer. Ethics violations under this Court's disciplinary proceedings involve probable cause hearings by a grievance committee, appointment of a referee by this Court, an evidentiary hearing and recommendation by the referee, and review by this Court. As part of the peer review process, the Board of Legal Specialization and Education and its area committees are required to review the applicant's professional ethics and disciplinary record, such review to include both disciplinary complaints and malpractice actions against an applicant. Based upon this review, an applicant otherwise qualified may be denied certification because of ethical shortcomings (in my opinion a form of discipline), without the benefit of the procedural safeguards inherent in disciplinary proceedings. I am concerned with whether such a sweeping and uncircumscribed review of the applicant's ethics is a legitimate concern of a certification plan and whether, as a practical matter, it will be administered with a sufficient degree of uniformity across rural and cosmopolitan areas.

Id. at 1151-1152 emphasis added. Since 1989 “many applicants” have been denied board certification because confidential reviewers have accused applicants of some form of inappropriate conduct.

Under the current procedure in Florida, nine unpaid volunteers are appointed to what is identified as an area committee (hence “AC”) by the president of the Florida Bar, and each applicant must be a licensed attorney certified in the subject area where the attorney is serving. In the application for certification (the “Application”) the applicant is required to list five

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15 See Basic Steps for Good Peer Review, 84 Fla. Bar J. 38 (February 2010). This article was written by Michael G. Tanner, Esq. who as the former chair of the Florida Board of Legal Specialization and Education and would be in a position to comment on the number of applicants denied certification.
attorneys familiar with the applicant. The volunteers then send a Confidential Statement of Reference (CSR) to the attorneys (hence a “reviewer”) identified by the applicant. The CSR requests that the reviewer also list additional attorneys who may be in a position to provide information on the applicant. The Florida CSR is attached as Exhibit B.

In addition to sending CSRs to the five attorneys identified by the applicant, the AC must solicit information from at least two attorneys identified within the CSRs. However, the AC can collect as much information as it wants on any applicant from any source.\(^{16}\) A statement within a CSR may come from someone who has personal knowledge of the applicant. However, if one attorney states another attorney knows the applicant, then the AC has no way to know to what extent that statement is true. In other words, the extent of any reviewer’s involvement with the applicant other than the five attorneys listed by the applicant is totally dependent on the reviewer. The AC will not know whether the reviewer spent fifteen minutes with the applicant six years ago or sees the applicant every other week. Further, a statement at the end of the CSR makes it clear that the reviewer does not need have any direct knowledge about the applicant, but he/she can complete the CSR if the reviewer heard something about the applicant and believes that information to be “true to the best of [the reviewers] knowledge and belief . . . .”\(^{17}\)

Policy 2.13(c) states that if a preponderance of the evidence does not establish that the applicant meets the requirements for certification or recertification, the AC will provide the applicant written notice that a recommendation of denial is under consideration and offer the applicant an opportunity to provide additional supporting documentation.\(^{18}\) Such notice shall

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\(^{16}\) See Rule 2.13(a). Assume that a member of the committee is aware of some individuals who do not like applicant, but no reviewer lists those individuals. The committee member can have a confidential CSR sent to the individuals who do not like the applicant and if those individuals are willing to say they know applicant (even if they have had no contact for years) then those individuals’ CSRs can be the sole basis to deny applicant certification. Given that an area committee can find that one or two CSRs qualitatively outweighs many more positive reviews, the AC can arrive at any conclusion it wants, especially with applicants who primarily litigate.

\(^{17}\) This quote was taken from part of a declaration that a reviewer is asked to sign on the CSR form. If the reviewer believes information is reliable, then the reviewer may list the information on the CSR. The following example would constitute a valid review: Five attorneys are sitting at a bar getting drunk. One attorney tells a story about an applicant. The attorney is inebriated so the story is not completely accurate. Another attorney at the table remembers the story and believes that the person that told the story was a good guy and was telling the truth; that attorney receives a CSR in the mail; he lists what he remembers about the attorney (applicant) on the CSR. The reviewer/attorney does not need to identify how he heard this information. The AC would not know the source of this information if it did not investigate further.

\(^{18}\) There is a lot of room for improvement here. Does it help an applicant to receive comments such as “reviewers said you are more interested in fees than representing your client’s best interests” or that an applicant engaged in “excessive litigation?”
state the basis of concern. With regard to the state legal certification plans, the most litigated issue in the country is Florida’s collection and processing of peer review.

III. IMPROVEMENT OPPORTUNITIES IN PEER REVIEW COLLECTION AND ANALYSIS.

One area where there is room for improvement concerns the lack of specificity in the questions on Florida Confidential Statement of Reference. Question 12, question 13, question 15, question 16, and question 18 of the CSR (Exhibit B) do not specify a time reference. If the AC collects inaccurate data, then the AC will make inaccurate conclusions.

What is the scientific basis that supports the idea an individual will be more truthful if there is no potential consequence resulting from their testimony? While this author has discovered no specific studies that discuss whether people will be more truthful if their testimony is secret, there have been studies that examine whether we can tell if others are telling the truth. Ask yourself this question: how accurate are human beings at determining whether someone is telling the truth?

The answer may surprise you. In an article titled Individual Differences in Judging Deception: Accuracy and Bias, the introductory paragraph reads as follows:

19 Assume that a litigator started practicing law in 2002. Now assume that a reviewer in answering question 13 of the CSR lists (most of which is accurate) an event that occurred in 2002, but fails to date the event. Now assume that several other reviewers list similar events that all occurred in 2002 but also fail to date the events. How exactly does the AC determine whether the litigator “presently” qualifies for board certification in 2012 based on these undated comments? Let us further assume that the applicants name is Ebenezer Scrooge and none of the 2002 behavior descriptions (which occurred before the visits from the ghosts of Christmas past, present and future) accurately describe this applicant’s present behavior. No doubt the unpaid volunteers will assert that they “take this seriously” and “try really hard” but if inaccurate data is collected, then how does the BLSE and AC’s purported effort in analyzing the imprecise data cure the data collection problem?

Further, this is policy schizophrenia. If there really is an attorney who is so unprofessional that the attorney should not qualify for certification despite meeting all objective requirements should not a goal of the certification plan be to encourage the unprofessional attorney to adopt professional behavior? A modified CSR similar to the Texas form should be adopted here. At least Texas requires a reviewer (see Exhibit C) to identify the last professional contact with the applicant. All certification plans should require a reviewer to date negative comments or the comments will not be used.

20 Most hospitals have a method to review hospital operations to identify potential quality-of-care problems and encourage review and evaluation of medical care rendered. See The Peer Review Privilege in Florida The Florida Bar Journal, July/August 1994 at page 61; see also Fla. Stat. 766.101(3)(a). There is a major distinction with the medical peer review privilege and what is happening in the Florida certification plan. With medical review, the goal is to identify specific changes for the future without worrying about litigation resulting from making those improvements. With the Florida certification plan the apparent goal is to coax a reviewer to make comments that reviewer would not dare make in public.

It has been widely believed (indeed, “virtually axiomatic”; Hubell, Mitchell, & Gee, 2001, p. 115) that people are not very accurate at detecting deception. This is the consensus among psychologists who arrange for people to judge lies and truths and to assess the percentage of those lies and truths they correctly detect.

In a large research literature review, overall rates of lie/truth discrimination average less than 55%, when 50% would be expected by chance (Aamodt & Mitchell, 2006). Moreover, accuracy rates vary little across studies (C.F. Bond & DePaulo, 2006).

Researchers have assumed that people vary in the ability to detect lies. Buller and Burgoon (1996) posited that lie detection accuracy depends, in part, on the receiver’s decoding skill; Malone and DePaulo (2001) discussed individual differences in sensitivity to deception; and O’Sullivan (2007) based some recent work on the assumption that “lie detection is an ability that can be measured” (p.118). Presupposing that this ability exists, researchers have attempted to discover the characteristics of people who have unusual lie detection skills. No such characterizes have been uncovered.

With hospital review committees, there is specific behavior that is identified and sought to be corrected. With the Florida legal certification plan, applicants are routinely denied certification because of non-falsifiable generalizations. These non-falsifiable generalizations cannot be specifically discussed with the applicant because then it is believed the anonymous person providing the secret generalizations would no longer provide this information.

The peer review process is especially unfair for applicants who litigate. Unlike a transactional lawyer, with litigators most reviewers are attorneys that a litigator has faced in an adversarial proceeding in court. Some attorneys that a litigator has defeated in court and whom a litigator competes with for business have no incentive to support a litigator’s attempt to become

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22 See for example SC10-1328 Attorney John Doe’s Petition for Review of Specialty Recertification Denial filed by “John Doe” as FN2. Mr. Doe was denied certification allegedly because his work product was “mediocre” his billing practices were “questionable” and Mr. Doe was “more interested in fees than representing his client’s best interests.” Does anyone reading this last comment believe that this comment was related to competence and not a personality conflict with another attorney out to get even with this applicant? In another example, attorney Jeanne L. Coleman was denied recertification because, it was alleged, that her reputation in the legal community was “below average to poor.” Ms. Coleman was accused of engaging in “excessive litigation” and acting “unprofessional.” See Fla. Bar. v. Coleman, 936 So.2d 566 (Fla. 2006).

23 In a paper titled 2011 ABA SPECIALIZATION ROUNDTABLE CREATING A SPECIALITY CERTIFICATION PROGRAM there is an interesting comment on page 11. “Because the references are generally self-selecting, and because in office based counseling specialties (where other attorneys rarely get to look closely at your work), the [California Independent Inquiry and Review] seems so far to have gone relatively unchallenged.” This is an excellent point. With non-litigators is not peer review really a popularity contest?
an “expert” in a given area, especially if the reviewer is not board certified. Why would any attorney competing with a litigator for business and possibly losing to a litigator in a court proceeding file an accurate review on a secret form submitted to an AC so that the litigator can advertise as an expert? Given this inherent conflict, the AC should review any negative information concerning a litigator as fundamentally suspect.

Florida Statute §90.608 allows a party to impeach a witness on the following grounds:

1. Introducing statements of the witness which are inconsistent with the witness's present testimony;
2. Showing that the witness is biased;
3. Proof by other witnesses that material facts are not as testified to by the witness being impeached.

Arizona, California, Louisiana and Texas have each considered impeachment issues and require a committee that receives negative information to verify the information or determine whether the information is related to proficiency. If we have no evidence that people will be more truthful if their testimony is secret, if all scientific evidence suggests that people with face to face contact are not very proficient at determining truth, if applicants have no opportunity to impeach false testimony, then Florida should adopt a process similar to Texas or California.

IV. POST DENIAL PROCEDURE.

The next step for one of the “many applicants” in Florida who have been denied certification solely on the basis of peer review is that the AC submits the record to the BLSE. Under Policy 2.13(g), the BLSE shall review the record and recommendation to determine whether the record supports the recommendation. However, the full BLSE does not review the record. In fact, a “Standards Committee” reviews the record. The Standards Committee (hence SC) consists of six members. It is not clear whether the full SC reviews the peer reviews or

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24 This is not a complete analysis of state programs.
whether a few members of the SC review the peer review of the applicant. The SC reports to the full sixteen (16) member BLSE. The BLSE then votes to approve the SC recommendation. 25

By not reviewing the record, the BLSE is not following its own policies. Under Policy 2.13(f), the “Record” consists of “all material obtained by the Area Committee during its review, investigation, and consideration process.” Under Policy 2.13(g), the BLSE “shall review the record and recommendation of the Area Committee to determine whether the record supports the recommendation.” While the BLSE “may delegate initial review of the record” to a BLSE subcommittee, delegating initial review to a subcommittee does not mean that the BLSE can issue a decision without looking at the “record” as defined by Policy 2.13(f)(2) and mandated by Policy 2.13(g).

Under Policy 2.13(j), an applicant may request to appear in front of the full BLSE if the BLSE affirms the decision of an AC to deny peer review. However, the applicant cannot submit anything that was not submitted to the AC. The applicant will then have ten (10) minutes to address the BLSE. Unless an individual board member has requested to review the peer reviews on the applicant when the applicant addresses the full BLSE, only some or all of the SC will have actually seen the peer reviews. 26 After the applicant has verbally argued his or her case, an AC member will assure the BLSE that the AC did the correct thing and the BLSE will immediately vote in private on whether to overrule the SC recommendation or uphold the AC and the SC. If the BLSE votes to approve the SC under Policy 2.13(o), then the applicant can only appeal “procedural rights as provided elsewhere in these policies.”

Under Policy 4.03(b), the applicant may appeal to the Appeals Committee (hence “ApC”). “However, the applicant has the burden of showing arbitrary, capricious or fraudulent denial of procedural rights or misapplication of BLSE policies or Rules Regulating the Florida Bar.” If the AC applies a beyond-a-reasonable-doubt standard or a clear-and convincing standard to the peer review instead of a preponderance of the evidence standard, there is no way to know. If the AC routinely asserts that a minority of peer reviews “qualitatively” outweigh many more peer reviews solely because the peer reviews are negative there is no way to know.

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25 Since the full BLSE has not seen the evidence that the SC has reviewed, it is not clear how the BLSE could do anything other than vote to approve the SC recommendation.

26 Id.
The BSLE and the Florida Board of Governors\(^27\) have set up a process to ensure that there is no review of any BLSE decisions on peer review. First, an applicant cannot apply for certification unless he/she waives any right to see the peer review; second, the normal practice despite Policy 2.13(g) is that the BSLE does not see the peer reviews, only some or all of the subcommittee of six (6) BLSE members does; third, once the applicant receives a derogatory letter from the AC based on peer review, the applicant has the burden to prove that the peer review \textbf{that the applicant cannot see} was improperly evaluated by the AC and the subcommittee of the BSLE; finally the ApC, the Florida Board of Governors and the Florida Supreme Court cannot see the peer reviews to decide whether an applicant’s allegations concerning standard of proof applied to reviews have any merit.\(^28\) Unlike the Florida Certification Plan, Policy 4.03(b) was never adopted or approved by the Florida Supreme Court.

\section*{V. ALL POTENTIAL PROBLEMS WILL NOT BE CORRECTLY RESOLVED JUST BECAUSE BOARD CERTIFIED LAWYERS ARE INVOLVED.}

In 1963 Yale University psychologist Stanley Milgram conducted an experiment to see what would happen if people were told to take action that they believed was wrong:

The volunteer subject was given the role of teacher, and the confederate (an actor), the role of learner. The participants drew slips of paper to 'determine' their roles. Unknown to the subject, both slips said "teacher", and the actor claimed to have the slip that read "learner", thus guaranteeing that the participant would always be the "teacher". At this point, the "teacher" and "learner" were separated into different rooms where they could communicate but not see each other. In one version of the experiment, the confederate was sure to mention to the participant that he had a heart condition.

\(^{27}\) See The Florida Bar Board of Governors Regular Minutes dated December 5, 2003 available at www.flabar.org.
\(^{28}\) The BLSE has implied that the reason for this Policy is that further review would endanger peer review and the perception may be that the CSR are not confidential if this review is allowed. See The Florida Bar News, July 1, 2003 at http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/cb53c80e8fadb49d85256b5900678f6c/92d187b99f2c028a85256d4f0048d23b!OpenDocument&Highlight=0.board,certification*. Effectively there is one level of review. Appellate courts make errors all the time; that is why there is a Florida and a US Supreme Court, and judging by the number of opinions from the supreme courts, there is a lot of error. However, here we don’t have an appellate court we have a group of unpaid volunteers who do this in addition to their full time jobs. Thus, a court level of review is more important. Further, the current appeals above the BLSE are restricted to procedural matters. Thus, the BLSE knows that nothing it does concerning peer review is subject to any review. Is it possible that this knowledge has contributed to decreased diligence concerning peer review? After all, these are unpaid volunteers; what incentive is there to spend extra unpaid time attempting to ensure fairness when no one will know about the extra time spent?
The "teacher" was given an electric shock from the electro-shock generator as a sample of the shock that the "learner" would supposedly receive during the experiment. The "teacher" was then given a list of word pairs which he was to teach the learner. The teacher began by reading the list of word pairs to the learner. The teacher would then read the first word of each pair and read four possible answers. The learner would press a button to indicate his response. If the answer was incorrect, the teacher would administer a shock to the learner, with the voltage increasing in 15-volt increments for each wrong answer. If correct, the teacher would read the next word pair.

The subjects believed that for each wrong answer, the learner was receiving actual shocks. In reality, there were no shocks. After the confederate was separated from the subject, the confederate set up a tape recorder integrated with the electro-shock generator, which played pre-recorded sounds for each shock level. After a number of voltage level increases, the actor started to bang on the wall that separated him from the subject. After several times banging on the wall and complaining about his heart condition, all responses by the learner would cease.

At this point, many people indicated their desire to stop the experiment and check on the learner. Some test subjects paused at 135 volts and began to question the purpose of the experiment. Most continued after being assured that they would not be held responsible. A few subjects began to laugh nervously or exhibit other signs of extreme stress once they heard the screams of pain coming from the learner.

If at any time the subject indicated his desire to halt the experiment, he was given a succession of verbal prods by the experimenter, in this order: (a) Please continue; (b) The experiment requires that you continue; (c) It is absolutely essential that you continue; (d) You have no other choice, you must go on.

If the subject still wished to stop after all four successive verbal prods, the experiment was halted. Otherwise, it was halted after the subject had given the maximum 450-volt shock three times in succession.

Before conducting the experiment, Milgram polled fourteen Yale University senior-year psychology majors to predict the behavior of 100 hypothetical teachers. All of the poll respondents believed that only a very small fraction of teachers (the range was from zero to 3 out of 100, with an average of 1.2) would be prepared to inflict the maximum voltage. Milgram also informally polled his colleagues and found that they, too, believed very few subjects would progress beyond a very strong shock.

In Milgram's first set of experiments, 65 percent (26 of 40) of experiment participants administered the experiment's final massive 450-volt shock, though many were very uncomfortable doing so; at some point, every participant paused
and questioned the experiment, some said they would refund the money they were paid for participating in the experiment.

Milgram summarized the experiment in his 1974 article, "The Perils of Obedience" writing:

The legal and philosophic aspects of obedience are of enormous importance, but they say very little about how most people behave in concrete situations. I set up a simple experiment at Yale University to test how much pain an ordinary citizen would inflict on another person simply because he was ordered to by an experimental scientist. Stark authority was pitted against the subjects' strongest moral imperatives against hurting others, and, with the subjects' ears ringing with the screams of the victims, authority won more often than not. The extreme willingness of adults to go to almost any lengths on the command of an authority constitutes the chief finding of the study and the fact most urgently demanding explanation.

Ordinary people, simply doing their jobs, and without any particular hostility on their part, can become agents in a terrible destructive process. Moreover, even when the destructive effects of their work become patently clear, and they are asked to carry out actions incompatible with fundamental standards of morality, relatively few people have the resources needed to resist authority.

Encouraging people to give secret testimony and taking action upon that testimony without giving the accused an opportunity to respond to anything other than non-falsifiable generalizations is wrong. The AC’s action of arbitrary deeming a minority of negative peer reviews as qualitatively more persuasive than a majority of positive peer reviews is wrong. Soliciting information with no time frame identified fosters gross inaccuracies, and is wrong. Soliciting information from attorneys who have demonstrated extreme incompetence or gross unprofessionalism in a litigated case against an applicant and then denying that applicant board certification because of that distorted information is wrong. Allowing a reviewer to file a review with no direct knowledge creates an environment for libel, and is wrong. Asking attorneys to provide secret information when those providing the information have an inherent conflict of interest because those attorneys are competing for clients in the same market fosters inaccurate and misleading information. The list could go on and on.

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29 Or told this is the way this is supposed to be done because it has always been done this way.
31 In other words, “we have met the enemy and they are us.” There is no justification in the Judeo-Christian history of this nation for the state to encourage witnesses to give testimony under the promise that they will never be
VI. DO WE WANT MORE CERTIFIED LAWYERS?

Is not a major purpose behind the certification process\(^{32}\) to provide better legal services to members of the public? If the public benefits from more certified lawyers, then Florida has major problems in its future as demonstrated in the diagram below.\(^{33}\) According to the Florida Bar, in 1999 there were 59,918 attorneys licensed to practice law. In 2011 there are 74,770 attorneys who can actively practice law. Thus, from 1999 to 2011 the number of licensed attorneys increased 24.79%.

<table>
<thead>
<tr>
<th></th>
<th>1999</th>
<th>2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>Florida Members of the Bar</td>
<td>59,918</td>
<td>74,770</td>
</tr>
<tr>
<td>Tax law</td>
<td>278</td>
<td>253</td>
</tr>
<tr>
<td>Civil trial</td>
<td>1,103</td>
<td>1,073</td>
</tr>
<tr>
<td>Wills, trusts and estates</td>
<td>301</td>
<td>337</td>
</tr>
</tbody>
</table>

Several things are clear from the diagram. First, important substantive areas have decreased as a percentage of the total attorneys from 1999 to 2011.\(^{34}\) The members of the bar increased 24.79%, while the number of tax lawyers actually decreased in real terms (278 were certified in 1999, but only 253 are certified in 2011). Thus, in 1999 .46% of lawyers were certified in tax law. In 2011 .39% of lawyers are certified in tax law. This is decrease of 27% of the total number of certified tax lawyers and these lawyers are serving a much larger population. There were 301 certified WT&E lawyers in 1999 and there are 337 in 2011. Thus, from 1981 (the year the certification plan was adopted in Florida) through 1999 the number of certified WT&E lawyers went from 0 to 301. However, from 1999 through 2011 the number increased by 36.\(^{35}\) Further, as a percentage of certified lawyers, the total percentage has gone down. In 1999 accountable for their statements. In fact, in ancient Israel the “hands of the witnesses” were directly involved in the consequences of their testimony. See Deuteronomy 17:7. There is not one example in the Torah or the Bible where man is encouraged to set up a process where individuals are assured secrecy for bearing witness against their neighbor especially when those individuals have an economic or other improper incentive to do so. “In order for evil to flourish, all that is required is for good men [and women] to do nothing.” Edward Burke.

32 See FN 2 supra.
33 This information was taken from various articles published within the Florida Bar Journal, which is available at www.lexis.com.
34 These three areas were selected only because the author practices in each of these areas.
35 Now reread Justice Shaw’s dissent to the certification plan printed on page 4.
.502% of the lawyers actually practicing were certified in WT&E, but in 2011 only .450% are certified. That is a decrease as a percentage of the total certified WT&E lawyers practicing of 10.28%. Over the next ten years in Florida there is likely to be a huge decrease in the percentage of WT&E lawyers certified because of the number of certified lawyers in their 60s. All this litigation in Florida related to peer review is not increasing the applications, and there is a need for more certified lawyers because of the large amount of malpractice in this area.

VII. CONCLUSION.

State certification plans benefit the attorneys involved and increase the quality of legal services provided to members of the public. However, many of the assumptions underlying the collection and processing of peer review in the certification plans have no scientific basis. State certification plans vary concerning how the plans collect and process peer review. The peer review component of the Florida Certification Plan is the most litigated certification issue in the country. There are improvements that Florida can implement that will make the collection and processing of peer review data more accurate. Those improvements are listed below.

The Florida CSRs should designate a time frame for the information collected. Attorneys should not be allowed to fill out a CSR unless that attorney has direct knowledge of an applicant’s behavior. Florida Bar Reg. R. 6-3.5, Policy 2.13(o) and Policy 4.03(b) of the Florida certification plan provide too much discretion to each AC allowing an AC to reach any results it wants to reach with litigators. The Florida ACs should be required to investigate negative comments similar to the requirements of the California and Texas certification plans in order to filter peer review that is related to personality conflicts and not related to competence. The BLSE also should amend Policy 2.13(o) and Policy 4.03(b) to allow the ApC, the Board of Governors and the Florida Supreme Court to see an applicant’s peer review. These changes will improve the peer review component of the Florida Board Certification process, reduce the litigation in Florida, increase the number of certified attorneys and increase the quality of legal services provided to members of the public.
RULES GOVERNING THE STATE BAR OF CALIFORNIA PROGRAM FOR CERTIFYING LEGAL SPECIALISTS

9.0 Independent Inquiry and Review - The appropriate Commission shall conduct an independent inquiry and review of each applicant.

9.1 References - Each applicant shall be required to submit the names of three attorneys or judges to serve as references who are familiar with the tasks upon which the applicant has relied to satisfy the task requirement, except where the number and type of references are set forth in the individual specialty standards. Each reference shall be asked to submit the names of two additional references familiar with the applicant’s proficiency. The Commission may seek additional references from other persons familiar with the tasks described in the individual standards. The references shall be sent a questionnaire. The references shall not include any attorney who is associated with the applicant, including clients, relatives, current partners, associates, employers or employees of the applicant.

9.2 Minimum Number of Favorable References - An application shall not be acted upon until a minimum of five favorable references have been received, except Criminal Law, where a minimum of eight favorable references are required for action. To be considered, the references must also be eligible pursuant to the criteria set forth in section 9.1 above. The Commission may, in its discretion, act upon an application that has been pending for longer than one year even if the minimum number of favorable references has not been received. In appropriate instances of limitations on the applicant’s practice by reason of geographical location, limited nature of practice, or similar reasons, the Commission may, in its discretion, reduce the number of references required to a minimum of two persons. If, within 30 days of the mailing of the initial reference forms, five favorable responses have not been received, the applicant shall be so notified and may be requested to provide additional references.

9.3 Evaluation Criteria - The Commission shall consider whether the applicant has achieved recognition as having a level of competence indicating proficient performance in handling the usual matters in the specialty field and conforms his or her conduct to the California Rules of Professional Conduct. Such consideration shall be based on relevant criteria which the Commission deems appropriate to take into account prior to making its recommendation to the Board, including:

9.3.1 the applicant’s work product, problem analysis, and statement of issues and analysis;
9.3.2 felony convictions;
9.3.3 final disciplinary actions imposed for professional misconduct by any court or body before whom the applicant appears;
9.3.4 resignation from any bar, court or body before whom the applicant appears;
9.3.5 three or more judgments of professional negligence filed in a 12-month period;
9.3.6 sanctions, other than discovery sanctions, of $1,000 or more entered against the applicant by any court or body before whom the applicant appears;
9.3.7 findings of contempt by any court or body before whom the applicant appears.
An applicant or certified specialist shall have a continuing duty to disclose the foregoing matters as provided by section 3.3 of these Rules. In determining whether or not an attorney conforms his or her conduct to the Rules of Professional Conduct, the Commission will make an independent assessment concerning how such conduct bears on an attorney’s qualification to obtain or maintain certification. The Commission may only find an applicant to have not successfully completed independent inquiry and review on the basis of substantial and credible information received in the independent inquiry and review of the applicant.

9.4 Negative or Adverse Responses In the event that two references indicate that the applicant does not demonstrate proficiency in the specialty field, or if a serious question is raised concerning the applicant’s demonstrated proficiency in the specialty field, further information may be sought. The chair will designate one member of the Commission to investigate significant negative responses to assure that they are related to proficiency and not to personality conflicts or other factors irrelevant to proficiency. The designated member will make reasonable efforts to contact the source or sources of negative or adverse comments and to obtain independent verification of the negative and adverse comments. The designated member will be the only person authorized to seek additional information on behalf of the Commission. Whenever possible, the Commission will not place continuing and exclusive reliance on the same sources of information in evaluating various applicants from any given geographic area.

9.5 Oral Interview

9.5.1 The purpose of an oral interview is to provide an applicant with a reasonable opportunity to respond to adverse information and to present any additional information which may support his or her qualifications. It is not a hearing and the applicant is not entitled to have counsel present during the interview. In the event that a recommendation of not qualified is being considered, the Advisory Commission or Board shall request an oral interview with the applicant at a time and place it designates. The oral interview should be held only after the Advisory Commission or Board receives a substantial part of the relevant information and should allow sufficient time prior to the interview for the applicant’s rebuttal of any adverse comments. The applicant should be notified, as specifically as possible without any breach of confidentiality as provided for in these Rules, of the subject matter of substantial and credible adverse allegations that the Advisory Commission or Board has received regarding the applicant’s qualifications that would, unless rebutted, be determinative of the applicant’s being not qualified.

9.5.2 At the interview, all relevant factors, including both positive and negative information, should be discussed with the applicant. After the interview, an applicant may submit additional information in response to adverse allegations raised in the interview. This section shall not be construed as permitting the disclosure to the applicant of information from which the applicant may infer the source, and no information shall either be disclosed to the applicant or be obtained by any process which would jeopardize the confidentiality of communications for persons whose opinion has been sought on the candidate’s qualifications.

9.5.3 Upon request by an applicant and at the applicant’s expense, the interview may be tape recorded or reported by a court reporter. The tape or transcript shall be the property of the State Bar.
RULES AND REGULATIONS OF THE LOUISIANA BOARD OF LEGAL SPECIALIZATION

8. INDEPENDENT INQUIRY.

8.1 Timing. After the applicant has satisfied all other requirements established for recognition, but prior to recognition, the Advisory Commission shall conduct an independent inquiry and review of the applicant. An applicant for renewal must submit a completed and notarized Application for Renewal Certification in the form specified by the Board. The Advisory Commission may make an independent inquiry and review of a renewal applicant as it deems appropriate.”

8.2 Criteria. The independent inquiry and review shall consider information furnished by references and other information which the Advisory Commission deems relevant to demonstrate whether the applicant has achieved recognition as having a level of competence indicating proficient performance and handling the usual matters of the specialty field. Such information may include the applicant's work product, problem analysis, statement of issues and analysis or such other criteria which the Advisory Commission deems appropriate to take into account prior to making its recommendation.

8.3 References. An applicant shall submit to the Board the names and addresses of at least five persons who are lawyers who can attest to the applicant's competence in the specialty field in which recognition is sought.

a. References must be fairly representative of various facets of the practice in the specialty field involved.

b. The Board and the Advisory Commission reserve the right to request further references.

8.4 Limitations. An applicant shall not submit as a reference the name of any lawyer who fits in the following categories:

a. A reference who is related by blood or marriage to the applicant;

b. More than one reference who is, or, within the year immediately preceding the filing of the application for recognition was a partner, associate of, or co-worker with the applicant; or

c. A reference who is serving or has served within the three (3) years immediately preceding the filing of the application for recognition, on the Board or the Advisory Commission for the specialty field in which recognition is sought.

8.5 Forms. All individuals listed as references by the applicant shall be furnished with forms for statements of reference by the applicant. All such forms shall be sent directly by the reference to the Executive Director of the Louisiana Board of Legal Specialization at the address provided by the applicant. Reference statements are not to be sent to the applicant and will not be accepted if sent to the Board by the applicant.

8.6 Reservation of further review. The Board and the Advisory Commission reserve the right to engage in an independent inquiry as to the applicant's overall competence and competence in the specialty field in which recognition or renewal is sought. In the event any information is received
which indicates the applicant may not have achieved an acceptable standard of competence in the field in which recognition is sought, then in such event, the Board or the Advisory Commission shall engage in an independent inquiry as to the issues reflecting adversely on the applicant's competence.

8.7 Publication of applications. The names of those seeking to qualify shall be released for publication and shall be published in the Louisiana Bar Journal. Within thirty (30) days after such publication, any person may comment upon the applicant's qualifications. Such comments shall be considered as part of the independent inquiry and review process. Publication shall take place only after all requirements, other than independent inquiry and review have been met.

8.8 Evaluation. An application shall not be acted upon until the minimum number of references required by the individual standards have been received and the comment period following publication has expired. In the event that two references indicate that the attorney has not demonstrated proficiency in the specialty field, or if a serious question in the exclusive discretion of the Board or Advisory Commission is raised concerning the applicant's demonstrated proficiency in the specialty field, the Board or Advisory Commission shall seek further information. Negative responses shall be investigated to assure they are related to competence and not to personality conflicts or other factors irrelevant to competence.

8.9 Oral interview. If the Board or Advisory Commission desires further information, it may request that applicant appear for an oral interview.

8.10 Review and recommendation. At the next meeting of the Advisory Commission after receipt of the minimum number of references or after the comment date following publication expires, whichever occurs later, the Advisory Commission shall review the application. In the event of a recommendation for denial of specialty recognition, the Advisory Commission's recommendations shall not be forwarded to the Board until the Advisory Commission has complied with the provisions of Section 10 of these rules and regulations. In the event that the review is delayed, each applicant so affected shall be notified of the delay.
TEXAS PLAN FOR RECOGNITION AND REGULATION OF SPECIALIZATION IN THE LAW

SECTION III - PEER REVIEW

A. TYPES OF REFERENCES.

1. An applicant shall submit names and addresses of attorneys and judges, not his or her partners, shareholders, employees or associates, who can attest to his or her competence in a specialty area, in accordance with the Standards.
2. A certification applicant described in Section I, B, 1. c of these Rules is not required to submit references unless deemed necessary by TBLS.
3. TBLS may solicit at random additional attorneys and/or judges to attest to the applicant's competence.
4. Absent a specific determination by TBLS or its designee to the contrary, no more than a total of 15 Statements of Reference may be solicited on an individual applicant.
5. Statements of Reference shall be submitted on forms approved and furnished by TBLS. All Statements of Reference received by TBLS shall be confidential.

B. EVALUATION OF REFERENCES.

TBLS shall review the Statements of Reference received for an applicant to determine whether he or she has demonstrated sufficient knowledge, skills, and abilities in the specialty area, and whether his or her conduct conforms to that required by the Texas Disciplinary Rules of Professional Conduct (TDRPC). All Statements of Reference received by TBLS shall be confidential.

1. Minimum Number of Favorable References. A favorable reference is one in which the respondent: (i) works in the specialty area; (ii) is familiar with the applicant's work in the specialty area; (iii) based on a scale of 1-5, has rated the applicant's skills and knowledge of the specialty area at an average of 3.0 or greater; and (iv) has affirmed that the applicant should be certified in the specialty area. TBLS may approve an applicant with fewer favorable references than those specified in the applicable portion of Section III, B, 1. a-b of these Rules only on a finding that an applicant's practice is limited because of geographical location, nature of practice, or similar reasons.

   a. Certification.

      (1) A certification applicant shall submit the names and addresses of persons with whom he or she has had dealings in the 3 years immediately preceding application.

      (2) A certification applicant in the specialty areas of Criminal Law, Civil Trial Law, Family Law, Juvenile Law, and Personal Injury Trial Law shall receive a minimum of 5 favorable references.
(3) A certification applicant in any other specialty area not listed in Section III, B, 1, a of these Rules shall receive a minimum of 3 favorable references.

b. Recertification.

(1) A recertification applicant shall submit the names and addresses of persons with whom he or she has had dealings since certification or the most recent recertification.

(2) A recertification applicant in any specialty area shall receive a minimum of 3 favorable references.

2. Negative or Adverse Responses. TBLS shall seek additional information on an applicant at any time during the year of application or recertification if: (i) two references indicate that the applicant does not demonstrate special competence in the specialty area; (ii) a serious question is raised concerning the applicant’s special competence in the specialty area; or (iii) the applicant has failed to conform his or her conduct to the TDRPC. TBLS shall seek this additional information even if this applicant has received the requisite number of favorable references. Significant negative responses shall be investigated to assure that they are related to special competence or failure to abide by the TDRPC and not to personality conflicts or other factors irrelevant to special competence. Reasonable efforts shall be made to contact the source or sources of negative or adverse comments and reasonable efforts shall be made to obtain independent verification of the negative or adverse comments. Whenever possible, continuing and exclusive reliance shall not be placed on the same source of information in evaluating various applicants from any given geographical area.

3. Denial Based on Statements of Reference. An applicant may be denied if he or she receives fewer than the requisite number of favorable reference responses or on the basis of substantial and credible information received in the peer review process that reflects that he or she does not demonstrate special competence. All Statements of Reference received by TBLS shall be confidential.
RULES AND REGULATIONS OF THE ARIZONA BOARD OF LEGAL SPECIALIZATION

I. Peer Review

1. With each application, the applicant will submit the names of at least five Arizona attorneys, other professionals* who practice in the field, and/or judges before whom the applicant has appeared, familiar with the applicant’s practice, and not including current partners or associates. (*Other professionals may only be included in the list of references where approval has been authorized in the Standards for Certification in the applicable specialty field.) The Advisory Commission will select at least five additional Arizona lawyers, judges, or qualified professionals as references from cases/matters/projects submitted by the applicant. The references will be requested to provide written comments concerning the applicant not only on such specific topics as knowledge, skill, thoroughness, preparation, effectiveness and judgment, but also concerning the applicant’s ethics and professionalism. References who provide negative and/or adverse comments concerning an applicant should be requested to provide the factual basis and any substantiating information for them. Names of applicants will be published in a State Bar publication, providing an opportunity for comment, at least 30 days before consideration of applications by the Advisory Commission. Reference names supplied by the applicant shall not include members of the Board of Legal Specialization or Advisory Commission. The Advisory Commission may also consult other sources. Documentation of all matters and comments considered by the Advisory Commission shall be contained in the applicant’s file.

2. Applicant may be asked to supplement the record with additional names for peer review if necessary.

3. Advisory Commission may investigate, research, substantiate, and corroborate any information provided in peer review letters which may help them make a recommendation. No anonymous peer review comments will be considered by the Advisory Commission or the Board of Legal Specialization.

4. If negative and/or adverse information concerning an applicant is provided by a reference, or any other source, on the basis that the identity of the source of the information be retained in confidence and not be disclosed, an investigation will be conducted to attempt to substantiate or corroborate the accuracy of the information. If the information is corroborated or substantiated, then it may be considered by the Advisory Commission or the Board of Legal Specialization. If the investigation is unable to substantiate or corroborate the adverse information provided by the source requesting confidentiality, then the information may not be considered by the Advisory Commission or the Board of Legal Specialization.
2.08 PEER REVIEW

Each applicant shall submit names of lawyers and judges who can attest to the applicant's special competence and substantial involvement in the practice of law in which certification is sought, as well as the applicant's character, ethics, and reputation for professionalism, in accordance with the area standards and rule 6-3.5(c)(6).

(a) The BLSE or certification committee may solicit statements from additional lawyers and/or judges.

(b) Statements of reference concerning applicants shall be submitted on forms furnished by the BLSE.

(c) No member of the board of governors ("BoG") or officer of The Florida Bar, appeals committee (AC), BLSE, or certification committee shall submit a reference for an applicant. Members of the Supreme Court of Florida shall also be excluded from the solicitation of statements of reference.
Rule 6-3.5. Standards for Certification

(a) Standards for Certification. --The minimum standards for certification are prescribed below. Each area of certification established under this chapter may contain higher or additional standards if approved by the Supreme Court of Florida.

(b) Eligibility for Application. --A member in good standing of The Florida Bar who is currently engaged in the practice of law and who meets the area's standards may apply for certification. From the date the application is filed to the date the certificate is issued, the applicant must continue to practice law and remain a member in good standing of The Florida Bar. The certificate issued by the board of legal specialization and education shall state that the lawyer is a "Board Certified (area of certification) Lawyer."

(c) Minimum Requirements for Qualifying for Certification With Examination. --Minimum requirements for qualifying for certification by examination are as follows:

1. A minimum of 5 years substantially engaged in the practice of law. The "practice of law" means legal work performed primarily for purposes of rendering legal advice or representation. Service as a judge of any court of record shall be deemed to constitute the practice of law. Employment by the government of the United States, any state (including subdivisions of the state such as counties or municipalities), or the District of Columbia, and employment by a public or private corporation or other business shall be deemed to constitute the practice of law if the individual was required as a condition of employment to be a member of the bar of any state or the District of Columbia. If otherwise permitted in the particular standards for the area in which certification is sought, the practice of law in a foreign nation state, U.S. territory, or U.S. protectorate, or employment in a position that requires as a condition of employment that the employee be licensed to practice law in such foreign nation state, U.S. territory, or U.S. protectorate, shall be counted as up to, but no more than, 3 of the 5 years required for certification.

2. A satisfactory showing of substantial involvement in the particular area for which certification is sought during 3 of the last 5 years preceding the application for certification.

3. A satisfactory showing of such continuing legal education in a particular field of law for which certification is sought as set by that area's standards but in no event less than 10 certification hours per year.
(4) Passing a written and/or oral examination applied uniformly to all applicants to demonstrate sufficient knowledge, skills, and proficiency in the area for which certification is sought and in the various areas relating to such field. The examination shall include professional responsibility and ethics. The award of an LL.M. degree from an approved law school in the area for which certification is sought within 8 years of application may substitute as the written examination required in this subdivision if the area's standards so provide.

(5) Current certification by an approved organization in the area for which certification is sought within 5 years of filing an application may, at the option of the certification committee, substitute as partial equivalent credit, including the written examination required in subdivision (c)(4). Approval will be by the board of legal specialization and education following a positive or negative recommendation from the certification committee.

(6) Peer review shall be used to solicit information to assess competence in the specialty field, and professionalism and ethics in the practice of law. To qualify for board certification, an applicant must be recognized as having achieved a level of competence indicating special knowledge, skills, and proficiency in handling the usual matters in the specialty field. The applicant shall also be evaluated as to character, ethics, and reputation for professionalism. An applicant otherwise qualified may be denied certification on the basis of peer review. Certification may also be withheld pending the outcome of any disciplinary complaint or malpractice action.

As part of the peer review process, the board of legal specialization and education and its area committees shall review an applicant's professionalism, ethics, and disciplinary record. Such review shall include both disciplinary complaints and malpractice actions. The process may also include solicitation of public input and independent inquiry apart from written references. Peer review is mandatory for all applicants and may not be eliminated by equivalents.
CONFIDENTIAL STATEMENT OF REFERENCE

To: ______________________________________

For the certification application: __________________________________________

Practicing in the city of: ________________________________________________

If you do not know the applicant’s professional qualifications well enough to complete this statement of reference, please check here and sign and return this form in the enclosed envelope.

1. Are you a Judge, Mediator, Arbitrator or Administrator before whom the applicant has appeared? Yes No

2. Do you practice law in the same geographical area as the applicant? Yes No

3. Are you now a partner or associate of the applicant? Yes No

4. Are you related by blood or marriage to the applicant? Yes No

5. Are you a lawyer with whom or against whom the applicant has been involved in matters of significant wills, trusts and estates law issues? Yes No

6. What are the major areas of your law practice? __________________________________________________________

7. Are you board certified? If so, in what area is your certification? ___________________________________________

8. What percentage of your law practice is devoted to wills, trusts and estates law? _____ %

9. How long have you been acquainted with the applicant? _____ (year)

10. Have you been associated with the applicant in the practice of law? Yes No
    If so, how?

11. Your observations of the applicant’s ability to handle wills, trusts and estates law matters include his/her actions as: (circle all that apply) co-counsel; adversary; speaker in wills, trusts and estates law programs; other: _________________________________________________________________

12. Please state your opinion of both the applicant’s ability to handle wills, trusts and estates law matters and the applicant’s reputation as a wills, trusts and estates law attorney among lawyers and non-lawyers.

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

If responding “yes” to any of the following questions, please fully explain your answer.

13. Are there any incidents in the applicant’s law practice which, in your opinion, reflect conduct which has been undignified or discourteous to the court or towards opposing counsel?

   No Yes

Sample – Do Not Submit
14. Are you aware of any facts or circumstances which indicate the applicant is not presently able to represent clients with the competency and professionalism expected of a board certified attorney?

No    Yes

15. Are there any incidents in the applicant's law practice which, in your opinion, reflect insufficient skills, knowledge, proficiency or ethics in the practice of wills, trusts and estates law such that you have some doubt about the applicant's entitlement to board certification?

No    Yes

16. Please rate the applicant as to the criteria listed below in comparison to wills, trusts and estates law attorneys with whose practices you are familiar. Please use the following ratings:

5 = Outstanding; 4 = Above Average; 3 = Average; 2 = Below Average; 1 = Poor; 0 = Unknown.

➢ Technical knowledge:

➢ Ability to apply technical knowledge to factual problems:

➢ Preparation and completion of matters taken on:

➢ Reputation in the legal community for ethical conduct:

17. Please list the names and addresses of three other persons who might have particular knowledge about the applicant's practice of wills, trusts and estates law and could be asked questions similar to those on this reference form:

a. 

b. 

c. 

18. Do you recommend this applicant for board certification in wills, trusts and estates law, thereby affirming his or her "special knowledge, skills and proficiency" in wills, trusts and estates law as well as his/her character, ethics and reputation for professionalism in the practice of law? If not, please explain your reasons.

Yes    No

I declare that I have read the foregoing answers and the facts stated in them (i) are true where given from personal knowledge; (ii) are true to the best of my knowledge and belief where given from information received from others, or sources which I believe to be reliable; and (iii) have not been secured from the applicant, the applicant's family or any other person submitting a reference on this applicant. I further declare that I have attached separate documentation, if applicable, which details other information of which the Committee and Board should be aware in assessing the qualifications of this applicant. Finally, I understand that all information provided is confidential and will not be disclosed to the applicant. I make this declaration pursuant to section 92.525, Florida Statutes, and under penalties of perjury.

Signature

Date

Should you have any questions, please contact the wills, trusts and estates law certification staff liaison, Stacey Piland, at either 850/661-3141 or through e-mail at <spiland@flabar.org>.
CONFIDENTIAL STATEMENT OF REFERENCE

To: RE:

The attorney named above has applied with TBLS in the referenced specialty area of law for
You have been selected to attest to the competence in the referenced specialty area of law by
Questions 1-7 request information concerning your practice of law and your relationship to the applicant. Questions 8-10 involve
rating and evaluating the applicant's special competence specifically in the referenced specialty area of
TBLS encourages candid, frank and objective responses because your opinion and evaluation is important. Peer review is a significant factor in
the certification process.

The content of this form is confidential. The applicant has waived any right to review your evaluation and the contents of the
Statement of Reference form. Additionally, it is important that you regard this form and your comments as confidential.

Important instructions for completing this form:
• Please use PENCIL only.
• Fill in bubbles completely, see examples.
• Please print all comments.

1. I am currently licensed to practice law. □ Yes □ No
2A. I am currently a judge. □ Yes □ No

2B. Name of Court:
□ County Court □ Appellate Court
□ State District Court □ Other
□ Federal District Court

3A. Identify the area(s) to which you devote at least 25% of
your practice.
□ Administrative □ Immigration & Nationality
□ Bankruptcy □ Juvenile
□ Civil Appellate □ Labor & Employment
□ Civil Trial □ Oil, Gas & Mineral
□ Consumer & Commercial □ Personal Injury Trial
□ Criminal □ Real Estate
□ Estate Planning & Probate □ Tax
□ Family □ Workers’ Compensation
□ Health □ Other

3B. If you do not devote at least 25% of your practice in the
referenced area of specialty, please describe your
experience in

_____________________________________________________________________

_____________________________________________________________________

4. I am related to the applicant by blood or marriage.
□ Yes □ No

5. I am familiar with this applicant. □ Yes □ No

If "NO", please disregard the remainder of this reference form, sign the reverse side and return it to
our office. Please note that the TBLS sends Statement of Reference forms to randomly selected attorneys or
judges and you may have been chosen in this manner.

6. The applicant and I are currently employed with the
same firm, agency or Court.
□ Yes □ No

7A. When was your last professional contact with the applicant
involving a matter in
□ No contact □ 2 - 3 yrs. □ 7 - 10 yrs.
□ 0 - 1 yr. □ 4 - 6 yrs. □ 10+

7B. Describe the extent of your professional contact
w/applicant.
_____________________________________________________________________

_____________________________________________________________________

Exhibit □

Page 1 of 2
8. **INSTRUCTIONS ON RATING.** Based on your professional knowledge, rate the applicant's COMPETENCE by using the criteria below and fill in the appropriate bubble. Compare the applicant to all other attorneys who practice in the referenced specialty area of law. If you are not familiar enough with the applicant's practice in the referenced specialty area of law to rate a particular category, fill in the unknown bubble for that specific category. Completely fill in the bubbles.

   A. Preparation (including document preparation)
   
   B. Resourcefulness
   
   C. Knowledge of substantive and procedural law in the referenced specialty area of law
   
   D. Ability to try/handle a matter in the referenced specialty area of law
   
   E. Effectiveness of advocacy (court presentations, negotiations, etc., as applicable)

9A. Are you aware of any unethical or unprofessional conduct by the applicant toward a client, judge or another attorney?

   ○ Yes  ○ No

9B. If yes, please describe.  

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

10A. In your opinion, should this applicant be certified in the referenced specialty area of law?

   ○ Yes  ○ No

10B. Please provide reasons for your answer to the previous question. These comments will be held in the strictest confidence.

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

I certify that any information given in this Statement of Reference is from personal knowledge or is from other reliable sources, and has not been secured from the applicant or his/her family. I am furnishing this information to the Texas Board of Legal Specialization with the understanding that this information will be kept confidential by the Board and their staff. I agree that I will keep this information confidential.

**I WILL NOT PROVIDE THE APPLICANT WITH A COPY OF THIS COMPLETED STATEMENT OF REFERENCE.**

DATE:  
SIGNATURE:  

Exhibit C of 2