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Repository Citation

Hook, Andrew H. (2001) "What is a Certified Elder Law Attorney?," *Marquette Elder's Advisor*: Vol. 2: Iss. 3, Article 6.
Available at: <http://scholarship.law.marquette.edu/elders/vol2/iss3/6>

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What Is a Certified Elder Law Attorney?

What does it take to become a certified elder law attorney? This in-depth look at the certification qualifications and process, the organization that performs the certification, and the standards and ethics to which all certified attorneys must adhere tells it all. The only question left is "Is it for you?"

By Andrew H. Hook

In the spring of 1994, I discussed the new elder law attorney certification program with my paralegal, Janice Windley. To be honest, I was reluctant to apply. I had not taken a formal exam since I took the Virginia bar exam twenty years before. The thought of a formal exam made me apprehensive. Would the benefit outweigh the cost and effort? Janice, however, said "Andy, I think you should do it. Why don't you try?"

During the summer, I ordered the recommended

reading materials and studied every Sunday afternoon. The preparation for the exam was very helpful. Frankly, I learned a lot that I put to use in my practice.

I passed the exam in November of 1994 in New Orleans the first time it was given. I was certified as an elder law attorney in February 1995 after the American Bar Association (ABA) granted accreditation. Subsequently, I have helped to write and grade certification exams, and I serve as a member of the board of directors of the National Elder Law Foundation (NELF), the organization that administers the certification program. Five years have passed since I was certified, and I recently passed my recertification exam.

A History of CELA Certification

In July of 1993, the National Academy of Elder Law Attorneys (NAELA) assisted in the formation of NELF as a nonprofit organization. NELF's purpose is to develop and improve the professional competence of lawyers in elder law.

NELF's board decided to identify as certified elder law attorneys (CELAs) those lawyers with a sufficiently enhanced level of skill and knowledge to be able to identify all of the elderly client's needs, and either meet those needs or refer the client to someone else who could. A definition of elder law was a critical step in the process. NELF developed a certification program and submitted it to the American Bar Association for accreditation. In February 1995, the ABA's House of Delegates accredited NELF as the certifying entity for specialization in elder law.

As of May 2000, there are 177 CELAs in 31 states. According to the ABA Standing Committee on Specialization National Roundtable for 2000,

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4.7% of the 3,930 attorneys who were listed in Martindale Hubbell as elder law attorneys are CELAs. Elder law is the fastest growing ABA accredited specialty.¹

Definition of Elder Law

NELF defines elder law as follows:

Elder law is the legal practice of counseling and representing older persons and their representatives about the legal aspects of health and long-term care planning, public benefits, surrogate decision-making, older persons' legal capacity, the conservation, disposition and administration of older persons' estates and the implementation of their decisions concerning such matters, giving due consideration to the applicable tax consequences of the action, or the need for more sophisticated tax expertise.

In addition, attorneys certified in elder law must be capable of recognizing issues of concern that arise during counseling and representation of older persons, or their representatives, with respect to abuse, neglect, or exploitation of the older person, insurance, housing, long-term care, employment, and retirement. The certified elder law attorney must also be familiar with professional and non-legal resources and services publicly and privately available to meet the needs of the older persons, and be capable of recognizing the professional conduct and ethical issues that arise during representation.²

Who Can Be Certified?

Certification as a CELA is open to all qualified attorneys, and is not limited to members of the NAELA. An applicant must be licensed to practice law and be an active member of the bar in at least one state, the District of Columbia, the Commonwealth of Puerto Rico, or any U.S. territory. The applicant must be in good standing with the bars of all jurisdictions in which he or she is licensed to practice.³

The applicant must have practiced law for five years before applying. Service as a judge or law professor may be substituted at the discretion of NELF. The applicant may not be certified for three years following any public discipline, final criminal conviction, final malpractice judgment, or admission of malpractice, unless the applicant establishes to NELF that such factors are not relevant to the applicant's fitness to be certified.⁴

Substantial Involvement in Elder Law

The applicant must make a satisfactory showing that, in each of the preceding three years, he or she practiced elder law an average of sixteen hours per week. During those three years, the applicant must have provided legal services in sixty elder law matters in the following categories:

1. Health and personal care planning, including giving advice regarding, and preparing, advance medical directives (medical powers of attorney, living wills, and health care declarations) and counseling older persons, attorneys-in-fact, and families about medical and life-sustaining choices, and related personal life choices.
2. Pre-mortem legal planning, including giving advice and preparing documents regarding wills, trusts, durable general or financial powers of attorney, real estate, gifting, and the financial and tax implications of any proposed action.
3. Fiduciary representation, including seeking the appointment of, giving advice to, representing, or serving as executor, personal representative, attorney-in-fact, trustee, guardian, conservator, representative payee, or other formal or informal fiduciary.
4. Legal capacity counseling, including advising how capacity is determined and the level of capacity required for various legal activities, and representing those who are or may be the subject of guardianship/conservatorship proceedings or other protective arrangements.
5. Public benefits advice, including planning for and assisting in obtaining Medicare, Medicaid, Social Security, Supplemental Security Income, veterans benefits, and food stamps.
6. Advice on insurance matters, including analyzing and explaining the types of insurance available, such as health, life, long-term care, home care, COBRA, Medigap, long-term disability, dread disease, and burial/funeral policies.
7. Resident rights advocacy, including advising patients and residents of hospitals, nursing facilities, continuing care retirement communities, assisted-living facilities, adult-care facilities, and those cared for in their homes of their rights and appropriate remedies in matters such as admission, transfer and discharge policies, quality of care, and related issues.
8. Housing counseling, including reviewing the options available and the financing of those

options such as: mortgage alternatives, renovation loan programs, life-care contracts, and home equity conversion.

9. Employment and retirement advice, including pension, retiree health benefits, unemployment benefits, and other benefits.
10. Income, estate and gift tax advice, including consequences of plans made and advice offered.
11. Counseling about tort claims against nursing homes.
12. Counseling with regard to age and/or disability discrimination in employment and housing.
13. Litigation and administrative advocacy in connection with any of the above matters, including will contests, contested capacity issues, elder abuse (including financial or consumer fraud), fiduciary administration, public benefits, nursing home torts, and discrimination.⁵

Forty of the sixty elder law matters must be in categories 1 through 5, with at least five matters in each category. Ten of the elder law matters must be in categories 6 through 13, with no more than five in any one category. The remaining ten matters may be in any of the thirteen categories without limitation. An hour of attorney time may satisfy the requirements of more than one category.

Continuing Legal Education and Peer Review

Within the three years preceding the application for certification, the applicant must have participated in at least forty-five hours of continuing legal education in elder law. Also, the applicant must submit as references the names of five attorneys who are familiar with the competence and qualifications of the applicant in elder law. Three of these must have devoted a minimum of eight hundred hours to the practice of elder law during each of the preceding three years. NELF may also make additional inquiries about the applicant's fitness to be certified.⁶

The Application Process

The CELA certification process begins with the applicant filing a short-form application.⁷ The package of information provided by NELF includes an explanation of the certification program, a copy of the "Rules and Regulations," and the short-form application itself. NELF uses the short form to

determine if the applicant meets the initial requirements concerning licensing and length of practice.

An applicant who meets the initial requirements receives a long-form application, including a notice of upcoming examinations. The completed long-form application documents substantial involvement in elder law, continuing legal education, and peer review. The applicant must give notice of intent to take the exam at least thirty days before the intended exam date.

An attorney can take the exam before or after completing the application. However, the entire application process must be completed within two years after filing the short form.

Certification Review Class

Prior to taking the certification exam, I strongly recommend taking the NAELA Certification Review Course.⁸ The review course consists of home study, practice exams, and an all-day review session held immediately prior to a NAELA symposium or institute. The registration fee (currently \$175) includes audiotapes, a manual of written materials, and attendance at the review session. I found the preparation for the exam to be a *very valuable* learning experience. Frequently, I purchase the newest audiotapes to keep up-to-date on developments in the law and for internal training for my staff.

The Examination

The certification exam is administered twice yearly, typically in late fall and late spring. It is held after the annual NAELA Advanced Institute, which will be in Colorado Springs on November 20, 2000, and in St. Louis, Missouri on November 5, 2001. The exam is also offered annually in June at regional locations. In 2000, regional certification exams were administered in 56 cities in 21 states.

The exam is a one-day, closed-book test consisting of essay, short-answer, and multiple-choice questions. Each exam is graded by two graders. If the grades on any question vary significantly, the question will be graded by a third evaluator. The graders do not know the names of the persons whose exams they are grading. The pass rate for the past four exams is fifty-seven percent.

In my experience the exam concentrates on categories 1 through 5, as listed above. Frequently, these categories are the subjects of essay and short-answer questions. As a test evaluator, I believe the

most frequent error that test takers make is failing to take time to organize their thoughts for these essay and short-answer questions. A few minutes of organization and outlining can significantly improve an answer. Additionally, a test taker who does not have in-depth knowledge of the answer should at least identify the issues and state how to approach solving the problem.

The following are examples of questions that have been used on prior exams but have been retired from the exam question bank:

Long Essay Question (Suggested time: 40 Minutes)

Richard and Kate are husband and wife. Richard is 70 years old and his health is declining steadily. He is barely ambulatory at this time. His wife, Kate, is also 70 years old but is in marvelous health. They reside in a home worth approximately \$80,000, which is free from mortgage. They have two children, Helen, who is 46 years old and is currently receiving Social Security Disability; and Robert, who is 42 years old, married and has two children. Robert is in fine health.

Kate comes to your office and indicates that together she and her husband have an estate with a total value of \$500,000. Both Richard and Helen (although in questionable health) are fully mentally competent. Richard's and Kate's income consists of:

- \$6,000 per year pension (Richard)
- \$12,000 per year SSA (Richard)
- \$6,000 per year SSA (Kate)
- \$12,000 per year investment/dividend income (Richard & Kate, jointly with right of survivorship)

Kate and Richard indicate that they want to avoid probate as much as possible; provide for Richard's care if his health continues to decline; provide for the future of their disabled daughter; and preserve as much of their joint wealth as possible from the claims of the state for any Medicaid benefits that may be extended.

Suggest and justify a plan and the steps needed to implement the plan that would meet these goals.

(For purposes of this hypothetical, assume that both Richard and Kate desire to have the attorney represent both of them and *do not discuss* the ethical issues that may arise under that arrangement.)

Short-Essay Question (Suggested time: 15 minutes)

Jane was married to John for 11 years before their divorce 5 years ago. John is 64, remarried, and still working full-time. Jane just turned 62 and next month is marrying a 66-year-old man who is retired and on Social Security. Explain whether Jane is likely to be eligible for Social Security and on what possible bases.

Multiple Choice

1. A gifted life insurance policy will be included in the estate of an insured donor for how long after the date of the gift:
 - A. 3 years
 - B. 60 months
 - C. 30 months
 - D. 1 year
 - E. An unlimited period
2. After a hospital stay, Medicare may fully pay for up to how many days in a skilled nursing facility?
 - A. 14 days
 - B. 20 days
 - C. 100 days
 - D. 0 days are fully paid

What Does CELA Certification Cost?

The filing fees for the short-form application and the long-form application are \$25 and \$275, respectively. The cost of taking the exam is \$300. After certification, the attorney pays an annual fee of \$100, which covers the ongoing cost of administering the certification program and ABA and state accreditation fees. For example, the ABA charges \$3,500 every five years.

In addition to these fees, you will likely incur costs for the certification review course (approximately \$175), CLE expenses and travel expenses to the exam site. I recommend budgeting about \$1,250 for application fees, exam fees, review course, travel, and lodging. These costs will not be incurred all at once, but will be spread over a two-year period. An attorney often can reduce the travel expenses by taking a regional examination.

Revocation and Suspension

CELA certification can be suspended or revoked by NELF if any of the following apply:

- Certification was granted contrary to NELF's rules and regulations;

- Certification was granted to a person ineligible to acquire the certification or the person made;
- False representation or misleading statements in the application process;
- The certificate holder has failed to abide by NELF's rules;
- The certificate holder has failed to pay applicable fees;
- The certificate holder no longer meets the qualifications for a CELA;
- The certificate holder has been disciplined, disbarred, or suspended from the practice of law by anybody authorized to impose professional discipline;
- The certificate holder has admitted malpractice or a final malpractice judgment has been entered against the certificate holder.⁹

Certified attorneys have the obligation to inform NELF of any fact or circumstance that could result in the revocation or suspension of certification.

Prior to revocation or suspension of a CELA certification, NELF will advise the certificate holder of the proposed action, the reasons for the action, and the certificate holder's right to file a written response within thirty days of the notice. After expiration of the thirty days, the NELF Board of Directors (consisting of nine members) will meet to consider the grounds for the proposed action and the certified attorney's response. The board advises the certificate holder of its decision within fifteen days of its meeting.

Since the CELA certification program began in 1995, only one CELA certificate has been revoked.

Recertification

Certification is effective for five years. A CELA who desires continued certification must apply, pay a recertification fee, and meet the following requirements:

1. Submit satisfactory evidence of good standing in all jurisdictions in which the CELA is licensed to practice law;
2. Pass an open-book, take-home examination;
3. Make a satisfactory showing of continued substantial involvement in the practice of elder law;
4. Submit satisfactory evidence of sixty hours of continuing legal education in elder law during the last five years; and

5. Submit the names and addresses of three current CELAs who are familiar with the competence and qualification of the applicant in elder law, together with a signed confidentiality waiver.

NELF may also make additional inquiries as it deems appropriate.

If, after reviewing this information, NELF believes that the applicant may not meet the standards established for CELAs, it may conduct further investigation or require additional information from the applicant.

Recently, I took the exam for recertification and, frankly, it was challenging. I estimate that it took me at least ten hours. However, like the certification exam, it was a valuable learning tool.

Announcing CELA Certification: Rules on Communication of Speciality Certification

NELF's rules provide that "[e]xcept as restricted by applicable law, an attorney holding a current certification from the Board of Certification shall use the following language to disclose the certification in written communication: 'Certified as an Elder Law Attorney by the National Elder Law Foundation.'"¹⁰ Whether, and how, an attorney can use such a statement depends upon rules of the licensing state, developed pursuant to U.S. Supreme Court decisions.

The Supreme Court Decisions

In 1990, the United Supreme Court, in *Peel v. Attorney Registration & Disciplinary Comm'n of Illinois*, held that an absolute ban on attorney advertising of certification as a "Certified Civil Trial Specialist by the National Board of Trial Advocacy" was an unconstitutional violation of the attorney's first amendment rights.¹¹ However, a total of five of the justices discussed the possibility that advertising could be potentially misleading, and that the state could require a disclaimer as a remedy.

In 1994, the United States Supreme Court, in *Ibanez v. Florida Department of Business and Professional Regulation*,¹² dealt with a less restrictive issue. The Florida Bar Association had reprimanded an attorney who placed the designations CPA (certified public accountant) and CFP (certified financial planner) next to her name on her business cards and in a Yellow Pages ad. The

Florida Bar argued that the use of the term “certified” to refer to an organization other than the Florida Bar (or an organization it had approved) “inherently misleads the public into believing that state approval and recognition exists.”¹³ The Supreme Court disagreed.

The Florida Bar next argued that the statements were potentially misleading so that it could require a disclaimer. The Supreme Court ruled that for a state to restrict commercial speech that is not false, deceptive, or misleading, it must substantiate the claimed harms and show that its restriction will alleviate them to a material degree.¹⁴ The Supreme Court found that the Florida Bar had not demonstrated with sufficient specificity that any member of the public could have been misled by the designations CPA and CFP or that any harm could have resulted from their use. The Supreme Court noted that Certified Financial Planner was a well-established and protected federal trademark.

The Court also examined the criteria required to achieve the CFP designation, including core educational requirements, passage of an exam, and continuing education. The Court stated that the designation CFP did not fall within the caveat note in *Peel* covering certifications issued by organizations that made no inquiry into the applicant’s fitness or issued certificates for a price. The requirements for certification as a CFP as recited in the Court’s decision appear comparable to the requirements for certification as a CELA.

The ABA Rules

After the *Peel* decision, the ABA modified its *Model Rules of Professional Conduct* concerning Communication of Fields of Practice and Certification¹⁵ as follows:

For jurisdictions where there is a regulatory authority granting certification, or approving organizations that grant certification a lawyer may communicate the fact that the lawyer has been certified as a specialist in a field of law by a named organization or authority but only if:

- (1) such certification is granted by the appropriate regulatory authority or by an organization which has been approved by the appropriate regulatory authority to grant such certification; or
- (2) such certification is granted by an organization that has not yet been approved by, or has been

denied the approval available from, the appropriate regulatory authority, and the absence or denial of approval is clearly stated in the communication, and in any advertising subject to Rule 7.2, such statement appears in the same sentence that communicates the certification.

For jurisdictions where there are no procedure either for certification of specialties or for approval of organizations that grant certification, a lawyer may communicate the fact that the lawyer has been certified as a specialist in a field of law by a named organization, provided that the communication clearly states that there is no procedure in this jurisdiction for approving certifying organizations. If, however, the named organization has been accredited by the American Bar Association to certify lawyers as specialists in a particular field of law, the communication need not contain such a statement.¹⁶

Designation in the States

A few states have adopted this rule verbatim. However, many states have used portions of it to craft ethics rules reflecting local preferences. As of April 25, 2000, states have adopted the following approaches:¹⁷

1. States that recognize ABA accreditation but ask the certifying entity to make application with the state: Alabama, California, Idaho, South Carolina, and Tennessee. NELF has been accredited by Alabama, California, Idaho, and Tennessee.
2. States that recognize ABA accreditation and require no additional action on the part of the certifying entity: Delaware, Florida, Maine, Mississippi, New Jersey, North Carolina, South Dakota, Vermont, and Wisconsin.
3. States that allow communication of certification with a disclaimer designated by the state: Alaska, Colorado, Hawaii, Iowa, Massachusetts, Missouri, New Mexico, New York, Virginia, Washington, and Wyoming.
4. Ohio allows communication of certification with a disclaimer if the certifying entity has not been approved by the state. Communication without a disclaimer is allowed for entities that apply and are approved by the state. The NELF Ohio application is pending.
5. States that allow communication by state accredited organizations: Arizona, Connecticut,

Georgia, Indiana, Louisiana, Minnesota, Pennsylvania, and Texas. NELF has been accredited by Indiana, Minnesota, and Pennsylvania. NELF has applied for accreditation from Georgia and Arizona.

6. States that allow communication without restrictions as long as the communication is true and not misleading; or states with no regulations: Kansas, Kentucky, Michigan, Mississippi, Montana, North Dakota, Oregon, and Washington D.C.
7. States that do not allow communication of certification: Arkansas, Maryland, Nebraska, Nevada, New Hampshire, Oklahoma, Rhode Island, Utah, and West Virginia.

Additional information can be obtained from the ABA's website.¹⁸

I believe that the state rules requiring disclaimers are more restrictive than permitted by the applicable Supreme Court decisions. Therefore, I believe that a CELA should not be required to use a disclaimer since the certification process has been accredited by the ABA, and the requirements include an inquiry into the candidate's fitness, an examination, and continuing education. But it is good to bear in mind that your state might not see it this way.

The Legal Malpractice Standard of Care

Specialists are held to a higher standard of care in legal malpractice cases than are general practitioners. The California Court of Appeals in *Wright v. Williams*¹⁹ held that, generally, attorneys who hold themselves out to the public and to the profession as specializing in an area of law must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field. Similarly, the Wisconsin Court of Appeals, in *Duffey Law Office v. Tank Transport*,²⁰ held an attorney to a higher standard because he held himself out to the public as a specialist, even though Wisconsin did not have a formal specialist certification program.²¹ Thus, application of the higher standard of care does not require formal certification as a specialist. Rather, the higher standard of care results from the attorney's representations, including personal representations or advertisement.

An attorney with a CELA certification will be held to the higher standard of care for specialists. However, most attorneys who are qualified to

secure CELA certification probably already have made representations to the public concerning their "specialization" that would trigger the higher standard of care. Therefore, the CELA certification will not increase malpractice exposure of most attorneys who are already substantially involved in an elder law practice.

Conclusion

The CELA program is good for the public. *De facto* lawyer specialization is widespread. Lawyers describe themselves to clients and the public by specialty: "I am a trial lawyer" or "I am a criminal defense attorney." The CELA certification program helps the public identify attorneys with an enhanced level of skill in meeting an elderly person's legal needs.

The CELA program has been good for elder law attorneys. In developing the CELA program, NELF developed a comprehensive definition of elder law. The ABA's recognition of elder law and the accreditation of the CELA program have helped elder law to gain recognition and acceptance with the bar and the public as a legal specialty. The certification process itself provides valuable learning experiences and helps attorneys to differentiate their practices from others and establish a place in their market.

CELA certification has been good for the legal profession since it has helped develop and improve the professional competence of lawyers.

And, CELA certification has been good for me. Janice was right in 1994. I learned a lot in preparation for the exam. With this new information, I have been able to expand the services offered by my office, and I frequently receive referrals due to my CELA certification.

I encourage each elder lawyer to consider obtaining CELA certification. It is worth the time and effort.

Endnotes

1. See ABA Standing Committee on Specialization (visited Aug. 12, 2000), <www.abanet.org/specialization/home.html>.
2. NAT'L ELDER LAW FOUNDATION, RULES AND REGULATIONS REGARDING CERTIFICATION OF ELDER LAW ATTORNEYS, Sec. 2.1, 2.2 (1994) [hereinafter RULES AND REGULATIONS].

3. *See id.* § 5.1.1.
4. *See id.* § 5.1.2.
5. *Id.* § 5.1.4.2.
6. *See id.* §§ 5.1.5, 5.1.6.
7. The short-form application package can be obtained by writing to NELF, 1604 N. Country Club Rd, Tucson, AZ 85716-3102, or faxing (520) 325-7925.
8. Registration is handled by NAELA, also at the address provided *supra* note 7.
9. See RULES AND REGULATIONS, *supra* note 2, § 4.3.5.
10. *See id.* § 8.
11. *See* 496 U.S. 91, 111 (1990).
12. *See* 512 U.S. 136 (1994).
13. *See id.* at 144.
14. *See id.* at 142–143.
15. ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.4 (c).
16. *See id.*
17. *See* NAT'L ELDER LAW FOUNDATION, state status list as of Apr. 25, 2000 (on file with the author).
18. *See* <<http://www.abanet.org/specialization/state.html#tx>>.
19. *See* 47 Cal. App. 3d 802 (1975).
20. *See* 535 N.W. 2d 91 (Wis. Ct. App. 1995).
21. *See id.* at 96.