CERTIFICATION LINK

Your Quarterly ABA Specialization Connection

JUNE 2002

Newslink

What's new from programs across the country

◆ From the ***North Carolina State Bar***: The Plan of Legal Specialization was amended to permit a waiver of the substantial involvement requirement for recertification for a period of one year. The waiver will encourage board certified specialists to take sabbaticals to advance mental health and competency. No more than one year of substantial involvement may be waived consecutively and a specialist only qualifies for the waiver once every five years of certification.

◆ ***The American Board of Certification*** (ABC) begins administration of a new creditors' rights exam July 11, 2002. The prior exam contained 150 multiple-choice questions. The new exam is comprised of 50 multiple-choice questions in addition to ethics essays and creditors rights substantive essay questions. The new exam format was altered to more closely mirror the ABC bankruptcy

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Judicial Review a Key Component of Certification Application Process

By ***Judge Ralph Artigliere, Tenth Judicial Circuit, Florida***

Meaningful and sufficient peer review is arguably the most important aspect of the certification process, as it measures the applicant's actual performance for clients as opposed to accomplishments in academic, examination, or continuing education venues. Peer review monitors quality of effort rather than years of experience or numbers of trials, hearings, or cases. Peer evaluation is the best "litmus test" for candidates, because peer review shows whether an applicant continuously meets ethical and competency standards. Judges are essential peer evaluators because they do not compete with applicants and have a unique perspective from the bench involving conduct during some of the most challenging events in law practice. For those reasons, the board certification rules require judicial peer review in certain specialties. Yet, despite their importance as peer evaluators, most judges remain largely uninformed about board certification and the evaluation process.

Background

Board certification of lawyers in Florida is recent enough that most judges ascended to the bench before board certification was established in their respective specialty areas or before they would have met the minimum periods of practice or experience requirements for certification. Thus, most of our judges are not board certified and have never had a reason or opportunity to become fully informed about the certification or recertification process. The only contact that most judges have with board certification is receiving (and hopefully completing) peer evaluation forms or reading about board certification in the media or bar materials, which rarely address peer review issues. Few judges know or appreciate the specific goals, standards, and importance of The Florida Bar board certification program and their role as evaluators in the process. While this will change gradually as more board certified attorneys ascend to the bench, there is an immediate need for judges to be better informed in order for The Florida Bar to fully and effectively tap the judiciary as an essential peer review source.

Clearing up Misunderstandings and Providing Information

The board certification staff and committee members need to understand and debunk the judges' perceived impediments to participation as peer reviewers. Some judges may not realize the significance of failing to respond or fully respond to a peer evaluation request. Certain certification areas require an applicant to identify a judge before whom the applicant has appeared within the previous two years for peer evaluation. If the judge selected by the applicant does not respond and the committee cannot locate a judge who is willing and able to complete peer review, then the application is deemed insufficient for certification. Some judges may only reply when they have a favorable

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exams and industry standards. Additional information on the exam composition and sample exams are available on the ABC website at www.abcworld.org. The new exam will be given in both Cape Cod, MA and Park City, UT on July 11. Upcoming exams dates are August 7 in Kiawah Island, SC; October 2 in Chicago; November 21 in New York, NY; and December 5 in Tucson, AZ.

◆ ***Roundtable Wrap-up:*** The National Roundtable on Lawyer Specialty Certification, the only national opportunity for state and private certification program administrators to discuss their programs, share ideas and network, was held this year in Charleston, SC in late March. Pre-meeting activity included a strategic communications session, which we hope to turn into a public relations plan that all programs can share. Highlights include a keynote speech by Justice Craig Enoch of the Supreme Court of Texas, a certified civil trial law specialist who provided a view from the bench on the importance of professional competence; noted legal ethics expert Dick Lee who spoke on ethical obligations and lawyer specialty certification; and the program administrators' workshop.The social event included a tour of Middleton Place plantation and a dinner on the grounds.
If you have program ideas or want more information, email **specialization@abanet.org** and watch our website at **www.legalspecialists.org** for upcoming date and program information.

Certification Standard of Care Applies to Certified Attorneys

By Paul B. Geilich
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The popularity of certification among lawyers specializing in a certain practice area has surged in the last ten years. A solid base of certified lawyers was established by state-sponsored boards in the late 1970s and 1980s, and in the 1990s and early 2000s several newly-formed private certification organizations have reinforced this growth. The American Board of Certification, for example, sponsored by the American Bankruptcy Institute and the Commercial Law League of America, has enjoyed a steady increase in certified attorneys since its inception in 1992, and now boasts a roster of nearly 1,000 certified attorneys in all fifty states and Puerto Rico.

Due to this heightened visibility, many non-certified lawyers are considering the possibility of becoming certified themselves. Some, however, may be reluctant to take this step due to a perception that certified lawyers are held to a higher standard of care in legal malpractice cases than non-certified lawyers. A review of applicable case law reveals that this is not so.

It is true that the standard of care applied in legal malpractice cases, as traditionally has been the case in medical malpractice cases, is higher for specialists than non-specialists. Such cases are founded on common law principles of negligence, which require a finding that the defendant violated a duty owed to the plaintiff. In legal malpractice cases, this duty will vary depending on defendant attorney's level of experience and skill.

In *FDIC v. O'Melveny and Myers*[1], the Ninth Circuit Court of Appeals found that attorneys generally fulfill their duty to clients by "performing the legal services for which they have been engaged with "such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess..." [2] However, if an attorney "specializes within the profession, he must meet the standards of knowledge and skill of such specialists."[3] Other jurisdictions have used a similar standard, finding that an attorney who holds himself out as a specialist in a field is held to the standard of the "reasonably prudent expert attorney in that field".[4]

Upon recognizing a difference in treatment of specialists versus non-specialists in malpractice cases, the question arises: where is the line? At what point does a general practitioner concentrate so much in a particular area of law that he becomes a specialist? In the courtroom, the answer can be supplied by objective evidence of the defendant's years of experience, education, the number and types of cases accepted and litigated, etc. If the defendant is board certified, that fact likely will be offered as further evidence of a legal specialty. This is simply because the typical qualifications for certification as a legal specialist are the same as those reviewed by courts in establishing whether a malpractice defendant is a specialist.

Generally speaking, to qualify for certification, state and private certifying boards require attorneys to prove they spend at least a minimum percentage of their practice time in their chosen specialty, a minimum number of hours practicing in that specialty, participate in a minimum number of continuing legal education hours, and perform certain tasks common to the specialty a minimum number of times. An applicant for certification in business bankruptcy law by the American Board of Certification, for instance, must show that he or she spends at least 30 percent of his or her practice time and at least 400 hours in the specialty in each of the last three years, has participated in at least thirty business bankruptcy-related adversary proceedings or contested matters over the prior three years, and has participated in at least sixty hours of continuing legal education in bankruptcy law within the same time period.

These standards for board certification can make a convenient bundle of facts for the plaintiff in a malpractice case. But these requirements alone do not create a specialty, they merely set standards for recognizing one. The American Board of Certification, like other certification boards, confers its certification as a recognition of that which the attorney has already achieved, i.e., special competence in his or her field. A certified lawyer is by definition a specialist prior to becoming certified, and will be so held by a court if subject to a malpractice action.

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recommendation on an applicant and choose to not respond if their response would hurt the applicant's chances. While this is a gentle and kindly approach, it does not meet the needs of peer review. In some cases, a judge may be the only witness to an important ethical or competency digression, or may be one of the few persons who can provide meaningful input as to critical issues. Lack of response fails to identify the applicant who may not meet ethical or competence requirements or the applicant who may meet standards. Judges need to know how important it is to respond.

Judges may be reticent to respond because they feel it is inappropriate to lend the prestige of judicial office to advance the private interests of one lawyer over others. This is especially true if the judge does not have a full understanding of the board certification program as a matter of public interest and value to the bar and public as a whole. While Canon 2 of the Florida Code of Judicial Conduct prohibits judges from voluntarily testifying as character witnesses or writing recommendations on judicial stationary to promote personal or business interests, an exception exists for character references based on personal knowledge which are otherwise permitted by the Code. Judges are encouraged in Canon 4 to participate in activities designed to improve the legal system and in efforts to promote the integrity of the legal profession. The Bar's board certification program has broad public interest goals of improving the competence and ethics of lawyers and informing the general public and other members of the bar of the abilities and specialization of those who attain board certification. Peer review determines whether applicants consistently demonstrate "special knowledge, skills, and proficiency in handling the usual matters in the specialty field" and whether applicants possess "character, ethics, and [a] reputation for professionalism." Judges should endeavor to contribute their unique perspective to the effort. The ethical course for a judge is to respond to peer inquiries on board certification whenever the judge has meaningful and relevant information on an applicant.

Confidentiality is important for most reviewers, including judges, and, if the process is not absolutely confidential, meaningful participation is substantially compromised. Judges may fear discomfort or injury personally, politically, or professionally if the applicants could discover the identity or content of peer review. This is an understandable but unfounded fear. Peer reviews are absolutely confidential. The applicant specifically waives access to the peer review information, and The Florida Bar has confirmed that peer evaluations are not subject to disclosure by any means, including the Sunshine laws. Confidentiality is an integral, inherent requirement of the peer review process, which has been scrupulously confirmed, protected, and sustained in the past.

Judges should endeavor to contribute their unique perspective to the effort.

Judicial input essential

Judges need to know what board certification means and why The Florida Bar is asking them to participate in the process. They need to know that board certified attorneys must meet the highest practice standards of quality and ethics, not minimum standards, and that the system fails if quality is not maintained. Judges need to know that judicial input is confidential and vital to the process; that their observations may be the only piece of the puzzle available to qualify or disqualify an applicant. They need to be aware that board certification establishes important, credible information about legal specialists that is available to the general public and other lawyers; that the program is not merely a benefit for board certified lawyers; and that board certification raises the standards for lawyers, improves the quality and availability of legal services to the public, and establishes an avenue for access to specialists. Arming judges with the information about board certification will improve the peer review process and assist the board certification program in accomplishing its goals. Additionally, judges will gain new respect for board certification, which would benefit the program. ◆

Upcoming Events

National Assocation of Estates Planners & Councils (NAEPC) 39th Annual Conference
November 7-9, 2002
For more information:
www.naepc.org

National Academy of Elder Law Attorneys (NAELA) Institute
November 14-17, 2002
Albuquerque, NM
For more information:
www.naela.org

Do you have a meeting that you want to announce? Email us at specialization@abanet.org or fax to 312/988-5710.

Role of Exam Essential in Certification

By Professor Stephen Wizner, Yale Law School
& Professor Bridget McCormack, University of Michigan-School of Law

All NBTA certified trial specialists have passed a written examination. The examination is a requirement for NBTA certification as a Civil, Criminal, or Family Law Trial Specialist. While the examination is only one of several certification requirements, which include extensive trial experience in the particular specialty, peer references, judicial references, trial briefs or legal memoranda, and a good ethical record, it is an important measure of an attorney's competence. It is offered twice each year and examinees have eight hours in which to complete it.

Of course there is a different examination given for each specialty, and each is tailored to fit that specialty. The examination for Civil Trial certification offers both required and elective questions. The applicant is required to answer questions on Civil Evidence and Civil Ethics, and offers a choice of questions in such varied areas as Personal Injury, Medical Malpractice, Contracts, Business Torts, Business Litigation, and Product Liability. The Criminal Trial examination contains all required questions in Criminal Evidence, Criminal Ethics, and Criminal Trial Practice. The Family Law Trial examination contains required questions in Family Law Ethics, Family Law Evidence, and Family Law Trial Practice, covering such diverse areas as divorce, custody and visitation, alimony and support, parental kidnapping, tax and asset valuation, interstate litigation issues, child molestation and abuse, grandparent visitation, and other issues that commonly arise in family law litigation and trial.

The examination format is not that of a law school examination or a bar examination. Rather, it is designed to test what a competent and experienced trial lawyer should know about the litigation and trial of cases in his or her particular trial specialty. Accordingly, the examination emphasizes trial preparation, discovery, motion practice, jury voir dire, trial strategy, proof of facts evidentiary issues, and settlement negotiations. Not surprisingly, then, the attorney's trial experience goes a long way toward preparing for the examination. The role of the trial lawyer in alternative dispute resolution, such as arbitration and mediation, also appears in some examination questions.

Straightforward testing of how the applicant would assess a factual scenario, devise a litigation and trial strategy, and answer specific evidence and ethics questions as a trial lawyer

Essential measure of the applicant's thinking, writing, and analytical abilities

Attorney's trial experience goes a long way toward preparing for the examination

Examination questions and sample answers are prepared by a cadre of NBTA certified trial lawyers, and reviewed by the Dean of the Faculty. The Dean then either approves the questions and sample answers as written, or requests that changes or additions be made to the questions and answers. Once a question and answer have been approved, it is either used on the next scheduled NBTA examination, or held in reserve for a subsequent examination.

The same cadre of examination writers grades the examinations. More specifically, each question is graded by the author of the question. Any failing answer, that is, any answer that receives a grade below 75 out of 100, is automatically reviewed by the members of the examination committee, who are all members of the NBTA Board of Directors, and who have the power collectively to raise the grade to a passing grade, or to affirm the decision of the question writer.

The examination is designed so that any experienced, competent, thoughtful trial lawyer should be able to pass the examination in her specialty area. It is not intended to be an excessively difficult examination with "trick" questions. It is meant to be a straightforward testing of how the applicant would assess a factual scenario, devise a litigation and trial strategy, and answer specific evidence and ethics questions as a trial lawyer.

Finally, it bears emphasis that the written examination is not the only, or even the most important, element of the certification process. It is, however, an essential measure of the applicant's thinking, writing, and analytical abilities. ◆

Do you have a story idea for Cert Link?
Care to share your thoughts on this publication?
Email elym@staff.abanet.org

Standard of Care-Continued from page 2

Admittedly, it would be difficult for a certified attorney to deny his special skills in the area in which he was certified. But the mere fact of his certification is not the issue; it is the standard of competence he or she was required to show in order to become certified in which the court is most interested. Could an attorney credibly deny that he is a specialist when, in fact, he is? Could the fact that he is *not* certified as a specialist persuade a judge or jury in a malpractice case to apply a lower standard of care, whereas the same lawyer bearing a certification would be subjected to a higher standard? No, it is submitted that this is not the case. A specialist in bankruptcy law or any other practice area will be held to a higher standard of care, whether certified or not.

This author's review of case law in this area revealed scattered cases in which board certification was cited as a factor in determining a specialty in a legal malpractice action, and only one in which certification was actually used to establish a standard of care.[5] Those legal malpractice cases that mention certification at all are generally similar to medical malpractice cases, in that board certification is often discussed, among other points, as a factor in determining whether the defendant physician is a specialist.[6] In legal malpractice cases, the mention of board certification in establishing a specialty is still quite rare. This is not to say that certification will not be a factor in future cases. As legal certification becomes more common, it will likely become more prominent in legal malpractice cases – not to determine a standard of care, but as a factor in determining whether a practitioner is a specialist subject to a higher standard of care.

Specialization by lawyers has become the rule rather than the exception, because it is demanded by our clients and the courts in which we practice.[7] And we in the profession are not shy about proclaiming our specialties and expertise. We commonly refer to ourselves as "experts" or "specialists," whether certified or not. We do this because we know that the benefits of advertising a legal specialty are greater than the risk of being held to a higher standard of care.

There is little doubt that the benefits of board certification outweigh the risk that an attorney's certification may be cited as evidence of a legal specialty in a malpractice case. For instance, certified attorneys may enjoy higher hourly rates of compensation for their services. The twelve factors enumerated by the 5th Circuit in the *Johnson v. Georgia Highway Express, Inc.*[8] case, commonly employed by bankruptcy courts nationwide in judging fee applications, place great emphasis on the skill and expertise of the attorney applicant, and certification is an objective indicator of such skill. Soon to come may be new legislation expressly recognizing the value of board certification as a tool in determining the value of a bankruptcy attorney's services.[9] Prospective clients may be attracted by an attorney's certification, and anecdotal evidence indicates that malpractice insurance companies are beginning to offer discounts on premium rates for certified lawyers. Not to be forgotten is the intangible but undeniable benefit of professional pride enjoyed by certified lawyers who have achieved a skill level worthy of recognition by their peers.

The conclusion to be drawn is that certified attorneys *will* be held to a higher standard of care for their clients, but not because of their certification. There is no "super-standard" of care for certified specialists. Board certification does not make a specialist, it merely recognizes one. Certification is an acknowledgment of specialization that already exists, and it is that specialization that will cause courts to impose a greater duty. ◆

1 969 F.2d 744 (9th Cir. 1992)
[2] Id. at 748
[3] Id. at 748
[4] See, e.g., *Rhodes v Batilla*, 848 S.W.2d 833, 843 (Tex. App. – Hous. [14th Dist.] 1993). See also, *Rodriguez v. Horton*, 622 P.2d 261(N.M. App. 1980); *Wright v. Williams*, 47 Cal. App. 3d 802, 47 Cal. Rptr. 194 (Ct. App. 1975).
[5] *Green v. Brantley*, 11 S.W.3d 259, 266 (Tex.App. – Ft. Worth [2d Dist.] 1999) (. . . [A]n attorney board-certified in personal injury trial law is held to the standard of care that would be exercised by a reasonably prudent attorney, board-certified in personal injury trial law, acting under the same or similar circumstances.")
[6] See, e.g., *Robbins v. Footer*, 553 F.2d 123 (D.C. Cir. 1977)("We therefore hold that at least with respect to nationally certified medical specialists like Dr. Footer the "same or similar locality" rule no longer applies. Specialists are required to exercise that degree of care and skill expected of a reasonably competent practitioner in his specialty acting in the same or similar circumstances."). But note that the typically-applied standard for *non*-certified medical specialists is virtually identical, e.g., *White v. Wah,* 789 S.W. 2d 312, 320 (Tex App. – Hous. [1st Dist.] 1990)("Medical specialists in Texas are held to the standard of a reasonable and prudent specialist, in the defendant doctor's specialty area, under the same or similar circumstances.")
[7] Bankruptcy lawyers, in particular, are compelled to "hold themselves out" as specialists by stating their their skills and credentials in applications for fees and employment as professionals in bankruptcy cases.
[8] 488 F.2d 714 (5th Cir. 1974)("Most fee scales reflect an experience differential with the more experienced attorneys receiving larger compensation. An attorney specializing in civil rights cases may enjoy a higher rate for his expertise than others, provided his ability corresponds with his experience.")
9 Bankruptcy reform legislation pending in both the House and Senate include a provision that allows bankruptcy courts to increase professional compensation awards to attorneys who are board certified.

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