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Specialist Certification for Lawyers: What Is Going On?

Judith Kilpatrick

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Specialist Certification for Lawyers: What Is Going On?

JUDITH KILPATRICK*

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I. INTRODUCTION

Formal certification of attorney specialists by state regulating authorities began in 1972, when the California Supreme Court approved a pilot program in three areas—criminal law, taxation, and workers compensation.¹ Since then, the California program has become permanent,² and twelve other states have created similar programs.³ For more than twenty years, then, some lawyers in some states have spent time and money jumping through numerous hoops⁴ in order to qualify as certified legal specialists. While individual programs have performed varying degrees of self-review⁵ and the American Bar Association ("ABA")

1. See CALIFORNIA BD. OF LEGAL SPECIALIZATION, STATE BAR OF CAL., FIRST ANNUAL REPORT 1 (1987) [hereinafter CAL. REPORT]. The California Supreme Court approved the program in 1972, and the first specialists were certified in 1973. See *id.*

2. The California Supreme Court approved permanent status for the program on May 20, 1985. See *id.*

3. See ARIZONA BD. OF LEGAL SPECIALIZATION, STATE BAR OF ARIZ., PROGRAM IN LEGAL SPECIALIZATION (1988) [hereinafter ARIZ. PLAN], reprinted in STANDING COMM. ON SPECIALIZATION, AMERICAN BAR ASS'N, SPECIALIZATION STATE PLAN BOOK 32 (rev. ed. 1993) [hereinafter STATE PLAN BOOK]; COMMITTEE ON SPECIALIZATION AND ADVER., ARKANSAS BAR ASS'N, ARKANSAS PLAN OF SPECIALIZATION (1982) [hereinafter ARK. PLAN], reprinted in STATE PLAN BOOK, *supra*, at 82; BOARD OF LEGAL SPECIALIZATION AND EDUC., FLORIDA BAR, FLORIDA CERTIFICATION PLAN [hereinafter FLA. PLAN]; LOUISIANA STATE BAR ASS'N, PLAN OF LEGAL SPECIALIZATION (1995) [hereinafter LA. PLAN]; PLAN FOR THE MINNESOTA STATE BOARD OF LEGAL CERTIFICATION (1985) [hereinafter MINN. PLAN], reprinted in STATE PLAN BOOK, *supra*, at 223; N.J. CT. R. 1:39 [hereinafter N.J. PLAN]; RULES OF LEGAL SPECIALIZATION (1991) [hereinafter N.M. PLAN], reprinted in STATE PLAN BOOK, *supra*, at 309; THE PLAN OF LEGAL SPECIALIZATION (1994) [hereinafter N.C. PLAN]; S.C. APP. CT. R. 408 [hereinafter S.C. PLAN]; In re Petition of Comm'n on Continuing Legal Educ. to Amend Rules 8 and 21 of the Rules of the Supreme Court to Create a Program to Certify Attorneys as Specialists in Tenn. (Tenn. July 1, 1993) [hereinafter TENN. PLAN], reprinted in STATE PLAN BOOK, *supra*, at 439; TEXAS PLAN FOR RECOGNITION AND REGULATION OF SPECIALIZATION IN THE LAW (1995) [hereinafter TEX. PLAN], reprinted in TEXAS BD. OF LEGAL SPECIALIZATION, STANDARDS FOR CERTIFICATION 73; UTAH PLAN OF SPECIALIZATION (1983) [hereinafter UTAH PLAN], reprinted in STATE PLAN BOOK, *supra*, at 537.

4. To qualify for certification, lawyers must pass an examination, show work and educational experience in the specialty area, and submit to peer review. See, e.g., THE STATE BAR OF CALIFORNIA PROGRAM FOR CERTIFYING LEGAL SPECIALISTS § 5 (effective May 20, 1985) [hereinafter CAL. PLAN]; see also *infra* Part III.C.

5. See surveys discussed *infra* Part IV.

has kept a paternal eye on progress during that time, there has been no detailed investigation into what is occurring, and no overall discussion about how, or whether, certification programs are affecting the practice of law and the delivery of legal services.

This Article seeks to provide a foundation for such an assessment. Part II will put the specialization certification phenomenon in perspective by briefly discussing the history of lawyer specialization and recognition efforts in the United States. Part III will focus on state-operated certification programs, comparing the structure and operation of nine existing state plans. Part IV will review state certification standards in two specialty areas, noting their similarities and differences, and attempt to determine whether the disparities alter the ultimate product. Part V will raise questions about the programs and their effectiveness in meeting their stated goals, looking particularly at the effect such programs have had on the public.

II. HISTORY OF ATTORNEY SPECIALIZATION RECOGNITION EFFORTS

In 1921, a high degree of informal specialization in legal practice in the United States was obvious to onlookers. Alfred Z. Reed conducted an eight-year, nationwide study of attorneys' education, work, and role in society for the Carnegie Foundation for the Advancement of Teaching in which he noted that attorneys were focusing their efforts on certain types of clients and client needs.⁶ Concluding that lawyers "are part of the governing mechanism of the state" and, therefore, "essential for the maintenance of private rights,"⁷ Reed suggested that the profession formally recognize the reality of specialization and provide differentiated law school training, specialized as to function.⁸

Reed observed that the ideal of an independent, egalitarian, and

6. ALFRED ZANTZINGER REED, CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, BULL. NO. 15, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 417 (photo. reprint 1976) (1921). The Foundation funded this study at the request of bar leaders who were impressed by a similar report (the "Flexner Report") on the medical profession. See Henry S. Pritchett, *Preface to id.* at xviii. The Flexner Report had spurred the medical profession to revamp the education and training of doctors in the United States. See *infra* note 215 and accompanying text.

7. REED, *supra* note 6, at 3.

8. See *id.* at 416-20. The phenomenon Reed noted in 1921 still exists. See, e.g., JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (rev. ed. 1994) (finding that "[l]awyers tend to specialize in the representation of limited, identifiable types of clients and to perform as broad or narrow a range of tasks as their clientele demands"); LYNN M. LOPUCKI, THE DE FACTO PATTERN OF LAWYER SPECIALIZATION (Disputes Processing Res. Program Working Papers Series No. 9, 1990) (suggesting that lawyers specialize along at least eight parameters: body of knowledge, type of client, side, operation, forum, geographical area, size of the matter, and relation to team); Bill Ibelle, *Should You Specialize?*, LAW. WKLY. USA Apr. 22, 1996, at B1 (reporting on the increasing demand for and benefits of specialized practice).

unitary bar is rooted in our nation's history.⁹ This would make the changes he suggested difficult to achieve. Once admitted to practice law in a particular jurisdiction, a lawyer is considered able to perform any type of legal work. Officially, anyone who meets the requirements can become a lawyer, and all lawyers are deemed equally competent.

This was not always the case. Before the American Revolution, our legal system included a differentiated bar modeled after Great Britain's, in which lawyers were designated as either barristers or solicitors and admitted to practice exclusively in upper or lower courts.¹⁰ Many were trained in England.¹¹ Maintaining such a system in the primitive frontier colonies was unwieldy, at best. Little legal work was available, and economic competition soon forced relaxation of those distinctions.¹² In the period between the Revolution and the Civil War, strong feelings against privilege and in favor of democratic ideals eliminated these distinctions almost entirely.¹³ The bar strove to become a unitary profession.¹⁴

In the period following the Civil War, widespread corruption in government and the legal profession ignited a national reform movement.¹⁵ Some established lawyers and law schools saw an opportunity to "clean up" the profession.¹⁶ Between 1870 and 1895, their efforts led to a number of major changes: moving professional legal training from

9. REED, *supra* note 6, at 35-41; see also Bryant G. Garth, *Rethinking the Legal Profession's Approach to Collective Self-Improvement: Lawyer Competence and the Consumer Perspective*, 1983 Wis. L. REV. 639, 651.

10. See REED, *supra* note 6, at 36, 39; see also Paul D. Carrington, *One Law: The Role of Legal Education in the Opening of the Legal Profession Since 1776*, 44 FLA. L. REV. 501, 502-07 (1992).

11. See REED, *supra* note 6, at 36.

12. See *id.* at 80.

13. See *id.* at 39. Of course, these beliefs were only egalitarian within the limited sense of the word at that time. This is not the place to review the right or ability of a female or a nonwhite male to become a lawyer during this period, or for some time later. However, see Carrington, *supra* note 6, at 513-46, for an account of this subject.

14. See REED, *supra* note 6, at 405 (discussing the democratic politics that destroyed the beginnings of a differentiated bar to allow everyone access to the profession). Reed wrote:

The unsuccessful effort to construct a bar that should be divided and differentiated according to the functions it performs was to be followed by a later and still less successful effort to build up a unitary profession. We came to assume without discussion that there is or can be a standardized lawyer, so to speak—an object to be treated with scrupulous uniformity by the state, whatever be the precise form of treatment.

Id.

15. See *id.* at 206.

16. See *id.* at 206-07; see also ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 35-42 (1983) (stating that the major movement occurred when Charles Eliot was president of Harvard University and Christopher Columbus Langdell was dean of its law school). These changes came about for many of the same reasons later voiced in discussions about formal specialization certification: concerns that the profession retain public

law offices to law schools, increasing law school entrance requirements, creating more uniformity in law school curricula, and making admission to the bar dependent on passing a standardized bar examination administered by state or court officials.¹⁷

The nature of these changes strengthened the drive to become a unitary profession, and affirmed resistance toward any reforms that hinted of elitism.¹⁸ All lawyers were equal, at this point more than ever. Although members of the bar undoubtedly acknowledged individual differences in ability and in practice areas privately, the profession as a whole did not openly admit to such variation.¹⁹

Reed's report, coming after the long history of internal efforts to improve the consistency and quality of professional services, was met with rejection.²⁰ The legal profession was unwilling, at this point, to create "unequal" lawyers. As Reed himself had anticipated, "[t]he legalistic tradition of a general practitioner of law has been too long established in this country to be lightly overturned."²¹

While the legal profession succeeded in consigning Reed's suggestions to the wastebasket, the realities pushing practice specialization persisted. The law and the range of services clients demanded was expanding, driving individual attorneys to focus on particular areas of law as their full-time work.²² As the substantive knowledge required to advise clients on the law multiplied, lawyers increasingly limited their practices to certain substantive areas.²³

In 1952, responding to agitation within its ranks on this subject, the ABA formed the Committee on Continuing Specialized Legal Education

respect by assuring quality services, that the bar remain independent and self-regulated, and that competition between lawyers be restrained.

17. See REED, *supra* note 6, at chs. XXXII-XXXIII; see also STEVENS, *supra* note 16, at 92-103.

18. See Garth, *supra* note 9, at 651. There is a significant body of modern writing that suggests the lawyers' efforts were directed, not so much at improving legal services, as at eliminating certain classes of practitioners who were entering the profession. See, e.g., STEVENS, *supra* note 16, at 92-103; Lloyd B. Snyder, *Rhetoric, Evidence, and Bar Agency Restrictions on Speech by Attorneys*, 28 CREIGHTON L. REV. 357, 361-64 (1995).

19. See REED, *supra* note 6, at 405; see also the discussion in Michael Ariens, *Know the Law: A History of Legal Specialization*, 45 S.C. L. REV. 1003, 1003-08 (1994).

20. See STEVENS, *supra* note 16, at 113-17 (presenting the conflicting views as to the direction in which the legal profession should proceed).

21. REED, *supra* note 6, at 419.

22. See Ariens, *supra* note 19, at 1008-09 (discussing the arguments for and against specialization).

23. See generally, e.g., Elliott E. Cheatham, *The Growing Need for Specialized Legal Services*, 16 VAND. L. REV. 497 (1963); David Fromson, *Let's Be Realistic About Specialization*, 63 A.B.A. J. 74 (1977); O. Randolph Rollins, *The Coming of Legal Specialization*, 19 U. RICH. L. REV. 479 (1985); Harrison Tweed, *The Changing Practice of Law: The Question of Specialization*, 48 A.B.A. J. 423 (1962).

to study the situation and make recommendations.²⁴ The Committee's report "pointed out that the age of specialization was at hand in the practice of law, and that some regulation of specialization should be undertaken for the protection of the public and the bar."²⁵ Although the ABA approved the idea in principle and appointed a subcommittee to prepare a plan for regulating specialization, a hearing on the proposal made it clear that there was strong opposition to the idea.²⁶ The subject was dropped.

Balked for the moment, those imbued with the concept of improving the profession by recognizing and regulating specialists continued to press their ideas. In 1961, another ABA committee went so far as to propose basic criteria for a specialization recognition plan, but opposition again prevented any meaningful action.²⁷

Soon thereafter, specialization proponents within the profession received some indirect support. The leaders of the consumer and civil rights revolutions of the 1960s and 1970s strongly criticized the quality and cost of legal services.²⁸ Lay and legal activists recognized that the majority of citizens had an unmet need for improved access to the courts and demanded change in the way legal services were offered to the public.²⁹ Criticism of the profession came not only from outsiders; it also appeared within the ranks. Prominent jurists such as Chief Justice Warren Burger of the United States Supreme Court³⁰ and Chief Judge Irving Kaufman of the Court of Appeals for the Second Circuit,³¹ distressed by the quality of practitioners appearing before them, called for restricting practice in the federal courts to those attorneys who had received special training in trial skills.

Social activists within the organized bar supported specialization

24. See GLENN GREENWOOD & ROBERT F. FREDERICKSON, *SPECIALIZATION IN THE MEDICAL AND LEGAL PROFESSIONS* 163 (American Bar Found. "Studies of the Legal Profession" Series 1964).

25. See *id.* at 163-64. With this statement, specialization recognition became a part of professional concern about attorney competence.

26. See *id.* at 165-66.

27. See Fromson, *supra* note 23, at 75. The ABA hierarchy approved the report of the Special Committee on Recognition and Certification of Specialization in Law Practice in principle, but its House of Delegates defeated the Committee's proposed plan for national regulation. See GREENWOOD & FREDERICKSON, *supra* note 24, at 172, 177.

28. See, e.g., Jerome A. Hochberg, *The Drive to Specialization*, in *VERDICTS ON LAWYERS* 118 (Ralph Nader & Mark Green eds., 1976).

29. See Roderick N. Petrey, *Professional Competence and Legal Specialization*, 50 ST. JOHN'S L. REV. 561 (1976).

30. See Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 227 (1973); Warren E. Burger, *Special Skills of Advocacy*, 48 FLA. B.J. 154, 154 (1974).

31. See Irving R. Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A. J. 569 (1975).

recognition and believed that such recognition would improve competence in the profession.³² In 1964, the ABA, through the American Bar Foundation ("ABF"), published a study on the subject, comparing specialization in the medical and legal professions.³³ The study was intended to provide a factual background for discussions on whether or not to formally recognize attorney specialization.³⁴

In 1967, the ABA created its third committee on specialization.³⁵ This committee, in cooperation with the ABF, published a monograph that reviewed specialization's "social utility" for "persons of modest means," in which the author made a number of conclusions concerning the usefulness of specialization in closing the gap between the need for and the availability of legal services.³⁶ He suggested that (1) the quality of legal services improves as a lawyer's focus narrows, and a lawyer would do a better job if he offered a narrow range of services than if he attempted to cover the universe of legal problems;³⁷ (2) the common problems ordinary people face are appropriate areas of law for specialization and a form of "mass production;"³⁸ and (3) using specialization for the public good requires easier access to lawyers, which is possible only if attorneys are allowed to advertise their practice areas.³⁹

The profession's reaction to the ABF's work was mixed. While most of the author's conclusions supported the ABA's specialization goals, the idea that specialization recognition would involve advertising was unwelcome to a profession that abhorred "commercialism" and considered advertising unprofessional.⁴⁰ After reviewing the situation, and

32. See BARLOW F. CHRISTENSEN, *SPECIALIZATION* (tent. draft 1967). See also *infra* note 127 and accompanying text, regarding the goals of certification programs.

33. See GREENWOOD & FREDERICKSON, *supra* note 24; see also CHRISTENSEN, *supra* note 32, at 28-32.

34. See E. Blythe Stason, *Foreword to* GREENWOOD & FREDERICKSON, *supra* note 24, at iii. The study includes a broad range of information about attorney specialization: client needs, existing recognition, arguments for and against it, and a history of the ABA's efforts in the area. While it makes no effort to correlate informal legal specialization with that in the medical profession, the study includes details of the regulation of medical specialists. See GREENWOOD & FREDERICKSON, *supra* note 24.

35. See SPECIAL COMM. ON SPECIALIZATION, AMERICAN BAR ASS'N, ANNUAL REPORT 1 (1974) [hereinafter 1974 ANNUAL REPORT]; David Fromson, *supra* note 23, at 75.

36. See Christensen, *supra* note 32, at 3.

37. See *id.* He noted that this narrowed concentration also would increase detection of defects in specific laws and galvanize efforts toward their improvement. See *id.* at 5.

38. See Christensen, *supra* note 32, at 4. The author believed that legal specialization would produce better and more efficient practice techniques, which would ultimately result in lower prices for quality legal services. See *id.* at 6.

39. See Christensen, *supra* note 32, at 6 (noting that group legal services also would improve accessibility).

40. See Henry S. Drinker, *LEGAL ETHICS* 215 (1953) (citing Canon 27, the anti-advertising section, of the Code of Professional Responsibility); ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953).

informally polling the membership about the creation of national specialization standards, the ABA committee proposed that the ABA encourage and assess pilot programs in individual states, rather than pursue a national plan.⁴¹ This recommendation was approved.⁴²

A. *Lawyer Resistance to Formal Recognition of Specialization*

By relinquishing, at least temporarily, its major role in the specialization recognition area, the ABA bowed to the strength of membership resistance to the idea. The membership had three concerns: (1) what effect formally acknowledging differences among bar members would have on competition and the profession; (2) what effect specialization might have on the services received by the public and society; and (3) how to handle the logistics of creating and fairly administering a certification program.⁴³

The first concern was based on worries about competition and the profession's status: specialists might attempt to keep others out of certain practice areas by imposing excessively high standards; they might weaken the cohesiveness of the bar by creating their own organizations; and those organizations might be more like "trade associations" than "professional societies," thus reducing overall professional responsibility standards.⁴⁴ Rural lawyers and sole practitioners believed they would be disadvantaged if some practitioners were given special distinction, because specialization was not considered possible in rural and smaller communities.⁴⁵ There was also fear that if specialization was formally recognized, specialists would want to advertise their status, leading to commercialism and turning lawyers into salesmen.⁴⁶ Even attorneys with established reputations as informal specialists were fearful. Labeling specialists as "certified" might imply that they weren't competent in other areas and lawyer prestige, as a whole, would suffer.⁴⁷ The concept of specialist recognition challenged basic assumptions that attorneys had (and have) about themselves, such as the myth of omnicompetence (any lawyer can perform any legal service), egalitari-

41. See 1974 ANNUAL REPORT, *supra* note 35, at 1; see also David Fromson & Charles H. Miller, *Specialty Certification, Designation, or Identification for the Practicing Lawyer—A Look at Midstream*, 50 ST. JOHN'S L. REV. 550, 552 (1976); Fromson, *supra* note 23, at 75.

42. See Fromson, *supra* note 23, at 75.

43. See GREENWOOD & FREDERICKSON, *supra* note 24, at 131-62.

44. *Id.* at 150. For example, some members argued that specialization would encourage fee-splitting (prohibited by the canons of professional responsibility) between specialists and general practitioners, based on referrals. See *id.* at 151.

45. See *id.* at 141-42; see also Christensen, *supra* note 32, at 11.

46. See GREENWOOD & FREDERICKSON, *supra* note 24, at 144-45.

47. See *id.* at 143.

anism (except in basic ability, no lawyer is any better than any other), and non-competition (law is not a business).

The second concern dealt with specialization's effect on the public and society. The membership claimed that encouraging specialization would narrow lawyers' vision, preventing them from seeing the "big picture" of their clients' situations. In addition, there was concern that it would distance lawyers from their clients and make them insensitive to influences requiring change.⁴⁸ There was also fear that certified specialists would be seen by the public as "better" than uncertified specialists, perhaps without real justification. The membership thought that specialization recognition would lead to increased specialization, depriving the trial courts, and potential clients, of good generalist lawyers.⁴⁹ They also believed that specialists would charge more, increasing consumers' legal costs.⁵⁰

The final concern involved practicalities: Who would decide which fields should be recognized as specialties?⁵¹ Would fields be categorized by subject matter or function? If the ABA operated such a program on the national level, how would it deal with differences in law and practice among individual states?⁵² What qualifications would be required of specialists? Would those standards be set from the lawyer's or client's point of view?⁵³ Would qualification be determined through a different examination in each state? Who would administer the examination and other parts of the qualification process?⁵⁴ When would a practitioner be able to qualify? What remedy would be available if qualification were denied? Should specialty training begin in law school or after some period of practice time?⁵⁵ Would informal specialists be treated as experts and admitted under a grandfathering clause?⁵⁶ If so, on what terms? Or would they be forced to become certified in order to compete effectively with recognized specialists?

What would happen after specialists were certified? Would there be continuing requirements—continuing legal education programs or recertification exams—or was admission for life, like the general bar examination?⁵⁷ Should a specialist's practice be limited to his or her area of specialty? Should specialists be prohibited from dealing directly

48. *See id.* at 131-32.

49. *See id.* at 135-37.

50. *See id.* at 146; *see also* LOPUCKI, *supra* note 8, at 1-2.

51. *See* GREENWOOD & FREDERICKSON, *supra* note 24, at 151-52.

52. *See id.* at 153.

53. *See id.* at 154-55.

54. *See id.* at 155-56.

55. *See id.* at 157.

56. *See id.* at 157.

57. *See id.* at 158-59.

with clients and limited to advising general practitioners?⁵⁸ On the reverse side, should non-specialists be prohibited from practicing in specialty fields? Should there be a limit on the number of specialists in any field? How many? Would specialists receive special privileges, particularly with regard to advertising?⁵⁹

All these concerns were left to the states for sorting, evaluation, and action, as ABA specialization activists went home and began to work in their respective jurisdictions.⁶⁰

B. *The First Ten Years (1967-1977)*

During this period, most states created committees to work on the specialization issue.⁶¹ Mindful of their opponents' concerns, the committees stepped carefully. Two dominant approaches to specialization recognition emerged, each constructed on a different theoretical basis. The first approach was the "California Plan," which the California State

58. *See id.* at 161.

59. *See id.* at 159. Qualification as a specialist would be less attractive if lawyers could not advertise that they were specialists.

60. They did not leave empty-handed. The ABA's Special Committee on Specialization published a mid-year report in 1969 which contained a set of guidelines derived from these concerns:

1. Participation therein should be on a completely voluntary basis.
2. A certified specialist should not retain the referred client upon completion of the referred matter. He should not again represent the client without the consent of the client's lawyer.
3. Certified legal specialists should be permitted to give appropriate and dignified notice that they are certified legal specialists, designating the particular field of law in which they are so certified.
4. Any lawyer, alone or in association with any other lawyer, should have the right to practice in any field of law, even though he is not certified therein; any lawyer should also have the right to practice in all fields of law, even though he is certified in a particular field of law.
5. A lawyer may be certified in more than one field of law if he meets the standards established therefor.
6. All responsibilities and privileges derived from the certification as a specialist should be individual and may not be attributed to or fulfilled by a law firm.
7. Any lawyer may publish in reputable law lists and legal directories a statement that his practice is confined to one or more fields of law, whether or not he is certified as a specialist therein.
8. Appropriate safeguards to insure continued proficiency as a specialist should be provided.
9. Adequate financing to cover the cost of administration should be derived from those who are certified as specialists.

SPECIAL COMM. ON SPECIALIZATION, AMERICAN BAR ASS'N, MID-YEAR REPORT, *reprinted in* SPECIAL COMM. ON SPECIALIZATION, AMERICAN BAR ASS'N, MID-YEAR REPORT 4 (1975) [hereinafter 1975 MID-YEAR REPORT].

61. Only ten states were without committees as of February 1975. *See* RICHARD H. ZEHLE, SPECIALIZATION IN THE LEGAL PROFESSION: AN ANALYSIS OF CURRENT PROPOSALS app. B (American Bar Found. 1975).

Bar adopted in 1970 and the state supreme court approved in 1972.⁶² This certification program was designed to measure competency. It, therefore, required specialists to have a minimum number of years in practice, substantial involvement in the specialty field for a reasonable period of time before certification, special educational experience in the field, and a passing score on a written examination.⁶³ The state determined that a rigorous approach was necessary to avoid deceiving the public, "which will inevitably expect that certification by a state as a specialist implies that the designated attorney is especially competent in that field."⁶⁴

The second major approach, the "New Mexico Plan," was adopted by the Supreme Court of New Mexico in 1973.⁶⁵ Less confident of the bar's ability to measure and assure attorney competence, the New Mexico Plan focused on identifying practitioners who specialized in specific fields of law. It encouraged attorneys to limit their practices by allowing them to advertise their specialization, in the belief that voluntary specialization ultimately would improve competence.⁶⁶

In operation, the New Mexico Plan worked as follows: The bar association created a list of thirty-eight specialty areas, and any attorney willing to swear that at least sixty percent of his or her practice, within the previous five years, had occurred in a listed specialty area, could say so—in the Yellow Pages, in bar lists, and on letterhead and personal cards.⁶⁷ The New Mexico Plan required specialists to limit their work for referred clients to the specialty area and to return the clients to their referring attorneys for other legal matters.⁶⁸ An alternative format allowed attorneys to designate, and advertise, the limitation of their practice to a maximum of three specialty areas.⁶⁹

Florida inaugurated a third approach in 1974—a designation program that combined features of both the California and New Mexico

62. See CAL. REPORT, *supra* note 1, at 1.

63. See ZEHNLE, *supra* note 61, at 20-22. Note: The current California program no longer requires a specific number of years in practice before an attorney may apply for certification.

64. ZEHNLE, *supra* note 61, at 5. But see Hochberg, *supra* note 28, at 118, for a different view of the plan's effect.

65. See Supreme Court Order dated July 10, 1973, effective September 1, 1973 (adopting Rule 2-105, Code of Professional Responsibility, Plan for Recognition of Specialization and Limiting of Law Practice) [hereinafter N.M. RECOGNITION PLAN]. Regulations for registration of New Mexico specialists were effective June 1, 1974. See *In re Adoption of Rules Governing the Specialization Bd.* (N.M. Sup. Ct. Mar. 7, 1974), reprinted in N.M. STAT. ANN. vol. J-3, judicial pamphlet 16, p. 155 (Michie 1995).

66. See N.M. RECOGNITION PLAN, *supra* note 65; see also ZEHNLE, *supra* note 61, at 8.

67. See N.M. RECOGNITION PLAN, *supra* note 65, § IV (stating that the list might be augmented as needed); see also ZEHNLE, *supra* note 61, at 7.

68. See N.M. Recognition Plan, *supra* note 65, § 1.5.

69. See *id.* § II.

plans.⁷⁰ Texas established a pilot certification program similar to California's in 1975.⁷¹ Despite the existence of so many state committees, no other jurisdictions established working specialization recognition programs of any sort during this time.⁷²

Toward the end of this period, the ABA Special Committee began urging other states to slow their specialization recognition efforts until there was an opportunity to evaluate the existing programs.⁷³ The Special Committee and the American Bar Foundation planned to take an extensive look at the operation and effects of all four programs during the mid-1970s,⁷⁴ but resource considerations first limited evaluation to the California and New Mexico programs,⁷⁵ and then postponed any work until after 1978, when California's program was required to perform a self-evaluation.⁷⁶ Ultimately, there was no ABA or ABF review and evaluation of specialization recognition programs.

A California survey provides some hard information on the extent of specialization within the bar before 1972. In 1969, the State Bar Committee on Specialization surveyed the California bar on attitudes toward specialist certification.⁷⁷ Two-thirds of the respondents identi-

70. See Fromson & Miller, *supra* note 41, at 557-58. Florida's self-designation program listed 20 practice areas in which an attorney might qualify. PROGRAM EVALUATION COMM., FLORIDA BAR, EVALUATION: DESIGNATION PROGRAM 7 (1993). It required applicants to show bar membership, three years of practice, substantial experience, and 30 hours of approved continuing legal education ("CLE") in each area where designation was sought. See RULES REGULATING THE FLORIDA BAR Rule 6-2.3(a) (1993). During the period of designation, the attorney had to maintain a minimum level of attendance at CLE programs in the specialty area. See *id.* at Rule 6-2.8(b).

Although Florida started a certification program on July 1, 1982, see *In re Amendment to Integration Rules*, 414 So. 2d 490, 490 (Fla. 1982), the self-designation program continued operating. However, on November 4, 1993, Florida's Supreme Court issued an order, on the recommendation of the Florida Bar, phasing out the designation program over three years, ending June 30, 1996. See RULES REGULATING THE FLORIDA BAR Rule 6-2.11 (1993). The Florida Bar advocated eliminating designation because it confused the public, the need for it was declining as more certification specialties and comprehensive advertising became available, and it had been intended as merely a stopgap measure until the certification program was in operation. See *Designation Program to End*, FLA. B. NEWS, Nov. 15, 1993, at 1.

71. See *Legal Specialization Comes to Texas*, 38 TEX. B.J. 235 (1975).

72. Three other state bar associations had approved plans, which had not been approved by their supreme courts (Arizona, South Carolina, Washington); seven state committees had prepared plans which had not been approved by their respective state's bar association or court (Colorado, Connecticut, Idaho, Minnesota, New Jersey, Oklahoma, Oregon); three states had rejected the concept entirely (Maryland, North Dakota, Wisconsin); and 12 states had no activity at all. See 1974 ANNUAL REPORT, *supra* note 35, at addendum no. 1; Fromson, *supra* note 23, at 75.

73. See 1974 ANNUAL REPORT, *supra* note 35, at 1.

74. See *id.* at 4.

75. See 1975 MID-YEAR REPORT, *supra* note 60, at 5.

76. See SPECIAL COMM. ON SPECIALIZATION, AMERICAN BAR ASS'N, ANNUAL REPORT 3 (1975). The California program evaluation was never completed.

77. See Committee on Specialization, *Results of Survey on Certification of Specialists*, 44 J. ST. B. CAL. 140 (1969) [hereinafter Committee on Specialization]. In addition to learning general attitudes toward specialization certification, the State Bar collected demographic information, and

fied themselves as specialists.⁷⁸ The California results compare favorably with the claims of lawyers in other states at about that time. A 1968 Wisconsin Bar Association survey found 58% of Wisconsin Bar Association members claiming to practice in a specialty field.⁷⁹ A 1975 Illinois State Bar Association survey reported that 48% of Illinois State Bar Association members claimed to practice in a specialty field, while 51% said they were general practitioners with one or more specialties.⁸⁰

C. *The Second Period (1977-1990)*

Three changes in the legal profession gave specialization recognition a boost during this period. First, increasing numbers of people were becoming lawyers. The lawyer population in the United States jumped from 355,242 in 1970⁸¹ to 542,205 in 1980,⁸² to 755,694 in 1990.⁸³

Second, in 1977 the United States Supreme Court issued the first of a series of decisions creating an attorney's right to advertise. Attorneys John R. Bates and Van O'Steen successfully challenged Arizona's power to prohibit all commercial advertising by lawyers.⁸⁴ *Bates* was followed by several other cases progressively relaxing restrictions on attorney advertising.⁸⁵

Third, after observing the California, New Mexico, Texas, and

responses to questions about the specific form a certification program might take. For example, the survey included questions on whether practice in specialty areas should be limited to certified lawyers, *see id.*, at app., question no. 31; whether the respondent believed certification would adversely affect the general practitioner, *see id.* at app., question no. 37; and whether there should be a minimum-years-of-practice requirement in such a program, *see id.*, at app. question no. 41.

78. *See id.* at 144. Eighty percent of respondents in firms of over 10 members and 53.1% of respondents in solo practice said they specialized. *See id.* The proportion of self-identified specialists was consistently higher in urban areas in 1969 than in communities with populations less than 500,000. For example, the four largest counties contained 67.6% of all California attorneys and 72.3% of self-described specialists. *See id.* at 146 n.7.

79. *See* Roxanna Nakamura, *Specialization and the State Bar*, WIS. LAW., Nov. 1991, at 11, 13.

80. *See* Petrey, *supra* note 29, at 567.

81. *See* AMERICAN BAR FOUND., THE 1971 LAWYER STATISTICAL REPORT 5 (Bette H. Sikes et al. eds., 1972).

82. *See* AMERICAN BAR FOUND., THE 1991 LAWYER STATISTICAL REPORT, (1992). This was an increase of 65.5%.

83. ABA State Ranking Report (1990). This was a 71.7% increase in the number of lawyers.

84. *See* *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). The defendant attorneys advertised their legal services in Arizona's major daily newspaper, listing the charges for routine "legal services at very reasonable fees." *Id.* at 354. This behavior violated Arizona's version of DR 2-101(B) of the ABA's Model Code of Professional Responsibility, which prohibited the use of publicity through "newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means." *Id.* at 355.

85. *See* *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466, 476 (1988) (refusing to approve total ban on solicitation letters sent to targeted audience, where less restrictive means to regulate abuses existed); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 630 (1985) (concerning use of an illustration in an attorney's advertisement); *In re R.M.J.*, 455 U.S. 191, 197 (1982) (involving a

Florida experiments in recognizing specialization, the ABA created, adopted, and promoted the Model Plan of Specialization.⁸⁶ Drafted to assist and encourage other states to create certification programs, the ABA's Model Plan was simple and drew upon successful features of existing state plans. Its thirteen sections outlined a certification program that a state's highest court could direct.⁸⁷ Later, in 1990, the ABA provided states with additional help in the form of Model Standards for Specialty Areas.⁸⁸

The increase in the lawyer population had numerous effects on the profession. Naturally, it led to increased competition among lawyers and greater efforts to differentiate one lawyer from others. The existence of open competition between lawyers made it clear that the practice of law was a business, requiring the same marketing skills as any commercial product.⁸⁹ Many new lawyers had grown up with television and mass advertising. They, therefore, did not share the traditional view that advertising was unprofessional.⁹⁰

Prior to the *Bates* decision, lawyers participating in specialization programs gained little material benefit, other than personal satisfaction. However, the Court's rationale in *Bates*⁹¹ offered hope that certification

lawyer's statement on letterhead that he had been admitted to practice before the United States Supreme Court).

86. See STANDING COMM. ON SPECIALIZATION, AMERICAN BAR ASS'N, MODEL PLAN OF SPECIALIZATION (1983) [hereinafter MODEL PLAN] (adopted by House of Delegates August 15, 1979).

87. The sections are as follows: 1) Purpose; 2) Establishment of Board of Legal Specialization; 3) Powers and Duties of the Board; 4) Retained Jurisdiction of the Supreme Court; 5) Privileges Conferred and Limitations Imposed; 6) Specialty Committees; 7) Advisory Commission; 8) Minimum Standards for Recognition of Specialists; 9) Minimum Standards for Continued Recognition of Specialists; 10) Establishment of Additional Standards; 11) Suspension or Revocation of Recognition as a Specialist; 12) Right of Hearing and Appeal to Supreme Court; and 13) Financing the Plan. *Id.* See also *infra* Part III, for a detailed review of the Plan's contents.

88. See STANDING COMM. ON SPECIALIZATION, AMERICAN BAR ASS'N, MODEL STANDARDS FOR SPECIALTY AREAS (1990) [hereinafter MODEL STANDARDS]. See also *infra* Part III, for detailed discussion.

89. See Marc Galanter & Thomas M. Palay, *Why the Big Get Bigger: The Promotion-to-Partner Tournament and the Growth of Large Law Firms*, 76 VA. L. REV. 747, 752 & n.22 (1990).

90. See Roy M. Sobelson, *The Ethics of Advertising by Georgia Lawyers: Survey and Analysis*, 6 GA. ST. L. REV. 23, 54 (1989) (noting that attorney respondents under 30 were "more likely to have favorable views of nearly every form of legal advertising than those in the higher age group").

91. The Court based its decision in *Bates* on reasoning used to extend First Amendment protection to commercial speech by pharmacists in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 749-50 (1976) (involving a Virginia statute that prohibited pharmacists from advertising the prices of prescription drugs). In *Bates*, the Court stated that Arizona's disciplinary statute "serves to inhibit the free flow of commercial information and to keep the public in ignorance." *Bates*, 433 U.S. at 365.

would be worth the additional effort it required, since it might finally have commercial value.⁹²

During this period, ten additional states created state-run certification programs,⁹³ establishing programs through which private organizations could certify attorneys,⁹⁴ or both.⁹⁵ New Mexico moved from its original self-designation program to a certification program based on the ABA Model Plan.⁹⁶ One state enacted a certification plan that has yet to be implemented.⁹⁷

D. *The Third Period (1990 to Present)*

In 1990, the Supreme Court directly dealt with the issue of specialty recognition advertising in *Peel v. Attorney Registration and Disciplinary Commission*.⁹⁸ An Illinois practitioner, Gary E. Peel, had obtained a Certificate in Civil Trial Advocacy from the National Board of Trial Advocacy.⁹⁹ Beginning in 1983, he included this information on his professional letterhead.¹⁰⁰ The state's disciplinary authority sanctioned him for violating two rules of the Illinois Code of Professional Responsibility.¹⁰¹ The Illinois Supreme Court affirmed the punishment

92. Attorneys moved slowly to take advantage of the Court's decision. Only three percent of lawyers advertised in 1978. By 1984, the number was 13 percent; in 1985, it was 24 percent; and in 1986, it was 32 percent. See Thomas D. Sawaya, *Willy Loman Joins the Bar*, A.B.A. J., Oct. 1990, at 88, 88.

93. See ARK. PLAN, *supra* note 3 (adopted 1982); LA. PLAN, *supra* note 3 (implemented 1983).

94. Connecticut (1981), Alabama (1987) and Georgia (1983).

95. See ARIZ. PLAN, *supra* note 3; MINN. PLAN, *supra* note 3; N.J. PLAN, *supra* note 3; N.C. PLAN, *supra* note 3; S.C. PLAN, *supra* note 3.

96. See *In re* Amendment of 19-101, 19-102, and 19-207 of the Rules of Legal Specialization (1988). Curtis W. Schwartz, who chaired New Mexico's specialization board, stated that the shift occurred because it was believed that the U.S. Supreme Court's decision in *In re R.M.J.*, 455 U.S. 191 (1982), made the designation program's advertising restrictions unconstitutional. Telephone Interview with Curtis W. Schwartz, Chairman, New Mexico Specialization Board, (May 24, 1996).

97. See UTAH PLAN, *supra* note 3, at 537.

98. See *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91 (1990).

99. See *id.* at 96. The National Board of Trial Advocacy ("NBTA") is a private organization established in 1977. See *id.* at 94. It is sponsored by several trial attorney organizations for the purpose of developing standards and procedures for certifying lawyers with significant experience and competence in trial work. See *id.* at 95. Sponsoring organizations include the Association of Trial Lawyers of America, the National District Attorneys Association, the National Association of Criminal Defense Lawyers, the National Association of Women Lawyers, the American Board of Professional Liability Attorneys, the International Society of Barristers, and the International Academy of Trial Lawyers. See *id.* at 94 n.3. The Court set forth the requirements for NBTA certification, noting they were "objective and demanding." *Id.* at 95 & n.4.

100. See *id.* at 96.

101. See *id.* at 97. The attorney was accused of violating Rule 2-105(a)(3), which prohibits an attorney from "hold[ing] himself out as 'certified' or a 'specialist,'" and Rule 2-101(b), which prohibits an attorney from making misleading or deceiving public communications. *Id.*

imposed.¹⁰²

A divided U.S. Supreme Court reversed and remanded the case, holding that a state may not impose a blanket prohibition on lawyer advertising that is not inherently or actually misleading.¹⁰³ By remanding the case for "proceedings not inconsistent with" its opinion, the majority rejected the state's position that it had a justifiable interest in banning Peel's statement because it was misleading or potentially misleading.¹⁰⁴ The Court indicated that the state could address these concerns through lesser means, such as requiring attorneys to include additional information about their certification in such advertising, screening certifying organizations and issuing statements about their quality and objectivity, or requiring attorneys to include disclaimers in their statements about certification.¹⁰⁵ The *Peel* decision generated significant publicity for specialization recognition programs and tied them even more irrevocably to advertising.

In the same year as the *Peel* decision, the ABA published *Model Standards for Specialty Areas* providing suggested standards for twenty-four fields of law ranging from admiralty to workers' compensation.¹⁰⁶ The Standing Committee on Specialization, in conjunction with the appropriate ABA sections and committees, promulgated these standards "to assist the [s]tates in the adoption of formal specialization plans."¹⁰⁷ The ABA hoped that the Standards would promote greater uniformity among state programs, in the belief that uniformity would "enhance public understanding of specialization plans."¹⁰⁸ In addition to providing specific language for adoption by the states, the Model Standards

102. See *In re Peel*, 534 N.E.2d 980, 986 (Ill. 1989).

103. See *Peel*, 496 U.S. at 110. The five-four decision produced three additional opinions, one concurring, see *id.* at 111 (Marshall, J., concurring), and two dissenting, see *id.* at 118 (White, J., dissenting), 119 (O'Connor, J., dissenting). The case became the subject of several law review notes and articles discussing the state of attorney advertising and its regulation. See, e.g., John A. Payton, Note, *Certification of Specialization: Another Limit on Attorney Advertising is Peeled Away*, 25 IND. L. REV. 589 (1991); Lori A. Spillane, Note, *Lawyer Certification in the 1990s: Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 35 ST. LOUIS U. L.J. 463 (1991).

104. Illinois had not asserted that Peel's statements were inaccurate, but rather that they "implied" a level of performance that was "so likely to mislead as to warrant restriction." *Peel*, 496 U.S. at 101. The Court found NBTA's certification standards rigorous and objectively clear and compared them favorably with existing state certification programs. See *id.* at 102-03. It also noted that there was no evidence that any consumers had been misled by those programs, even though consumers didn't know exactly what certification standards the programs maintained. See *id.* The Court also gave short shrift to the state's argument that by juxtaposing the certification statement with information on where he was licensed to practice, or using the word "specialist," Peel would blur state and NBTA authority in the public's mind. See *id.* at 102-05.

105. See *id.* at 109-10.

106. See MODEL STANDARDS, *supra* note 88.

107. *Id.* at tab 1.

108. *Id.*

include instructions for their use,¹⁰⁹ and comments that elucidate the intent and purpose of each standard.¹¹⁰

In 1992, eleven state bar associations asked the ABA to create standards for the accreditation of private, attorney certification organizations and a mechanism for such accreditation.¹¹¹ The request was approved by a voice vote of the ABA's House of Delegates, and the ABA Standing Committee on Specialization was delegated to perform the task.¹¹² While a few private professional organizations had been offering specialist certification for some time,¹¹³ they had no standing in most jurisdictions, and state rules limiting the ability of attorneys to advertise receipt of a private certification had limited their expansion. This new ABA effort was intended to fill the gap between those states with internal programs and those without them.

Between the *Peel* decision and 1993, four states changed their disciplinary rules to allow lawyers to advertise their private certifications.¹¹⁴ Since 1993, five states without internal certification programs have adopted rules recognizing the certifications awarded by private programs.¹¹⁵ Several states that administer internal certification programs now also recognize ABA-approved certifiers.¹¹⁶ In these states, attorneys certified by an ABA or state-approved private program may advertise that achievement. As of 1995, twenty-nine states still had no provision, active or inactive, for formal recognition of specialists.¹¹⁷

109. *See id.* at tab 3.

110. For example, the ABA Criminal Justice Section offered comments on the proposed Model Standards for Criminal Law. *See Model Standards for Criminal Law Standard 4.1.2 in MODEL STANDARDS*, *supra* note 88, at tab 12. *See infra* note 383, concerning the discussion on the use of peer review in connection with a criminal law specialty.

111. Report 10A, Annual Meeting, American Bar Association (August 1992). The states were Kansas, Michigan, South Carolina, North Carolina, Hawaii, Maryland, Maine, Massachusetts, Mississippi, Alabama, and Nevada.

112. Report 10A, Annual Meeting, American Bar Association (August 1992). In 1993, the Standing Committee approved certification of lawyers by the National Board of Trial Advocacy, the Commercial Law League of America, and the American Bankruptcy Board of Certification. Report 300, Annual Meeting, American Bar Association (August 1993).

113. The NBTA, which had certified Gary Peel, was established in 1977. *See Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91 (1990). The American Board of Professional Liability Attorneys began certifying lawyers in products liability law and medical professional liability law in 1982, and the National Association of Estate Planners & Councils began recognizing attorneys and nonattorneys as "Accredited Estate Planners" in 1987.

114. *See* ALA. R.P.C. 7.4 (adopted 1987); CONN. R.P.C. 7.4 (adopted 1981); GA. St. B.R. 4-102, Std. 18 (adopted 1976); P.A. R.P.C. 7.4 (adopted 1992).

115. Idaho (1994), Indiana (1995), Maine (1994), Ohio (1995), and South Dakota (1994).

116. *See* ARIZ. PLAN, *supra* note 3, § 2(h); FLA. PLAN, *supra* note 3, at Rule 6-3.1(g); MINN. PLAN, *supra* note 3, § 3.027; N.C. PLAN, *supra* note 3, § .1716(10); REGULATIONS FOR LEGAL SPECIALIZATION IN S.C. Reg. VI.A (1993) [hereinafter S.C. REGS.]; TENN. PLAN, *supra* note 3, § 10.02(b); TEX. PLAN, *supra* note 3, § 3(h).

117. *See* STANDING COMM. ON SPECIALIZATION, AMERICAN BAR ASS'N, STATE STATUS REPORT

III. COMPARISON OF STATE CERTIFICATION PLANS

In the years since California began its experiment with specialty recognition, only twelve states have adopted its "direct certification" model, in which an entity approved by the state supreme court creates and maintains standards and procedures for evaluating specialists.¹¹⁸ No state has joined this group since the *Peel* decision in 1990. Eleven of these programs are active,¹¹⁹ but three of them have distinctions that make them inappropriate for direct comparisons.¹²⁰ This Part, therefore, will review the structure of nine entirely in-state, direct certification programs,¹²¹ comparing and contrasting the programs with the structure proposed by the ABA's Model Plan and with each other.¹²²

The ABA Model Plan will be used as a standard for measuring the individual state plans for two reasons. The first is that the ABA created it after several years of state experimentation in specialization certification.¹²³ It, therefore, reflects lessons absorbed during that period. The second is that the ABA Standing Committee on Specialization approved

ON LAWYER SPECIALTY CERTIFICATION (1995) [hereinafter STATE STATUS REPORT]; Telephone Interview with Jeremy Perlin, Staff Attorney, Standing Committee on Specialization, American Bar Ass'n (May 15, 1996).

118. See ARIZ. PLAN, *supra* note 3 (adopted 1988); ARK. PLAN, *supra* note 3 (adopted 1982); FLA. PLAN, *supra* note 3 (implemented 1982); LA. PLAN, *supra* note 3 (implemented 1983); MINN. PLAN, *supra* note 3 (adopted 1985); N.J. PLAN, *supra* note 3 (implemented 1980); N.M. PLAN, *supra* note 3 (adopted 1987); N.C. PLAN, *supra* note 3 (adopted 1982); S.C. PLAN, *supra* note 3 (implemented 1981); TENN. PLAN, *supra* note 3 (adopted 1993); TEX. PLAN, *supra* note 3 (implemented 1980); UTAH PLAN, *supra* note 3 (adopted 1983).

119. The supreme court in Utah has formally adopted a certification plan. See UTAH PLAN, *supra* note 3, but Utah's plan has never been implemented.

120. Arkansas has a single specialty in tax law and its bar has shown little interest in expansion. See ARK PLAN, *supra* note 3. Minnesota has adopted a hybrid structure in which a board regulates attorney certification by independent entities. See MINN. PLAN, *supra* note 3. The board itself does not certify attorneys. See *id.* at Rule 3. Currently, only the NBTA (criminal and civil trial law), the Minnesota State Bar Association (real property and civil trial law), and the American Bankruptcy Board of Certification have been approved to certify attorneys in Minnesota.

Tennessee's hybrid program is just beginning its activities. When fully operational, a commission will "contract with private agencies to perform any or all portions of a certification procedure for particular specialties subject to standards established by the [c]ommission." TENN. PLAN, *supra* note 3, at § 10.02(b).

121. See ARIZ. PLAN, *supra* note 4; FLA. PLAN, *supra* note 3; CAL. PLAN, *supra* note 3; LA. PLAN, *supra* note 3; N.J. PLAN, *supra* note 3; N.M. PLAN, *supra* note 3; N.C. PLAN, *supra* note 3; S.C. PLAN, *supra* note 3; TEX. PLAN, *supra* note 3.

122. The state plan and individual specialty standards comparisons in Part III reflect certification activity as of 1995. The programs and their rules and regulations are in constant movement as the administrators add new specialties and refine older ones in order to keep pace with the needs of practicing lawyers. For example, as a result of expanding the number of specialty certification areas, New Jersey's program will undergo a major revision in September 1996 that will bring it more in line with other state certification programs. Telephone Interview with Wendy Weiss Daly, Staff Attorney, New Jersey Board of Trial Certification (Aug. 23, 1996).

123. See *supra* note 86, and accompanying text.

the Model Plan and the ABA House of Delegates adopted it.¹²⁴ The House of Delegates is comprised of representatives from every state, thus its adoption of the Model Plan indicates some general agreement within the profession on the shape a specialization certification program should take.¹²⁵ The extent to which state programs vary from the Model Plan will give an indication of the range of views about specialists held in the different jurisdictions and just how far the profession may be from achieving a uniform understanding of what a legal specialist is. The five aspects of the various plans that will be reviewed and considered are the goals, structure, minimum standards, standards for continuing certification, and grounds for decertification.

A. Goals of Certification Programs

As noted above, ABA activity in the specialization area was primarily justified by a stated concern for the quality of legal services provided to the public.¹²⁶ Section 1 of the ABA Model Plan underscores that motivation by setting forth three goals of certification:

[T]o assist in the delivery of legal services to the public by:

- 1.1 Providing greater access by the public to appropriate legal services;
- 1.2 Identifying and improving the quality and competence of legal services; and
- 1.3 Providing appropriate legal services at reasonable cost.¹²⁷

Not all of the nine state certification plans contain statements concerning their goals.¹²⁸ Those that do, vary in language from the ABA model, but generally comport with its first two goals. California, Florida, Louisiana, North Carolina, and Texas wish to ensure better public access to legal services by identifying specialists, and to encourage improvement of attorney competence through formal recognition of legal specialists' achievements.¹²⁹ Only New Mexico's plan, which

124. See *supra* note 86, and accompanying text.

125. This statement is not intended to assert that the ABA represents more than the opinion of its members, but rather that those members will share in the practice climates and morés of their respective states. Adoption by the House of Delegates generally represents at least the minimum level of national agreement on a subject. See, e.g., Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 244 (1985) (discussing ABA House of Delegates' approval of the Model Rules of Professional Conduct).

126. See *supra* note 32, and accompanying text.

127. MODEL PLAN *supra* note 86, § 1. These goals, and the states' progress achieving them, will form part of the discussion in Part IV.

128. The Arizona, New Jersey, and South Carolina plans contain no such statements. See ARIZ. PLAN, *supra* note 3; N.J. PLAN, *supra* note 3; S.C. PLAN, *supra* note 3.

129. See CAL. PLAN, *supra* note 4, at A-1; In re Amendment to Integration Rule (Certification Plan), 414 So. 2d 490 app. XXI at 491 (Fla. 1982); LA. PLAN, *supra* note 3, § 1.1; N.C. PLAN, *supra* note 3, § .1701; TEX. PLAN, *supra* note 3, § 1.

tracks the Model Plan language closely, includes the ABA's third suggested goal of "providing appropriate legal services at reasonable cost."¹³⁰

B. Structure of Certification Programs

The Oversight Board and Its Composition. Section 3 of the Model Plan provides that the state supreme court, which has jurisdiction over attorney regulation,¹³¹ appoint a nine-member Board of Legal Specialization, with authority over the shape and operation of the certification program¹³² and with a mandate to keep the program self-supporting through application fees.¹³³ This Board is to be chaired by one of eight lawyer members and is to include one non-lawyer.¹³⁴ The Model Plan also provides for the creation of a committee of five non-lawyers to advise the Board on "the public's legal needs and assist the Board in determining how the public can best be served through the specialization program."¹³⁵

Six state plans specifically provide that all certification activity falls under the general jurisdiction of the state supreme court.¹³⁶ Eight states,¹³⁷ all but New Jersey,¹³⁸ provide for oversight boards. Comparing the ABA's proposed Board with those created by the states is educational in one significant respect. Six of the state-created boards have no

130. N.M. PLAN, *supra* note 3, § 19-201.

131. See Thomas M. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 BUFF. L. REV. 525, 525 (1983); Susan R. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705, 706-08 (1981).

132. See MODEL PLAN, *supra* note 86, §§ 2-3. Section 3 of the Model Plan allocates 11 powers and duties to the Board, including designating specialty areas, supervising specialty advisory committees, adopting standards for certification, and coordinating the program with other professional requirements. See *id.* § 3.

133. See *id.* § 13. Eight state plans include this provision. See ARIZ. PLAN, *supra* note 3, § 13; CAL. PLAN, *supra* note 4, § 11; FLA. PLAN, *supra* note 3, at Rule 6-3.10; LA. PLAN, *supra* note 3, § 14; N.J. PLAN, *supra* note 3, § 205; N.M. PLAN, *supra* note 3, § 19-106; N.C. PLAN, *supra* note 3, § .1712; S.C. PLAN *supra* note 3, at Rule 408(j); TEX. PLAN, *supra* note 3, § XI.

134. See MODEL PLAN, *supra* note 86, § 2. Members are appointed to three-year terms, with a maximum service of two full terms. Initial appointees, however, may serve lesser terms. *Id.*

135. *Id.* at § 7. See discussion *infra* note 244, and accompanying text.

136. See CAL. PLAN, *supra* note 4, § 2(j); FLA. PLAN, *supra* note 3, at Rule 6-3.1(i); LA. PLAN, *supra* note 3, § 2.1; N.M. PLAN, *supra* note 3, § 19-107; N.C. PLAN, *supra* note 3, § .1716; TEX. PLAN, *supra* note 3, § XII.

137. See ARIZ. PLAN, *supra* note 3, § 1; CAL. PLAN, *supra* note 4, § 1; FLA. PLAN, *supra* note 3, at Rule 6-3.1; LA. PLAN, *supra* note 3, § 2.1; N.M. PLAN, *supra* note 3, § 19-101; N.C. PLAN, *supra* note 3, § .1702; S.C. PLAN, *supra* note 3, Rule 408(b)(1); TEX. PLAN, *supra* note 3, § II.

138. New Jersey, which currently certifies only trial attorneys, has omitted this "middle" level of administration. The state supreme court retains direct oversight responsibility over the certification program while an 11-member board of attorneys directly administers the program. See N.J. PLAN, *supra* note 3, at Rule 1:39-1.

provision for public involvement in program administration,¹³⁹ and none of the state plans include a lay advisory group in their structure. While several state plans do provide for a "public comment period" on proposed rules and regulations pertaining to the certification program,¹⁴⁰ notice of these opportunities receives limited distribution.¹⁴¹

Only two states—California and North Carolina—include non-lawyer board members who represent the public interest. Three members of North Carolina's nine-member board are non-lawyers.¹⁴² California's board consists of fifteen members, three of whom must be non-lawyers.¹⁴³

Protections for Practitioners. The ABA Model Plan specifically accommodates several of the concerns about competition raised by opponents to the formal recognition of specialists.¹⁴⁴ For example, section 5 of the Model Plan includes six limitations on the Board's work, including several that might be considered important policy decisions worthy of major discussion within the profession. One such limitation addresses the prevalent fear that certification programs might give recognized specialists an advantage in competition for clients. To make it very clear that the status quo of law practice would not be disturbed, the Model Plan prohibits the creation of a mandatory certification pro-

139. Arizona's board has 13 lawyers (10 practicing attorneys, one representative from each state law school, and one member of the State Bar Committee on CLE). *See* ARIZ. PLAN, *supra* note 3, § 1. Florida has 13 attorneys on its board. Telephone Interview with Dawna Bicknell, Executive Director, Board of Legal Specialization and Education, The Florida Bar (Aug. 22, 1996). Louisiana has nine attorney members, with one from a law school faculty. *See* LA. PLAN, *supra* note § 2.1. New Mexico has nine lawyer members. *See* N.M. PLAN, *supra* note 3, § 19-101. South Carolina has 12 members (including three judges from different level courts and one lawyer from each judicial region in the state). *See* S.C. PLAN, *supra* note 3, at Rule 408(b)(1). The Texas board has nine lawyer members. *See* TEX. PLAN, *supra* note 3, § II.

140. *See, e.g.*, CAL. PLAN, *supra* note 4, § 2(b); LA. PLAN, *supra* note 3, § 3.1.E; S.C. PLAN, *supra* note 3, at Rule 408(b)(2)(D); TEX. PLAN, *supra* note 3, § III.E.

141. The North Carolina and Texas plans, for example, provide for publication, but do not specify the venue. *See, e.g.*, N.C. PLAN, *supra* note 3, § .1716; TEX. PLAN, *supra* note 3, § II. In fact, such items are published only in bar association journals and newsletters. Telephone Interview with Alice Neece Moseley, Executive Director, North Carolina Board of Legal Specialization (Aug. 22, 1996); Telephone Interview with Gary W. McNeil, Executive Director, Texas Board of Legal Specialization (Aug. 22, 1996). An opportunity to comment on proposed regulations drafted solely by attorneys is quite different from direct involvement in the drafting process itself. Public opinion and contribution is more easily ignored with the former than the latter.

142. North Carolina's board consists of six attorneys, *see* N.C. PLAN, *supra* note 3, § .1704, and three non-lawyers, *see id.* § .1705.

143. *See* CAL. PLAN, *supra* note 4, § 1. California even provides for some additional public involvement. One member of each specialty advisory commission also must be a non-lawyer. *See id.* § 4.

144. *See supra* Part II.A.

gram¹⁴⁵ and bars the Board from limiting any lawyer's fields of practice, whether or not he or she is a recognized specialist.¹⁴⁶ In fact, the ABA was unwilling even to limit the number of specialty certifications a lawyer could obtain, stating that lawyers would be limited "only by such practical limits as are imposed by the requirement of substantial involvement and such other standards as may be established."¹⁴⁷ In addition, the Model Plan prohibits specialists from stealing clients referred to them by other lawyers.¹⁴⁸

Opponents of specialty recognition also expressed fear that solo and small firm practitioners would be at a disadvantage in qualifying for certification in a specialty. The Model Plan addresses this concern by prohibiting the Board from allowing law firms to profit from certification separately from the individual lawyer who is qualified as a specialist.¹⁴⁹

Most of the state plans have imposed some or all of these limitations on their certification programs. All nine states include, either explicitly or implicitly, four of the Model Plan limitations.¹⁵⁰ Six state plans have not limited the number of specialties in which an attorney might become certified, but specialties' standards have that effect.¹⁵¹

145. See MODEL PLAN, *supra* note 86, § 5.4 ("Participation in the program shall be on a completely voluntary basis. . .").

146. The Model Plan states that the Board cannot: "[L]imit the right of a recognized specialist to practice in all fields of law. Any lawyer . . . shall have the right to practice in all fields of law, even though . . . recognized as a specialist in a particular field of law." *Id.* at § 5.1. It also bars the Board from requiring a lawyer "to be recognized as a specialist in order to practice in the field of law covered by that specialty Any lawyer . . . shall have the right to practice in any field of law; even though . . . not recognized as a specialist in that field." *Id.* at § 5.2.

147. *Id.* § 5.5.

148. "A specialist may not "take advantage of [a] referral to enlarge the scope of his or her representation . . . outside the area of the specialty field." *Id.* § 5.6.

149. "All requirements for and all benefits to be derived from recognition as a specialist are individual and may not be fulfilled by nor attributed to the law firm of which the specialist may be a member . . ." *Id.* § 5.3.

150. The following plans provide that specialist recognition cannot hinder a specialist from practicing in other areas of law, that practice in a specialty area cannot be restricted to specialists, that recognition privileges or benefits inure only to the individual certified attorney, and that certification must be voluntary: ARIZ. PLAN, *supra* note 3, § 3; CAL. PLAN, *supra* note 4, § 3; FLA. PLAN, *supra* note 3, at Rule 6-3.4; LA. PLAN, *supra* note 3, § 5.C; N.M. PLAN, *supra* note 3, § 19-202; N.C. PLAN, *supra* note 3, § .1718; S.C. PLAN, *supra* note 3, at Rule 408(c)(2); TEX. PLAN, *supra* note 3, § IV. New Jersey's plan doesn't contain an express voluntariness requirement, but attorney certification is not mandatory. See N.J. PLAN, *supra* note 3, § 1:39-6.

151. See ARIZ. PLAN, *supra* note 3, § 3(e); FLA. PLAN, *supra* note 3, at Rule 6-3.4(e); LA. PLAN, *supra* note 3, § 5.1.E; N.M. PLAN, *supra* note 3, § 19-202(e); S.C. PLAN, *supra* note 3, at Rule 408(e)(4); TEX. PLAN, *supra* note 3, § IV(e). California's plan contains no reference to the number of specialties an attorney might acquire, see CAL. PLAN, *supra* note 4, § 3, while North Carolina specifically limits a lawyer to two fields, see N.C. PLAN, *supra* note 3, § .1718(5). New Jersey, having only two specialties—for civil and criminal law trial lawyers—appears to allow attorneys to specialize in both areas. See REGULATIONS OF THE BD. ON TRIAL ATTORNEY

New Mexico and North Carolina's plans also include the theft-of-clients prohibition.¹⁵² The fact is that some of these protections lessen the value of certification to the consumer, by making it more difficult to distinguish the formally-certified lawyer, who has met objective standards of practice, from the informal specialist.¹⁵³

Advertising. The ABA Model Plan¹⁵⁴ and all of the state plans¹⁵⁵ allow attorneys to advertise their specialist certification. As noted earlier, a large part of the anticipated value of specialist certification was the ability to advertise that fact.¹⁵⁶ The advertising of practice areas and qualifications also improves the chances of achieving a major goal—providing the public with improved access to legal services.¹⁵⁷

Specialty Committees. Section 6 of the Model Plan provides for the creation of a seven-member specialty committee for each designated specialty field. The committees are composed of lawyers considered competent as specialists. They are the workhorses of the program. They advise the Board on specialty standards, apply these standards to applicants, and present qualified attorneys to the Board for recognition in the

CERTIFICATION, Regulation 204:5 (Sup. Ct. of N.J. 1992) [hereinafter N.J. REGS.] ("Attorneys certified as *both Civil and Criminal Trial Attorneys* must fulfill a minimum of 105 hours of continuing legal education.") (emphasis added), reprinted in STATE PLAN BOOK, *supra* note 3, at 260, 283.

152. See N.M. PLAN, *supra* note 3, § 19-202(f); N.C. PLAN, *supra* note 3, § .1718(6). Concern about a client's right to select an attorney, an attorney's right to seek clients, and the difficulty of policing such a limitation may have been among the reasons for the omission of this limitation in other state plans.

153. For example, the MODEL PLAN does not restrict certified specialists to practice in the specialty area, see MODEL PLAN *supra* note 86, § 5.1, does not require a lawyer to be certified before practicing in a designated specialty area, see *id.* § 5.2, which limits the number of specialties a lawyer might acquire only by the practicalities demanded by the minimum standards, see *id.* § 5.5. Thus it allows for a mix of certified specialists and nonspecialists in any practice area. Because an attorney's right to advertise provides for the use of a number of words and phrases that could indicate "practice specialties," confusion can result. See *infra* notes 250-56 and accompanying text for a more extensive discussion.

154. See MODEL PLAN, *supra* note 86, § 5.7.

155. See ARIZ. PLAN, *supra* note 3, § 12; CAL. PLAN, *supra* note 4, § 5.a; FLA. PLAN, *supra* note 3, at Rule 6-3.8(a); LA. PLAN, *supra* note 3, § 6; N.J. PLAN, *supra* note 3, § 1:39-6(b); N.M. PLAN, *supra* note 3, § 19-202.G; N.C. PLAN, *supra* note 3, § .1718(7); S.C. PLAN, *supra* note 3, § VI.G; TEX. PLAN, *supra* note 3, § X.C.

156. See *supra* notes 91-92, and accompanying text.

157. Certification programs can improve access to legal services by allowing certified attorneys to advertise their certification and disseminating information on what certification means and what the requirements for certification are. This additional information will help the consumer locate an attorney who devotes a significant portion of practice time to a particular subject area and who has survived the requirements for certification. This is a positive response to the findings of a 1982 study on lawyer advertising, which noted "that consumers especially wanted information on a lawyer's qualifications, special services offered and fees charged." See Rollins, *supra* note 23, at 487. However, advertising proves to be a double-edged sword, because it depends on the sophistication of the consumer for proper use. See *infra* notes 250-56, and accompanying text for a discussion on "word games" in advertising.

field.¹⁵⁸ All the state plans provide for such committees, which work under the authority of the states' boards.¹⁵⁹ The state plans are similar to the Model Plan in their approach to committee responsibilities, although they include minor variations, such as a different number of committee members,¹⁶⁰ and a requirement that committee members have been admitted to practice for a minimum number of years.¹⁶¹ California alone includes a non-lawyer member on each specialty committee.¹⁶²

C. *Minimum Standards for Recognition as Specialist*

The Model Plan includes minimum practice standards for an attorney seeking certification.¹⁶³ Generally, an applicant must demonstrate "specialty knowledge of the law of th[e] state," pay required fees, and be licensed and in good standing.¹⁶⁴ In addition, the applicant must demonstrate "substantial involvement" in the specialty field over a period of time,¹⁶⁵ make a "satisfactory showing" of continuing education over a

158. Specifically, the Model Plan provides that each committee shall:

- 6.1 After public hearing on due notice, recommend . . . reasonable and nondiscriminatory standards applicable to that specialty;
- 6.2 Make recommendations to the Board for recognition, continued recognition, denial, suspension or revocation of recognition of specialists and for procedures with respect thereto;
- 6.3 Administer procedures established by the Board for applications for recognition and continued recognition as a specialist and for denial, suspension or revocation of such recognition;
- 6.4 Administer examinations and other testing procedures, . . . investigate references of applicants and, if deemed advisable, seek additional information regarding applicants . . . ;
- 6.5 Make recommendations to the Board concerning the approval of and credit to be allowed for continuing legal education courses, or educational alternatives . . . ; and
- 6.6 Perform such other duties and make such other recommendations as may be requested of or delegated to the Specialty Committee by the Board.

MODEL PLAN, *supra* note 86, §§ 6.1-6.

159. See ARIZ. PLAN, *supra* note 3, §§ 5, 11; CAL. PLAN, *supra* note 4, § 4; FLA. PLAN, *supra* note 3, at Rule 6-3.2; LA. PLAN, *supra* note 3, §§ 7.1-2; N.M. PLAN, *supra* note 3, §§ 19-103 to 104; N.C. PLAN, *supra* note 3, § .1719; S.C. PLAN, *supra* note 3, at Rule 408(d); TEX. PLAN, *supra* note 3, § V. New Jersey's committee reports directly to the state supreme court. See *supra* note 138 and accompanying text.

160. See, e.g., ARIZ. PLAN, *supra* note 3, § 11 (providing for five members in workers compensation, criminal, and tax law, but seven in bankruptcy law, nine in personal injury law, and 10 in real estate law).

161. See e.g., FLA. PLAN, *supra* note 3, at Rule 6-3.2 (requiring that members have been admitted to practice in Florida for at least ten years).

162. CAL. PLAN, *supra* note 4, § 4 (requiring nine members, one of whom must be a nonlawyer).

163. See MODEL PLAN, *supra* note 86, § 8. These standards are intended as a baseline for the standards an individual specialty committee may draft.

164. *Id.* §§ 8-8.1.

165. *Id.* § 8.2. The requirement is intended to measure the applicant's "actual experience" practicing within the specialty. The Model Plan suggests two methods of measurement. The first

period of time,¹⁶⁶ and exhibit "qualification . . . through peer review."¹⁶⁷ The Model Plan provides state specialty committees with the flexibility to require "additional, or more stringent standards" in a particular field, to accommodate variations in the demands of that field and geographical area.¹⁶⁸

The major concern is that requirements be objectively verifiable, and neither too restrictive nor too lax in application.¹⁶⁹ For example, the Model Plan gives specialty committees authority to grant credit for alternative types of CLE, if suitable courses have not been available to an attorney during the qualification period, and to waive CLE requirements entirely under certain circumstances.¹⁷⁰ It also prohibits applicants from using persons who are related to them, or who are "partner[s] of or otherwise associated with the applicants in the practice of law" as references.¹⁷¹

There is little variation among the states with regard to this aspect of the program. All require applicants for specialization to be active, licensed members of the bar in good standing.¹⁷² Most provide that more stringent requirements may be established.¹⁷³ In addition, all require applicants to make a satisfactory showing in the following four areas: (1) knowledge and competence in the specialty area;¹⁷⁴ (2) sub-

is a measurement of the percentage of time spent on work in the specialty area. The second is a measurement of the number or type of matters handled within a certain period of time. Alternatively, a combination of the two measurements may be used. If the first measurement is used, the Model Plan suggests that the percentage required be no less than 25% of a full-time practice. *See id.*

166. *Id.* § 8.3.

167. *Id.* § 8.4. The applicant does this "by providing, as references, the names of at least five lawyers . . . or judges, who are familiar with the competence and qualification of the applicant as a specialist." *Id.*

168. *Id.* § 10.

169. *See id.* § 8.2.

170. *See id.* § 8.3.

171. *See id.* § 8.4.

172. *See* ARIZ. PLAN, *supra* note 3, § 6(b) (also requiring applicants to maintain law offices in the state); CAL. PLAN, *supra* note 4, § 5(a); FLA. PLAN, *supra* note 3, at Rule 6-3.5(b); LA. PLAN, *supra* note 3, § 8.2; N.J. PLAN, *supra* note 3, § 1:39-2(a); N.M. PLAN, *supra* note 3, § 19-203.A; N.C. PLAN, *supra* note 3, § .1720(a)(1); S.C. PLAN, *supra* note 3, at Rule 408(e)(1)(A); TEX. PLAN, *supra* note 3, § VI (also requiring applicants to maintain offices in the state).

173. *See* ARIZ. PLAN, *supra* note 3, § 6; CAL. PLAN, *supra* note 4, § 5; FLA. PLAN, *supra* note 3, at Rule 6-3.5(a); LA. PLAN, *supra* note 3, § 8.1; N.M. PLAN, *supra* note 3, § 19.105; N.C. PLAN, *supra* note 3, § .1722; TEX. PLAN, *supra* note 3, § VI. South Carolina's plan contains no specific language to this effect, *see* S.C. PLAN, *supra* note 3, and New Jersey does not need separate authority, because its board directly administers the certification regulations.

174. *See* ARIZ. PLAN, *supra* note 3, § 6(c); CAL. PLAN, *supra* note 4, § 5.b.i; FLA. PLAN, *supra* note 3, at Rule 6-3.5(c)(4); LA. PLAN, *supra* note 3, § 8.3(4); N.J. PLAN, *supra* note 3, § 1:39-3(b); N.M. PLAN, *supra* note 3, § 19-203.B; N.C. PLAN, *supra* note 3, § .1720(a)(2); S.C. PLAN, *supra* note 3, at Rule 408(e)(2)(C); TEX. PLAN, *supra* note 3, § VI.B.4-5.

stantial practice involvement in the field;¹⁷⁵ (3) appropriate CLE;¹⁷⁶ and (4) peer review.¹⁷⁷

1. DEMONSTRATING "KNOWLEDGE" AND "COMPETENCE"

For most states, demonstrating specialty "knowledge" has meant an examination.¹⁷⁸ New Mexico alone does not require an examination in any of its specialties, although its board may summon an applicant to appear before it, or a designated committee, "for a discussion . . . of his or her qualifications."¹⁷⁹ The decision to omit an examination requirement was a result of the New Mexico Supreme Court's requirement that the certification program be self-supporting. Because examinations are

175. See ARIZ. PLAN, *supra* note 3, § 6(c); CAL. PLAN, *supra* note 4, § 5.6.i; FLA. PLAN, *supra* note 3, at Rule 6-3.5(c)(2); LA. PLAN, *supra* note 3, § 8.3(2); N.J. PLAN *supra* note 3, § 1:39-2(b); N.M. PLAN, *supra* note 3, § 19-203.B; N.C. PLAN, *supra* note 3, § .1720(a)(2); S.C. PLAN, *supra* note 3, at Rule 408(e)(2)(A); TEX. PLAN, *supra* note 3, § VI.2.

176. See RULES AND REGS. OF THE ARIZ. BD. OF LEGAL SPECIALIZATION § 4.A (1989) [hereinafter ARIZ. REGS.]; CAL. PLAN, *supra* note 4, § 5(b)(ii); FLA. PLAN *supra* note 3, at Rule 6-3.5(c)(3); LA. PLAN, *supra* note 3, § 8.3(3); N.J. PLAN, *supra* note 3, § 1:39-2(d); N.M. PLAN, *supra* note 3, § 19-203.C; N.C. PLAN, *supra* note 3, § .1720(a)(3); S.C. PLAN, *supra* note 3, at Rule 408(e)(2)(B); TEX. PLAN, *supra* note 3, § VI.B.3.

177. See STATE BAR OF CAL., POLICIES GOVERNING THE STATE BAR OF CALIFORNIA PROGRAM FOR CERTIFYING LEGAL SPECIALISTS § F [hereinafter CAL. POLICIES], in CAL. PLAN, *supra* note 4, at P-1; FLA. PLAN, *supra* note 3, at Rule 6-3.5(c)(6); N.J. PLAN, *supra* note 3, § 1:39-2(c); N.M. PLAN, *supra* note 3, § 19-203.D; N.C. PLAN, *supra* note 3, § .1720(a)(4); S.C. PLAN, *supra* note 3, at Rule 408(e)(1)(B); RULES AND REGS. OF THE TEX. BD. OF LEGAL SPECIALIZATION § IV.F [hereinafter TEX. REGS.], *reprinted in* STATE PLAN BOOK, *supra* note 3, at 451. Arizona's plan does not mention "peer review," but the specialty standards set require applicants to submit references. See, e.g., ARIZONA BD. OF LEGAL SPECIALIZATION, STATE BAR OF ARIZ. STANDARDS FOR CERTIFICATION OF LAWYERS SPECIALIZING IN CRIMINAL LAW § II.D (1994) [hereinafter ARIZ. CRIM. STDS.]. Similarly, Louisiana's plan does not contain this requirement, but it appears in the specialization regulations and the specialty standards for tax law. See RULES AND REGS. OF THE LA. BD. OF LEGAL SPECIALIZATION § 8 (rev. ed. 1995) [hereinafter LA. REGS.]; LOUISIANA STATE BAR ASS'N, SPECIALIZATION PLAN: TAXATION § 4.A(2) [hereinafter LA. TAX PLAN]. *reprinted in* STATE PLAN BOOK, *supra* note 3, at 191.

178. See ARIZ. PLAN, *supra* note 3, § 6(d) (requiring passage of a written examination, demonstrating a "high degree of competence," "higher than that possessed by a general practitioner who might occasionally handle a matter in" the area); CAL. PLAN, *supra* note 4, § 5(b)(iv)(a) (requiring passage of a written examination, and demonstration of "sufficient knowledge, proficiency, and experience in the field" "as is necessary to justify the representation as a specialist" to the profession and public); FLA. PLAN, *supra* note 3, at Rule 6-3.5(c)(4) (requiring passage of a written and/or oral examination); L.A. PLAN, *supra* note 3, § 8.3(4) (requiring passage of a written examination); N.J. PLAN, *supra* note 3, § 1:39-3 (requiring successful completion of a written examination and giving the board discretion to require an oral exam); N.C. PLAN, *supra* note 3, § .1720(a)(5) (requiring passage of a written examination); S.C. PLAN, *supra* note 3, § 408(e)(2)(c) (requiring passage of an "oral and/or written" examination); TEX. PLAN, *supra* note 3, § VI.B.4 (requiring passage of a written examination, but authorizing the board to require an applicant to pass an oral examination if that is "determined advisable").

179. N.M. BD. OF LEGAL SPECIALIZATION, STANDARDS FOR SPECIALIZATION IN NATURAL RESOURCES LAW § 4.4 (1989), *reprinted in* STATE PLAN BOOK, *supra* note 3, at 325.

costly, the state decided not to administer them.¹⁸⁰

Five of the remaining eight states provide certain applicants with limited relief from the examination requirement. Florida and Texas allow applicants to become certified without examination within two years after a specialty field is added to the certification program, if the other minimum standards are increased to offset that absence.¹⁸¹ In Florida, however, only one of the early specialty committees used that option; since then, each new specialty area has required examination.¹⁸² California's plan also allows an applicant to escape an examination, without limitation, "if additional and substantially more stringent standards are required for those for whom waiver is permitted."¹⁸³ North Carolina allows advisory committee members of a new specialty to bypass the examination and peer review requirements if they fulfill all other requirements.¹⁸⁴ A Florida applicant also may avoid the certification examination by obtaining an LL.M. degree in the specialty, from an "approved" law school, within the eight years preceding application.¹⁸⁵ Similarly, South Carolina may waive the examination requirement if an applicant has "recent, specialized, postgraduate education in the specialty area (e.g., a master's degree)."¹⁸⁶

2. DEMONSTRATING "SUBSTANTIAL INVOLVEMENT"

The Model Plan provides a lengthy definition for the term "substantial involvement" in a specialty area and suggests several ways by which the committee may require an individual applicant to demonstrate that it

180. Telephone Interview with Curtis W. Schwartz, former Chair, New Mexico Board of Legal Specialization (May 24, 1996). Mr. Schwartz cited the size of New Mexico's bar, the even smaller number of attorneys eligible for certification, and the anticipated expense of creating, administering, and grading examinations, as reasons for the decision to forgo exams.

181. Florida's Plan allows certification without examination if the following requirements are satisfied: (1) minimum of 20 years in full-time practice, (2) satisfactory showing of competence and substantial involvement in the specialty area during five of the 10 years prior to the application (this requirement may be waived), (3) satisfactory showing of CLE in the specialty area (no less than 15 hours per year), (4) satisfactory peer review and ethics record, and (5) payment of required fees. See FLA. PLAN, *supra* note 3, at Rule 6-3.5(d). Similarly, Texas allows certification without examination if the following requirements are satisfied: (1) a minimum of 10 years of actual, full-time practice, (2) a satisfactory showing of "special competence and substantial involvement" during a continuous period of, at least three and not more than five, years, as determined by the Board of Legal Specialization on advice from the appropriate advisory commission, and (3) payment of required fees. TEX. PLAN, *supra* note 3, § VI.A.

182. Telephone Interview with Dawna Bicknell, Executive Director, Florida Board of Legal Specialization and Education Certification Program (Aug. 22, 1996).

183. CAL. PLAN, *supra* note 4, § 5.b.iv(a).

184. See N.C. PLAN, *supra* note 3, § .1720(c).

185. See FLA. PLAN, *supra* note 3, at Rule 6-3.5(c)(4).

186. S.C. REGS., *supra* note 116, at Regulation VIII.A.

exists.¹⁸⁷ The states have responded in a number of similar ways. Although all nine require substantial involvement, their requirements exhibit minor variations. For example, only Arizona, Florida, New Jersey, and Texas require that applicants have been admitted to practice a certain number of years before applying for certification, even though they impose additional requirements covering only a portion of that period.¹⁸⁸ Otherwise, the plans leave specific requirements to the specialty committees in each designated field, with some general admonitions.¹⁸⁹

3. DEMONSTRATING "QUALIFICATION" THROUGH CONTINUING LEGAL EDUCATION

The Model Plan suggests requiring an average of ten hours of continuing legal education, or its equivalent, for each of the three years immediately preceding application.¹⁹⁰ All the states, but Arizona, require applicants to show that they have continued their legal education through some verifiable amount of educational activity after admission

187. Section 8.2 of the Model Plan suggests that the Specialty Committee in each specialty area submit to the Board a specific definition of "substantial involvement" "from a consideration of its [the specialty area's] nature, complexity and differences from other fields and from consideration of the kind and extent of effort and experience necessary to demonstrate competence in that specialty." MODEL PLAN, *supra* note 86, § 8.2. The standards suggested are "time spent on legal work within the area, . . . the number or type of matters handled within a certain period of time or any combination of these or other appropriate factors . . ." *Id.* The Model Plan also suggests that substitute for practice experience, such as teaching, judicial, governmental, or corporate legal experience, be available. *See id.*

188. *See* ARIZ. PLAN, § 6(a), (c), *supra* note 3, (requiring at least four years since admission to practice (one in full-time practice in Arizona) and a showing of substantial involvement during four of the six years immediately preceding application); FLA. PLAN, *supra* note 3, at Rule 6-3.5(c)(1)-(2) (requiring full-time practice for minimum of five years and substantial involvement during three of the five years preceding application); N.J. PLAN, *supra* note 3, § 1:39-2(a), (b)(2) (requiring minimum of five years since admission to practice in New Jersey, and substantial involvement in preparation and trial of litigated matters within the three years immediately preceding application); TEX. PLAN, *supra* note 3, § VI.A.1-2 (requiring admission to practice for 10 years, and substantial involvement "during a continuous five-year, or other reasonable period, (but not less than three years) immediately preceding certification").

189. For example, California's plan requires the standards set to:

- (1) Provide broad access to practitioners . . . ;
- (2) Not arbitrarily exclude certain practitioners by reason of their association with a limited practice office, i.e., government or agency offices;
- (3) Not be arbitrary in the amount or nature of the requirements set;
- (4) Avoid requirements which encourage unnecessary litigation;
- (5) Provide alternatives or equivalents to assure that practitioners are not arbitrarily excluded . . . where necessary due to the geographical location or type of practice.

CAL. POLICIES, *supra* note 177, § D.

190. *See* MODEL PLAN, *supra* note 86, § 8.3. This requirement is not absolute, however, because authority is given to the Committee to waive the requirement or give credit for alternative types of CLE, if suitable courses have not been available during those three years.

to practice.¹⁹¹ Most states require a specified number of CLE credit hours per year, ranging from ten through 13.3.¹⁹² The California and Louisiana plans do not require a specific number of credits; rather, they leave it to the specialty committees to set a specific standard.¹⁹³

4. DEMONSTRATING "QUALIFICATION" THROUGH "PEER REVIEW"

The Model Plan requires an applicant to provide five peer references—lawyers or judges, licensed and in good standing, who are familiar with the attorney's qualifications in the specialty.¹⁹⁴ All certification states provide for peer review.¹⁹⁵ Most also provide for investigation beyond the references submitted by the applicant,¹⁹⁶ and four state plans require publication of the applicant's name in the local bar journal or newspaper, allowing interested parties to comment on the applicant's

191. See CAL. PLAN, *supra* note 4, § 5(ii); FLA. PLAN, *supra* note 3, at Rule 6-3.5(c)(3); LA. PLAN, *supra* note 3, § 8.3(3); N.J. PLAN, *supra* note 3, § 1:39-2(d); N.M. PLAN, *supra* note 3, § 19-203.C; N.C. PLAN, *supra* note 3, § .1720(a)(3); S.C. PLAN, *supra* note 3, at Rule 408(e)(1)(B); TEX. PLAN, *supra* note 3, § VI.B.3. In contrast, Arizona has a mandatory CLE program for all attorneys and merely expects applicants to be in compliance with that requirement. See ARIZ. REGS., *supra* note 176, § 4.

192. See FLA. PLAN, *supra* note 3, at Rule 6-3.5(c)(3) (requiring "no less than" 10 hours per year, but allowing the individual specialty standards to rule); N.J. REGS. *supra* note 151, at Regulation 204:1 (requiring a "minimum of thirty hours . . . within the three years immediately preceding the application"); N.M. PLAN, *supra* note 3, § 19-203.C (requiring a minimum of 10 hours each year for the three years immediately preceding application); N.C. PLAN, *supra* note 3, § .1720(a)(3) (requiring 12 hours per year for three years immediately preceding application, and allowing waiver or substitution where CLE in the field was not available); S.C. REGS., *supra* note 116, at Reg. VII.F (requiring 36 hours during the three years immediately preceding application); TEXAS BD. OF LEGAL SPECIALIZATION, STATE BAR OF TEX., STANDARDS FOR CERTIFICATION IN CRIMINAL LAW § II.C [hereinafter TEX. CRIM. STDS.], *reprinted in* TEX. BD. OF LEGAL SPECIALIZATION, STANDARDS FOR CERTIFICATION 25 (requiring 40 hours during the three years preceding application).

193. See CAL. PLAN, *supra* note 4, § 5(b)(ii). California requires a showing of "special educational experience" in the field. *Id.* Its program generally requires a CLE showing for the three years immediately preceding application, and indicates that specifications are contained in the standards for each specialty. See RULES AND REGS. OF THE STATE BAR OF CAL. PROGRAM FOR CERTIFYING LEGAL SPECIALIZATION § III.B.1 [hereinafter CAL. REGS.], *reprinted in* CAL. PLAN, *supra* note 4, at B-1; LA. PLAN, *supra* note 3, § 8.3(3) (requiring "satisfactory showing" of CLE which the board determines for each specialty (for example, the tax certification program requires 24 hours per year, see LA. TAX PLAN, *supra* note 177 § 4.A(3)).

194. See MODEL PLAN, *supra* note 86, § 8.4. As noted earlier, none of the persons listed may be related to, a partner of, or otherwise associated with the applicant in a law practice. See *supra* note 171, and accompanying text. The Specialty Committee is to interview these references, the appropriate disciplinary body, "and other persons" about the applicant's "competence and qualification to be recognized as a specialist." *Id.*

195. See sources cited *supra* note 177.

196. See ARIZ. CRIM. STDS., *supra* note 177, § II.D; CAL. REGS., *supra* note 193, § VI.C.2; FLA. PLAN, *supra* note 3, at Rule 6-3.5(c)(6); N.J. PLAN, *supra* note 3, § 1:39-2(c); N.M. PLAN, *supra* note 3, § 19-203.D; N.C. PLAN, *supra* note 3, § .1720(a)(4); S.C. REGS., *supra* note 116, at Regulation VII.E; TEX. REGS., *supra* note 177, § VI.F.

fitness for certification as a specialist.¹⁹⁷ The state plans require references from peers within the profession, but leave the question of how many references to require to the individual specialty committees.¹⁹⁸ New Mexico, in its standards for the criminal law specialty, is the only state that provides for comment on an applicant from the lawyer's former clients as part of the "peer review" requirement.¹⁹⁹

D. *Minimum Standards for Continued Specialist Recognition*

The Model Plan suggests that an optimal period for certification is five years and sets forth a few criteria the certification body may use to assure that an attorney's recertification is justified.²⁰⁰ Most states have

197. See ARIZ. REGS., *supra* note 176, § 3.I; CAL. REGS., *supra* note 193, § VI.C.5; STANDING POLICIES OF THE BD. OF LEGAL SPECIALIZATION AND EDUC., § 2.04(i) [hereinafter FLA. POLICIES]; LA. REGS., *supra* note 177, § 8.7; RULES AND REGS. OF THE BD. OF LEGAL SPECIALIZATION, § 7.7 (1991), *reprinted in* N.M. PLAN, *supra* note 3, app. A. South Carolina publishes applicants' names, although the plan does not require it. Letter from Harold L. Miller, Executive Director, South Carolina's Commission on Continuing Legal Education and Specialization, to author, at no. 6 (Feb. 13, 1996) (on file with author) [hereinafter Miller Letter].

198. For example, Arizona requires reference letters that "conform to the standards for the specialty areas." ARIZ. REGS., *supra* note 176, § 3.H. See *infra* notes 382-89 and accompanying text for specific numbers required in criminal law specialty.

California has the most elaborate peer review process. The RULES AND REGULATIONS OF THE STATE BAR OF CALIFORNIA PROGRAM FOR CERTIFYING LEGAL SPECIALISTS delineates the process. It explains that the applicant must submit names of references who are familiar with the work on which the applicant relies to fulfill the "tasks" requirement. See CAL. REGS., *supra* note 193, § VI.C(1). Each of those persons named will be asked to submit names of additional references familiar with the applicant's competence, and questionnaires will be sent to them. See *id.* In addition, the commission will use its authority to solicit information independently from people on a list maintained by each specialty commission about the applicant. See *id.*, § VI.C(2). The regulations also specify that no evaluation of an applicant will occur until the minimum number of references has been received and the comment period has expired. See *id.*, § VI.C(6). If two references indicate that the applicant is not qualified, or there is a serious question raised about the applicant's proficiency, further investigation will take place. See *id.*

In addition to considering the references submitted by the applicant and any other references solicited independently by the specialty's advisory commission, the commission may review "the applicant's work product, problem analysis, statement of issues and analysis, or such other criteria which the advisory commission deems appropriate." *Id.* § VI.B. This entire process may be accomplished by authorizing the specialty's advisory commission to create "one or more independent inquiry and review committees consisting of persons who are proficient in the specialty" and who are on one of the specialty's "panels" which are composed of practitioners representing a diversity of viewpoints and geographical areas. *Id.* § VI.E (containing lengthy additional criteria for the panel members). Subsections F and G state procedures for the advisory commission and the independent inquiry and review committees to follow.

199. See NEW MEXICO BD. OF LEGAL SPECIALIZATION, APPROVED STDS. FOR SPECIALIZATION IN CRIMINAL LAW § 4.3 (1990) (requiring seven references: one judge, four attorneys, and two former clients) [hereinafter N.M. CRIM. STDS.], *reprinted in* STATE PLAN BOOK, *supra* note 3, at 330.

200. See MODEL PLAN, *supra* note 86, § 9. Before the end of the five-year period, the specialist must reapply and submit to the initial certification requirements, set forth in section 8. Compare *id.* with *id.* § 8. It also provides for the possibility of interim inquiry from the specialty

established similar requirements. All, with the exception of New Jersey, provide for a five-year certification period.²⁰¹ Upon application for recertification, the attorney must pay the appropriate fee.²⁰² The attorney must demonstrate that he or she continues to fulfill the substantial involvement and continuing legal education criteria.²⁰³ Five states—California, Florida, New Jersey, North Carolina, and South Carolina—also require a renewed showing of competence through peer review;²⁰⁴ four states—Arizona, Louisiana, New Mexico, and Texas—do not. Several states have authorized the specialty committee to require interim proof of continued qualification and compliance with requirements.²⁰⁵

No state requires that an applicant for recertification be re-examined in the specialty area, except in special circumstances, such as where the attorney fails to meet the recertification standards, there is a lapse in certification, or the committee “deems [it] appropriate.”²⁰⁶

E. Decertifying a Specialist

Section 11 of the Model Plan provides for revocation or suspension

committee during the five-year certification period and requires that the certified attorney comply with any such request. *See id.* § 9.

201. *See* ARIZ. PLAN, *supra* note 3, § 8; CAL. PLAN, *supra* note 4, § 6(a); FLA. PLAN, *supra* note 3, at Rule 6-3.6(a); LA. TAX PLAN, *supra* note 177, § 4; N.J. PLAN, *supra* note 3, § 1:39-7; N.M. PLAN, *supra* note 3, § 19-204; N.C. PLAN, *supra* note 3, § .1721(a); S.C. PLAN, *supra* note 3, at Rule 408(f); TEX. PLAN, *supra* note 3, § VII.

202. *See* ARIZ. PLAN, *supra* note 3, § 8(c); CAL. PLAN, *supra* note 4, § 11; FLA. PLAN, *supra* note 3, at Rule 6-3.6(b)(5); LA. TAX PLAN, *supra* note 177, at 195; N.J. REGS., *supra* note 151, at Reg. 501:2; N.M. PLAN, *supra* note 3, § 19-204; N.C. PLAN, *supra* note 3, § .1721(a); S.C. PLAN, *supra* note 3, at Rule 408(f)(3); TEX. PLAN, *supra* note 3, § VII.C.

203. *See* ARIZ. PLAN, *supra* note 3, § 8(a)-(b); CAL. PLAN, *supra* note 4, § 6(c); FLA. PLAN, *supra* note 3, at Rule 6-3.6(b)(1)-(2); LA. PLAN, *supra* note 3, § 4.B; N.J. PLAN, *supra* note 3, § 1:39-7; N.M. PLAN, *supra* note 3, § 19-204; N.C. PLAN, *supra* note 3, § .1721(a); S.C. PLAN, *supra* note 3, at Rule 408(f)(1)-(2); TEX. PLAN, *supra* note 3, § VII.A-B.

204. *See* CAL. PLAN, *supra* note 4, § 6(c)(iv); FLA. PLAN, *supra* note 3, at Rule 6-3.6(b)(3); N.J. REGS., *supra* note 151, § 501:1; N.C. PLAN, *supra* note 3, § .1721(a)(3); S.C. REGS., *supra* note 116, at Reg. VII.K.

205. Arizona requires all attorneys to file an annual affidavit of compliance with mandatory CLE requirements. *See* ARIZ. PLAN, *supra* note 3, § 7(c). In addition, certified specialists must submit a second form, listing each educational activity and affirming their continued qualification for certification. *See* ARIZ. REGS., *supra* note 176, § 4(A)(3).

Each year, New Mexico sends certified attorneys a form that asks questions related to their continued compliance with certification standards. N.M. PLAN, *supra* note 3, § 19-204. The form addresses issues such as attorney misconduct, disciplinary violations, and malpractice; the percentage-of-time spent in the specialty area; and the attorney's continuing substantial involvement. *See* Board of Legal Specialization, State Bar of N.M., Specialist Annual Report Form (Dec. 14, 1995). It also requests a list of qualifying CLE activities and the release of all records relevant to the issues. *See id.*; *cf.* N.C. PLAN, *supra* note 3, § .1721(a).

206. N.J. PLAN, *supra* note 3, § 1:39-7; *see also* FLA. PLAN, *supra* note 3, at Rule 6-3.6(c); TEX. PLAN, *supra* note 3, § VII.C.

of certification under several circumstances,²⁰⁷ and requires that a specialist notify the Board in the event that any of these situations occur.²⁰⁸ A lawyer who has been rejected, suspended, or decertified by the program may appeal to the Board, and then to the state supreme court, for relief.²⁰⁹ All certification states provide for hearings and appeals following denial of recognition.²¹⁰ A lawyer whose certification is suspended may reapply as if for initial certification.²¹¹ The states generally are in accord with the Model Plan in this respect.²¹²

207. Such action may be taken if the specialization program in the specialty is terminated, or when it is determined that:

11.1 The recognition of the lawyer as a specialist was made contrary to the rules and regulations of the Board;

11.2 The lawyer recognized as a specialist made a false representation, omission or misstatement of material fact to the Board or appropriate Specialty Committee;

11.3 The lawyer recognized as a specialist has failed to abide by all rules and regulations promulgated by the Board;

11.4 The lawyer recognized as a specialist has failed to pay the fees required;

11.5 The lawyer recognized as a specialist no longer meets the standards established by the Board for the recognition of specialists; or

11.6 The lawyer recognized as a specialist has been disciplined, disbarred or suspended from practice by the Supreme Court or any other state or federal court or agency.

MODEL PLAN, *supra* note 86, § 11.

208. *See id.*

209. *See id.* § 12.

210. *See* ARIZ. PLAN, *supra* note 3, § 10 (requiring appeal to board and bar's Board of Governors, as conditions precedent to judicial review); CAL. PLAN, *supra* note 4, § 8.b (providing hearing procedure); CAL. REGS., *supra* note 193, § VIII, providing for reconsideration by the board and a hearing by the State Bar Court, before supreme court review); FLA. PLAN, *supra* note 3, at Rule 6-3.9 (providing for hearing before state bar's Board of Governors, as condition precedent to supreme court review); LA. PLAN, *supra* note 3, § 11 (providing for appeal to Board of Governors prior to appeal to state supreme court); N.J. PLAN, *supra* note 3, § 1:39-9 (authorizing direct appeal to supreme court after final action denying certification); N.M. PLAN, *supra* note 3, § 19-206 (providing for hearing before Board, then appeal to supreme court); N.C. PLAN, *supra* note 3, § .1724 (providing for hearing before Board of Legal Specialization, then appeal to Council of the North Carolina State Bar, but not providing for formal review by state supreme court); S.C. PLAN, *supra* note 3, at Rule 408(h) (providing for hearing before specialization advisory board, then appeal to Commission on Continuing Legal Education and Specialization, then hearing before supreme court); TEX. PLAN, *supra* note 3, § IX (requiring hearing before Board of Directors of the State Bar of Texas as condition precedent to judicial review). While the Texas rules do not provide for ultimate hearing before the state supreme court, administrative procedures could gain an applicant such a hearing. Telephone Interview, with Gary W. McNeil, Executive Director, Texas Board of Legal Specialization (May 14, 1996).

211. *See* MODEL PLAN, *supra* note 86, § 11.

212. Arizona, California, Louisiana, New Mexico, North and South Carolina, and Texas track Model Plan subsections 11.1 through 11.6. *See* ARIZ. PLAN, *supra* note 3, § 9; CAL. PLAN, *supra* note 4, § 7; LA. PLAN, *supra* note 3, § 10.1; LA. TAX REGS., *supra* note 202, § XI; N.M. PLAN, *supra* note 3, § 19-205; N.C. PLAN, *supra* note 3, § .1723; S.C. PLAN, *supra* note 3, at Rule 408(g); TEX. REGS., *supra* note 177, § IX. Florida's plan eliminates subsection 11.1. *See* FLA. PLAN, *supra* note 3, at Rule 6-3.7. New Jersey provides for termination of certification where the attorney no longer demonstrates competence or has engaged in unacceptable conduct or omissions. *See* N.J. PLAN, *supra* note 3, § 1:39-8.

F. Comparing the Legal and Medical Specialist Certification Plans

The ABA's Model Plan and the certification plans developed by the various states share a similar basic structure. This structure bears a strong resemblance to the organization of medical specialty certification boards.²¹³ This resemblance is not surprising, since lawyers have seen medicine as the model for comparison from the beginning of internal efforts to organize and upgrade the legal profession.²¹⁴ It was the medical profession's immediate and positive reaction to a 1910 critique of medical education, funded by the Carnegie Foundation for the Advancement of Teaching and known as the "Flexner Report,"²¹⁵ that impelled the legal profession to request Foundation funding for Alfred Z. Reed's formal review of legal education and training.²¹⁶

In the area of specialty certification, too, the medical profession moved swiftly. In 1920, the profession created fifteen "committees to recommend the preparation . . . deemed essential to secure expertness in

In New Jersey, however, decertification is not automatic if disciplinary sanctions are imposed. Instead, the Board on Trial Attorney Certification is required to hold a hearing to determine what sanctions to impose. *See id.* At the hearing, the attorney may offer "relevant evidence in mitigation that is not inconsistent with [the facts established in the disciplinary hearing]." *Id.* Like some of the other certification states, *see, e.g.,* ARIZ. REGS., *supra* note 176, § 3.G; N.M. PLAN, *supra* note 3, § 19-205.C; N.C. PLAN, *supra* note 3, § .1723(c), New Jersey allows decertified attorneys to reapply for certification according to the requirements for original certification. *See* N.J. PLAN, *supra* note 3, § 1:39-8.

213. *See generally* John J. Smith, *The Specialty Boards and Antitrust: A Legal Perspective*, 10 J. CONTEMP. HEALTH L. & POL'Y 195 (1994). The medical certification program also (1) is voluntary and not required in order to practice, *see id.* at 195, 199; (2) gives specialists no monopoly in specialty fields, *see id.*; (3) requires graduation from an approved medical school, completion of an approved post-medical school residency, peer review of clinical skills, and passage of an examination, *see id.* at 198; (4) creates individual certifying boards from recognized specialists in the particular field, overseen by a parent group made up of representatives from several professional and public constituencies, *see id.* at 196 & n.3; and (5) is time-limited, but renewable, in its certification approval, *see id.* at 198-99.

214. *See* REED, *supra* note 6, at 209-10. Reed commented that, when the ABA was being formed, consideration was given to organizing lawyers in the same "federative form" adopted by the medical profession, but the notion was dropped for egotistic, logistic, and political reasons. *Id.* Reed continued: "The permanent [medical] organization . . . was not only pleasingly symmetrical; . . . it became also admirably efficient in operation. Any differences of opinion between society and society have from the beginning been settled within the profession itself, which thus speaks to the outside world with united authority." *Id.* at 209.

215. *See History of Accreditation of Medical Education Programs*, 250 JAMA 1502, 1503 (1983) [hereinafter JAMA HISTORY]. The report criticized the quality of the 155 medical schools then in existence. *See id.* Because the medical profession had established a strong national organization, it was able to move quickly in response to criticism of its training methods. Within 12 years, the number of approved medical schools dropped to 81. Formal internship programs following classroom education became available at some medical schools in the early 20th century, so that by 1910, approximately 70% of U.S. medical graduates were voluntarily seeking the experience. *See id.* at 1504.

216. *See* Henry S. Pritchett, *Preface to REED*, *supra* note 6, at xviii.

each of the specialties.”²¹⁷ Since then, certification has become a virtual requirement of medical practice. By 1978, ninety-one percent of a random sample of 1968 medical school graduates were either certified or on their way to becoming so.²¹⁸ Currently, twenty-six specialty committees participate in the medical residency accreditation process.²¹⁹

Lawyers active in attempts to improve the legal profession admired the medical profession’s organizational structure, and control over doctors and other participants, and suggested that it was a model to emulate.²²⁰ That influence still can be seen in legal specialization efforts.²²¹

This connection, and the public’s knowledge and acceptance of the distinction between general medical practitioners and specialists, support a direct comparison between doctors’ and lawyers’ certification requirements. While some aspects of the medical specialty certification structure are not particularly relevant to this discussion,²²² the structure of certification programs and the standards they set, do have great significance.

Structure of Certification Programs. The medical profession does not appear to have suffered from the competitiveness that affected legal discussions about specialization recognition. For example, even before the U.S. medical profession established formal specialty residencies, thousands of doctors were traveling to Europe to learn the latest techniques in different specialties and then returning to the United States to practice as self-designated specialists.²²³ And, while there must have been opposition to efforts to unify the method of medical training, it apparently was unable to slow steady movement in that direction.

There is no direct parallel between the entities that control certification in the medical and legal professions. The American Board of Medical Specialties (“ABMS”) applies standards for certification to doctor applicants in a particular area of medical practice,²²⁴ a task performed by

217. JAMA HISTORY, *supra* note 215, at 1505.

218. *Id.* at 1506.

219. See ACCREDITATION COUNCIL FOR GRADUATE MED. EDUC., ESSENTIALS AND INFORMATION ITEMS, 1995-1996, at 13 (1995) [hereinafter ESSENTIALS] (listing current residency review committees).

220. See REED, *supra* note 6, at 209-10; see also Russell D. Niles, *Ethical Prerequisites to Certification of Special Proficiency*, 49 A.B.A. J. 83, 84-85 (1963); Cheatham, *supra* note 23, at 502.

221. See, e.g., MODEL STANDARDS IN CRIMINAL LAW § 4.4.1 cmt. [hereinafter MODEL CRIM. STDS.] (Comparing law with medicine: “In the medical profession, for example, oral and written examinations are used in conjunction with formal training programs, but even then observation of skills and judgment play a more important role in the qualification process.”).

222. For example, the fact that the regulation of doctors is a private, rather than governmental, effort. See Smith, *supra* note 213, at 195.

223. See JAMA HISTORY, *supra* note 215, at 1502.

224. The ABMS is an independent entity, whose members include certified specialists in

the individual specialty committees in the state legal certification programs. Much like the state boards in legal certification programs, however, the ABMS exerts overall supervision over medical specialty certification activity.²²⁵ Yet, unlike the state boards, the ABMS does not decide whether a particular residency program complies with the appropriate standards set for the specialty.²²⁶ That work is performed by the Accreditation Council for Graduate Medical Education ("ACGME"),²²⁷ whose membership includes ABMS representatives and representatives of other specialties, nonspecialists, and government and public interests.²²⁸ In legal certification programs, however, that task is performed by the individual specialty committees.

Two major differences between the medical and legal specialty certification schemes, then, are apparent at first glance: (1) the former is national in scope, while the latter acts locally; and (2) the specialty standards set by specialist members of the medical profession are "applied" by a group that includes nonspecialists and members representing the public interest, while the legal profession acts in an insular manner, on the whole. These differences prevent the setting of uniform standards for experience and competence in legal specialty fields throughout the country and limit contribution from the public.²²⁹

Standards for Specialty Certification. Standards set on a state-by-state basis, compared with a uniform national standard, raise questions

various areas of medicine and three persons representing the public interest. Telephone Interview with Dr. Schneidman, Board of Medical Specialties (May 17, 1996); see also Smith, *supra* note 213, at 196. Currently, the public members of the ABMS are a former editor of a science magazine, the chancellor of a college system, and an M.B.A. who audits health care practice plans. Telephone Interview with Dr. Schneidman, Board of Medical Specialties (May 17, 1996).

225. The ABMS administers examinations, accepts specialty boards' recommendations of candidates for certification, and issues specialization certificates. See Smith, *supra* note 213, at 196.

226. The ESSENTIALS, *supra* note 219, contains requirements for review and accreditation of graduate medical education programs.

227. The Department of Education does not recognize the Council as an accreditation body; however, the Council's accreditation activities are included in various laws that provide funding to medical schools, which must "voluntarily" seek ACGME approval. Telephone Interview with Dr. Kenny, ACGME (May 17, 1996).

228. The Council includes representatives from the following medical groups: ABMS, the American Medical Association, the Association of American Medical Colleges, the American Hospital Association, the Council of Medical Specialty Societies. See Smith, *supra* note 213, at 197. It also includes nonvoting representatives of the public and the federal government. See *id.* The sponsoring medical organizations nominate the representatives of the public, usually after publication of notice of a vacancy. Telephone Interview with Dr. Kenny, ACGME (May 17, 1996). Currently, the public members include a staff attorney with Indiana University and a former state governor who is now with the University of Colorado. *Id.*

229. See discussion *infra* notes 261-72, and accompanying text, concerning the difficulties a nonlawyer has in knowing what he or she is getting when hiring a legal specialist, and Part IV, discussing the variety of ways in which the states have applied specific criteria.

about quality. As will be seen in the remainder of this section, and in Part IV, the state certification programs vary widely in their prerequisites. Despite the superficial similarity in state plans, these variations create uncertainty about the definition of a legal specialist.

To be certified in the medical profession, a doctor must have (1) graduated from an accredited medical school, or its equivalent; (2) completed an accredited graduate residency; and (3) passed a written (and sometimes oral) examination.²³⁰ Certification in the legal profession requires the same first step—a lawyer must have been admitted to the bar.²³¹ In most certification states, the third step also is identical; the lawyer must pass an examination in the specialty area.²³² The most significant differences between medical and legal certification are in step two—the residency requirement.

Medical residency programs provide a period of “on-the-job” training, are reviewed on a regular basis²³³ and are accredited on the basis of their compliance with national standards.²³⁴ Residency program curricula must conform to specific requirements for practical instruction and clinical experience.²³⁵

230. See Smith, *supra* note 213, at 198.

231. See *supra* note 164.

232. All but New Mexico administer examinations. See *supra* Part III.C.1.

233. “The maximum interval between reviews of programs holding full accreditation is five years; however, a review committee may specify a shorter cycle.” ACCREDITATION COUNCIL FOR GRADUATE MED. EDUC., MANUAL OF POLICIES AND PROCEDURES FOR GRADUATE MEDICAL EDUCATION REVIEW COMMITTEES 14 (1995).

234. See ACGME GUIDELINES FOR PREPARATION OF PROGRAM REQUIREMENTS AND FOR SUBSPECIALTY ACCREDITATION Part I.B., *reprinted in id.* app. B. (outlining suggested specialty program requirements, focusing on “[i]nstitutional organization,” “[f]aculty qualifications and responsibilities,” “[f]acilities and resources,” “[t]he educational program,” and “[i]nternal evaluation procedures.”). For example, the ACGME GUIDELINES suggest that the program requirements for each specialty’s residency’s clinical component should include:

1. Requirements regarding the number, variety, and classification of patients
2. Requirements regarding patient rotations/educational experiences for residents
3. Statements regarding:
 - a. Resident responsibility for patient care
 - b. Resident participation in continuity of patient care
 - c. Degree of resident supervision
 - d. Qualifications for providing graded responsibility to residents
 - e. Statement regarding the level of supervision residents may provide to more junior residents and other personnel.

Id. at 3.

235. See, ESSENTIALS, *e.g.*, *supra* note 219, at 46-53 (setting forth requirements for family practice residencies). The requirements for family practice residencies state: “Every residency program must have the core or required curriculum as contained herein,” *id.* at 47, and “Residents should develop and maintain a continuing physician-patient relationship with a panel of patients throughout the 3-year period . . . with family practice faculty supervision as appropriate.” *Id.* They include a list of 17 specific subject areas in which the resident must receive instruction and experience. See *id.* at 48-50. They also specify:

In contrast, the legal profession has created few formal post-law-school programs, and even fewer that compare with the rigor or focus of post graduate medical residencies.²³⁶ The task requirements of "substantial involvement"²³⁷ in the legal specialty area also do not compare favorably with the required clinical experience in a medical residency.²³⁸ For example, within a state, or even a county, there is little consistency in the task experience of an attorney in the practice of criminal law. The handling of a particular criminal law matter can be more or less educational, and more or less demanding of an attorney's skill, depending on the particular judge, the jury, and the individual facts of a case.

Some attorneys have argued that legal "residency" programs are inappropriate for lawyers because individual legal problems are unique and the law changes continually, whereas the human body is always the same. Doctors might respond that different medical patients and identical illnesses vary in exactly the same way, and that the purpose of a medical residency is to develop more sophisticated analytic abilities in

The faculty must contain teachers with the diversified interests and expertise necessary to meet the training responsibilities of the program. One measure of the quality of a faculty is whether there is evidence of participation in research and other scholarly activities. The number of physician faculty must be sufficient to ensure that there is always an appropriate number who, without other obligations, supervise the residents in the family practice center whenever the residents are seeing patients. There must be at least one full-time equivalent family physician faculty member for each six residents in the program.

Id. at 51.

236. A number of law schools have developed LL.M. and other post-law-degree programs in fields such as tax, which a couple of legal certification programs will accept as fulfilling all or part of the requirements for recognition. See *supra* notes 185-86 and accompanying text. These programs undergo periodic reaccreditation by the ABA and Association of American Law Schools, in conjunction with the reaccreditations of the law schools to which they are connected. See, ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS Std. 307 (1996); RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS BY THE ABA Rule 8 (1996). However, the graduate programs are not the focus of the ABA visit, as they are for the ACGME, and no one would argue that the degrees awarded have the value or power of a residency in a medical specialty.

237. See *supra* notes 187-89 and *infra* part IV.A.1.b, and accompanying text.

238. For example, one of the 17 substantive areas in which a family practice resident is required to have experience is pediatrics. See ESSENTIALS, *supra* note 219, at 49. The required content of that experience is as follows:

There must be a structured educational experience in pediatrics of 4 to 5 months, which involves ambulatory and inpatient experiences. This must include the newborn nursery, as well as experience in resuscitation, stabilization, and preparation for transport of the distressed neonate. The resident should have the opportunity to develop an understanding of the prenatal period, the growth and development of the newborn through adolescence, and emotional problems of children and their management. In addition, the resident should be taught to recognize and manage behavioral, medical, and surgical problems of children and adolescents in home, ambulatory, and hospital settings.

Id.

specialty fields of medicine than can be developed in medical school. The supervision and teaching provided by an experienced medical practitioner during the doctor's period of specialty residency, and that practitioner's evaluation of the doctor's skill, help to assure the doctor's expertise. There is no legal specialist with extensive trial experience and detailed knowledge of the particular area of law, whose duty is to observe the legal specialist applicant's performance of multiple tasks over a given period of time and to determine whether the applicant has learned and exercised the analytical skills necessary to be deemed a specialist.

The legal certification programs recognize that difference. Peer review, particularly where it requires references from a judge before whom the practitioner has appeared, and an attorney whom he or she has opposed in a case, attempts to make up for the difference.²³⁹ And it may do so—to an extent. However, it is not the role or duty of a presiding judge or opposing lawyer to closely observe the performance of the future applicant. Judges and other lawyers have their own obligations during a trial and are not likely to view a colleague's actions in the same detail, and with the same objectivity, as the faculty in a medical residency program. Trial recollections, particularly those given some time after the event, will be spotty, tending to highlight matters of particular concern to the reviewer. Review of the recollections of a number of independent references by the legal specialty committee may or may not improve the overall unreliability of peer review.

One aspect of the recertification process also is different for medical specialists. Board-certified doctors are re-examined on a regular basis;²⁴⁰ legal specialists are not.²⁴¹ Re-examination was not originally required of medical specialists, but ABMS quickly recognized that a lifetime certification, even with required continuing education, provided little incentive for doctors to keep up with new medical knowledge and techniques.²⁴² Similarly, continuing education requirements alone are not sufficient to assure the integration of new law and procedure into a lawyer's practice. Unpleasant as the prospect may be, but for the same reasons, re-examination is as necessary for lawyer specialists as it is for medical specialists.

Public contribution to certification programs. The standards for medical certification are applied with the involvement of public and

239. See, e.g., *infra* notes 382-94 and accompanying text discussing criminal law specialty requirements.

240. See Smith, *supra* note 213, at 199.

241. See *supra* note 206 and accompanying text.

242. See Smith, *supra* note 213, at 198.

governmental representatives, both on the ACGME, which accredits graduate residency programs, and on the ABMS, which handles the certification process. When the public has a voice in the process, their concerns about the quality of medical care can be raised and incorporated into medical training standards. Similarly, there are many aspects of legal practice that affect client access to and satisfaction with legal services. Some of these can be identified and resolved only through listening to clients.

The Model Plan's inclusion of public members on its specialization board makes sense. Given the goals of improving access to legal services and improving attorney competence, it seems likely that former, current, and potential clients would have pertinent contributions to make in formulating the criteria for certification. While the state specialization boards have access to information concerning the public's legal needs and complaints about attorneys that has been collected in national surveys,²⁴³ the inclusion of public representatives in the deliberations that create specific standards and requirements seems likely to assure that the survey information is effectively used. For example, representatives of consumer action groups, such as HALT, and state departments of consumer affairs are likely to have knowledge and ideas about improving access to legal services. Who better than the public to be served will know how to make legal services more available? Who better will know the barriers that exist to finding appropriate legal counsel?²⁴⁴

The use of advertising by lawyers. Whether the legal profession achieves its goal of increasing access to legal services depends on getting the word about legal specialists to the public in a way that can be easily understood. Doctors have never been prohibited from advertising

243. See, e.g., BARBARA A. CURRAN, AMERICAN BAR FOUND. & SPECIAL COMM. TO SURVEY LEGAL NEEDS, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* (1977).

244. California's program has obtained useful contribution from public participation. It is difficult for most people to put themselves in another's position. Attorneys, particularly those at the top of their profession and, thus, most likely to be appointed to specialization boards, are as likely as others to be myopic when it comes to empathizing with the concerns of undereducated citizens and the bulk of the middle class. See Letter from Phyllis J. Culp, Director, Legal Unit, California Board of Legal Specialization, to author 2 (Mar. 6, 1996) (on file with author) [hereinafter Culp Letter]. Culp noted:

[I]n the last few years, we have solicited and appointed individuals who have knowledge that would be helpful to the program. For example, we have on the Board of Legal Specialization (BLS) a professional liability insurance broker and representatives of the media, both print and electronic. Public members also provide a consumer viewpoint, which is often useful when evaluating applicants for certification and recertification.

Id.

their services, so the question whether advertising is proper, or professional, has never been a divisive issue in that profession.²⁴⁵ The legal profession is different. The propriety of lawyer advertising has been an issue in the legal profession since the turn of the century, when express prohibitions on most forms of advertising were implemented.²⁴⁶ Despite the Supreme Court decisions allowing attorney advertising, many lawyers still hold the opinion that advertising is demeaning to the profession.²⁴⁷ That group continues to resist what it sees as the "commercialization" of law practice, making legal advertising a major controversy for the legal profession.²⁴⁸

Advertising is also an issue for certification programs because the variations in specialty standards between and within the states create problems for consumers. Every state plan provides for the advertising of certification status.²⁴⁹ However, it is not clear that such provisions are very helpful to the consumer, or the specialist. Since Peel lifted the traditional prohibition on claiming expertise, consumers have been left to deal with attorney "word games."²⁵⁰ Eight certification states have reserved use of the words "certified," "certified specialist," "specialist," or "specializing," to certified attorneys.²⁵¹ South Carolina also prohibits non-certified attorneys from using the words "expert" and "author-

245. See Niles, *supra* note 220, at 84-85. There is a prohibition on soliciting patients, however. See *id.* at 84.

246. See Timothy J. Williams, Comment, *Specialization: Recognizing De Facto Specialization and the Fundamental Right of the Attorney to Advertise*, 19 CAP. U. L. REV. 573, 574 n.11 (1990) ("The first formal rules against advertising were promulgated by the Alabama State Bar Association in 1887, and the American Bar Association followed suit in 1908."); see also Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1085 n.2 (1983).

247. See *supra* notes 40-41 and accompanying text.

248. See generally, Tonia S. Goolsby, *Florida Bar v. Went For It: Ambulance-Chasing Attorneys Hit an Advertising Brick Wall*, ARK. L. REV. (forthcoming).

249. See *supra* note 155 and accompanying text.

250. Terrence M. Gherty, *Pro: Specialty Certification Is Here to Stay—Not to Regulate it Would Be Irresponsible*, WIS. LAW., Nov. 1991, at 10, 10.

251. One state reserves use to state-certified attorneys. See TEX. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 7.04 (1995). Seven states reserve use to attorneys certified by either state or independent programs. See ARIZ. RULES OF PROFESSIONAL CONDUCT ER 7.4 (1992); FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-7.6(b) (1994); LA. RULES OF PROFESSIONAL CONDUCT Rule 7.4(b)(2) (1993); N.J. RULES OF GENERAL APPLICATION RPC Rule 7.4 (1993); N.M. RULES OF PROFESSIONAL CONDUCT Rule 16-704(c)(D) (1992); N.C. RULES OF PROFESSIONAL CONDUCT Rule 2.5 (1993); S.C. RULES OF PROFESSIONAL CONDUCT Rule 7.4 (1990); S.C. REGS., *supra* note 116, at Reg. VI.G. In addition, eight states without internal certification programs—Alabama, Connecticut, Georgia, Idaho, Indiana, Maine, Ohio, and Pennsylvania—allow attorneys certified by ABA-approved entities to advertise their certification under certain conditions. See STATE STATUS REPORT, *supra* note 117; Telephone Interview with Jeremy Perlin, Staff Attorney, Standing Committee on Specialization, American Bar Ass'n (May 15, 1996).

ity.”²⁵² In two states, an attorney who is certified by an organization not approved by the state may list that certification, if a disclaimer is included, indicating that the attorney’s certification is not state-approved.²⁵³ Texas goes a bit further, requiring any attorney whose advertisements mention specific areas of practice to state either that the attorney is certified by the Texas Board of Legal Specialization, not certified by the Texas Board, or that the Texas Board has not designated the area as a specialty.²⁵⁴ Three states—Arizona, New Jersey, and South Carolina—authorize non-certified attorneys to advertise that they limit, or concentrate in, certain areas of practice, although New Jersey allows such advertising only in areas that have not been designated as a specialty.²⁵⁵ Only California does not limit advertising language. It merely requires that a communication not contain untrue or deceptive statements and, if the term “certified specialist,” or any implication of it, is used, that the attorney state the complete name of the entity granting such certification.²⁵⁶ Thus, an attorney may use the term “specialist” in advertising without being certified by the California bar.

252. See S.C. RULES OF PROFESSIONAL CONDUCT Rule 7.4 (1990).

253. See N.J. RULES OF GENERAL APPLICATION RPC 7.4(b) (1993). New Jersey requires that the advertisement:

state [] the name of the certifying organization, and state[] that the certification has been granted by the Supreme Court of New Jersey or by an organization that has been approved by the American Bar Association. If the certification has been granted by an organization that has not been approved, or has been denied approval, by the Supreme Court of New Jersey or the American Bar Association, the absence or denial of such approval shall be clearly identified in each such communication by the lawyer.

Id.; see also N.M. RULES OF PROFESSIONAL CONDUCT Rule 16-704(D) (1992). New Mexico’s rules provide:

A lawyer who is certified in a particular area of the law by an organization other than the New Mexico Board of Legal Specialization may so state so long as such certification is available to all lawyers who meet objective and consistently applied standards relevant in a particular area of the law, and the statement is accompanied by a prominent disclaimer that such certification does not constitute recognition by the New Mexico Board of Legal Specialization, unless the lawyer is also recognized by the board as a specialist in that area of law or the board does not recognize specialization in that area.

Id.

254. See TEX. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 7.04(b)(3) (1995). Texas requires a lawyer who has not been certified by the Texas Board of Legal Specialization, and who wishes to advertise practice in a specific area of law, to include the phrase “Not Certified by the Texas Board of Legal Specialization.” *Id.* If the area has not been designated a specialty by the Board, the lawyer must include this phrase: “No designation has been made by the Texas Board of Legal Specialization for a Certificate of Special Competence in this area.” *Id.* The statements “shall be displayed conspicuously . . . so as to be easily seen or understood by ordinary consumer.” *Id.* at Rule 7.04(c).

255. See ARIZ. RULES OF PROFESSIONAL CONDUCT ER 7.4 (1992); N.J. RULES OF GENERAL APPLICATION RPC 7.4 cmt. (1993); S.C. RULES OF PROFESSIONAL CONDUCT Rule 7.4(b) (1990).

256. See CAL. RULES OF PROFESSIONAL CONDUCT Rule 1-400 (1994).

In discussing whether or not notice of certification status was potentially confusing to the public, the *Peel* Court referred to its comment in *Bates*,²⁵⁷ and suggested that “[t]o the extent that potentially misleading statements of private certification or specialization could confuse consumers, a State might consider screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of a specialty.”²⁵⁸

Disclaimers of the sort required by New Jersey, New Mexico, and Texas are unwieldy and confusing.²⁵⁹ Required disclaimers also make it unlikely that an attorney who does not have the “approved” certification would advertise any certification status, even one a consumer might find useful.²⁶⁰

There is an additional problem in this area of advertising standards. In 1986 the ABA conducted a study in Minnesota and Florida²⁶¹ which found that the public generally believes a “specialist” has special skills or expertise.²⁶² Based on the data collected,²⁶³ the ABA Standing Com-

257. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977) (“We do not foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled.”).

258. *Peel v. Attorney Registration and Disciplinary Comm’n*, 496 U.S. 91, 110 (1990). In response to that suggestion, Illinois amended its advertising rules by adding a new subsection which provides that any reference to subspecialty certification “must state that the Supreme Court of Illinois does not recognize certifications of specialties in the practice of law and that the certificate, award or recognition is not a requirement to practice law in Illinois.” ILL. RULES OF PROFESSIONAL CONDUCT Rule 7.4(c)(2) (1990).

259. See *supra* notes 253-54 and accompanying text.

260. For example, Iowa allows an attorney who satisfies certain requirements to advertise that he or she “limits” practice to certain fields of law, but requires the inclusion of a disclaimer if the advertisement appears in “the classified section of the telephone directories, newspapers, periodicals, or legal directories.” IOWA RULES OF PROFESSIONAL RESPONSIBILITY DR 2-105(A)(3)(c) (1995). The disclaimer must state that:

A description or indication of limitation of practice does not mean that any agency or board has certified such lawyer as a specialist or expert in an indicated field of law practice, nor does it mean that such lawyer is necessarily any more expert or competent than any other lawyer. All potential clients are urged to make their own independent investigation and evaluation of any lawyer being considered. This notice is required by rule of the Supreme Court of Iowa.

Id. The language of this disclaimer could dissuade any lawyer from making perfectly legitimate claims about practice areas.

261. Florida has been a certification state since 1982. See *State Plan Book*, *supra* note 3, at 157.

262. See STANDING COMM. ON SPECIALIZATION, AMERICAN BAR ASS’N, A SURVEY ON HOW THE PUBLIC PERCEIVES A SPECIALIST 15 (1988) [hereinafter PUBLIC PERCEPTION SURVEY], reprinted in STANDING COMM. ON SPECIALIZATION, AMERICAN BAR ASS’N, SPECIALIZATION DESK BOOK Tab 9 (1993).

263. The survey results indicated that, while 92% of Florida respondents knew that lawyers specialized and 55% reported that they had used a legal specialist, 73% did not know if Florida required lawyers to meet certain standards before they could use the term “specialist.” See

mittee on Specialization concluded that "the term 'specialist,' in the eyes of the public, is a 'quality' term."²⁶⁴ Given these findings, a state-certified attorney's advertisement is likely to imply superior services, even if the ad contains no direct statement of that sort.²⁶⁵ However, most state programs have not been willing to be pinned down as to the quality of "certified" lawyers.²⁶⁶ Certification means merely that the attorney has performed the various tasks, attended the required CLE, and satisfied the various other requirements for certification. California's definition is representative: "'Certified specialist' refers to an attorney who has been designated a certified specialist by the board, who is an active member of the State Bar, and whose certificate has not been suspended, revoked or lapsed."²⁶⁷ California specifically warns that "[i]t is not the goal of the program to . . . guarantee competence."²⁶⁸

On the other hand, Louisiana and Texas provide that certification equals "special competence" in the specialty field,²⁶⁹ which is the closest any of the state programs come to indicating that a certified specialist is more than a long-time practitioner. Florida takes a different approach. It states that certified specialists have "special knowledge, skills, and proficiency in their areas of practice,"²⁷⁰ but it also provides that it "assume[s] no liability to any persons whomsoever by reason of the adoption and implementation of the . . . certification plan[]."²⁷¹

The unsophisticated consumer, faced with these variations in advertising language and disclaimers that seem to abdicate any special compe-

MARGARET A. TROHA, AMERICAN BAR FOUND., THE PUBLIC'S PERCEPTION OF THE QUALIFICATIONS OF A LAWYER SPECIALIST 22-23 (1986), reprinted in STANDING COMM. ON SPECIALIZATION, AMERICAN BAR ASS'N, SPECIALIZATION DESK BOOK Tab 10 (1993).

264. PUBLIC PERCEPTION SURVEY *supra* note 262, at 18. Florida respondents said it was "likely" or "very likely" that a lawyer specialist would be more efficient (92%), provide better advice (94%), have more experience (97%), and have additional formal education (79%). See *id.* The percentages for Minnesota were 92%, 93%, 94%, and 88%, respectively. See *id.*

265. See Payton, *supra* note 103, at 601-02.

266. Arizona requires specialists to demonstrate a "higher [degree of competence] than that possessed by a general practitioner who might occasionally handle a matter in that particular field of law. ARIZ. PLAN, *supra* note 3, § 6.d. Florida requires specialists to display "a level of competence indicating proficient performance in handling the usual matters in the specialty field." FLA. PLAN, *supra* note 3, at Rule 6-3.8(c)(6). North Carolina and New Mexico require an applicant for recertification to demonstrate "continued knowledge of the law" and "continued competence." N.C. PLAN, *supra* note 3, § .1721(a); N.M. PLAN, *supra* note 3, § 19-204. New Jersey provides for terminating a certification when the attorney "no longer demonstrates continuing competence," N.J. PLAN, *supra* note 3, § 1:39-8, while South Carolina will terminate a certification if the lawyer "fails to meet the standards of competence for his particular specialty." S.C. PLAN, *supra* note 3, at Rule 408(g)(6).

267. CAL. REGS., *supra* note 193, at Definitions.

268. CAL. POLICIES, *supra* note 177, § A.

269. LA. PLAN, *supra* note 3, § 8.2; TEX. REGS., *supra* note 177, § I.A.1.b.

270. RULES REGULATING THE FLORIDA BAR Rule 6-1.2 (1992).

271. RULES REGULATING THE FLORIDA BAR Rule 6-1.3 (1986).

tence, is unlikely to feel secure. While the restrictions on the use of certain words are intended to prevent the public from misconceiving what it is getting when it retains a certified specialist, it is not clear they have that effect. For example, it is questionable whether most people would perceive the fine distinctions in meaning between an advertisement using the term "specializing," "certified," "practice limited to," or "practice concentrated in," and an ad that lists a particular subject area under the attorney's name, such as "X, Attorney, Family Law."²⁷² The potential confusion about the quality and scope of certified specialists' services that results from the lack of national certification and advertising standards, complicated by the lack of contribution from users of legal services, is demonstrated more graphically in Part IV by comparing the minimum standards of particular specialty areas.

IV. STATE IMPLEMENTATION OF SPECIALIZATION STANDARDS IN PARTICULAR FIELDS

As previously noted, the nine state certification programs provide for state supreme courts, or their delegates, to appoint specialty committees to adapt the "minimum standards" of their respective state's certification plan to the practice requirements of particular specialties.²⁷³ How these committees carry out the intent of the state plans actually determines the standards an attorney must meet to gain recognition as a specialist in a designated field.

The states are not uniform in the number or type of specialty areas designated under their plans. Currently, the number of specialty areas per state ranges from two²⁷⁴ to seventeen.²⁷⁵ The number and types of

272. See *supra* note 29, at 569-70. In response to a 1993 Florida bar survey, a specialist commented:

A quick look at any city yellow pages will show the confusion, i.e., the explanation [of what certification means] is pages away from the certification listing; the 'public notice' does not clearly explain the differences between certification and designation; the certification and designation listings are continued [sic] in the same listing and they are overwhelmed by the trial lawyers and general firm listings.

BOARD OF LEGAL SPECIALIZATION & EDUC., FLA. BAR, CERTIFICATION AWARENESS CAMPAIGN SURVEY No. 8 cmts. at 9 (1993). Another specialist responded:

Because so many non-certified lawyers advertise that they practice in various named specialties, the public has no idea that they are *not* 'certified.' For example: 'Joe Doe, Esq., Marital and Family Law.' People think that Joe Doe is an expert in this area. What he is really saying is that he wants cases in this area of law.

Id.

273. See *supra* MODEL PLAN, *supra* note 86, § 6.

274. Louisiana began in 1983 with a single specialty in tax law and added family law in 1993. See Letter from Catherine S. Zulli, Louisiana Board of Legal Specialization (Feb. 14, 1996) (on file with author) [hereinafter Zulli Letter]. New Jersey only has specialties in civil and criminal trial practice. See N.J. PLAN, *supra* note 3, § 1:39.

275. Texas has specialties in administrative law, bankruptcy law (subdivided into business and

specialty areas reflect the different characteristics of the lawyer populations within a state. For example, the number of designated specialty areas can reflect the size of a state's lawyer population, because larger populations can support more attorneys who specialize in one or two areas. Similarly, the peculiar characteristics of a state's legal practice can reflect the main industries in the state. For example, only Texas has a specialty in oil, gas, and mineral law, reflecting its status as a major oil-producing state. It would make no sense to create a specialty in an area in which there were few practicing attorneys, particularly when the plans mandate that the programs be self-supporting.²⁷⁶

Another reason for the range of specialties is the interest shown by attorneys practicing in a distinct practice area. A particularly cohesive group, practicing in a fairly narrow area, can generate interest for certification among its members and can pressure the state board for official recognition. South Carolina's plan provides that 100 bar members may petition for the designation of a specialty area.²⁷⁷ Florida will act on a petition signed by twenty-five lawyers in a particular practice area.²⁷⁸

This section will compare state standards in two specialty fields—criminal and bankruptcy law. These specialties are appropriate for comparison because a significant number of certification states have designed them as specialty areas. This allows for a more accurate comparison of specialization certification activity across state lines. Seven states—Arizona, California, Florida, New Jersey, New Mexico, Carolina, and Texas—have created specialties in the practice of criminal law.²⁷⁹ Six states—Arizona, California, New Mexico, North Carolina, South Carolina, and Texas—have bankruptcy specialties.²⁸⁰

consumer), civil appellate law, civil trial law, consumer law, criminal law, estate planning and probate law, family law, immigration and nationality law, labor and employment law, oil, gas, and mineral law, personal injury trial law, real estate law (subdivided into commercial, farm and ranch, and residential), and tax law. See TEXAS BD. OF LEGAL SPECIALIZATION, STANDARDS FOR CERTIFICATION.

276. See *supra* note 133 and accompanying text.

277. See S.C. PLAN, *supra* note 3, at Rule 408(c)(1).

278. See FLA. POLICIES, *supra* note 197, § 2.03(b)(4) (also allowing petitions by sections or substantive standing committees of the state bar).

279. See ARIZ. CRIM. STDS., *supra* note 177; STATE BAR OF CAL., STANDARDS FOR CERTIFICATION AND RECERTIFICATION OF CRIMINAL LAW SPECIALISTS (1985) CAL. CRIM. STDS., reprinted in STATE PLAN BOOK, *supra* note 3, at 111; RULES REGULATING THE FLORIDA BAR § 6-8 (1994) [hereinafter FLA. CRIM. STDS.]; N.J. PLAN, *supra* note 3; N.M. CRIM. STDS., *supra* note 199; NORTH CAROLINA STATE BAR BD. OF LEGAL SPECIALIZATION, CERTIFICATION STANDARDS FOR THE CRIMINAL LAW SPECIALTY (1994); TEX. CRIM. STDS., *supra* note 192. Some of the states have added subspecialties, such as criminal appellate practice and state criminal law, with slightly different requirements for each. See, e.g., N.C. CRIM. STDS., *supra*, § 2502. However, for the purposes of this comparison, only the basic criminal trial practice requirements will be reviewed.

280. See ARIZONA BD. OF LEGAL SPECIALIZATION, STATE BAR OF ARIZ., STANDARDS FOR CERTIFICATION OF LAWYERS SPECIALIZING IN BANKRUPTCY LAW (1994) [hereinafter ARIZ.

Comparing these two specialties may be useful in another way. As noted above, the ABA's first efforts were geared toward a national certification program,²⁸¹ following the medical profession's lead. One argument against that approach was the need to accommodate differences in state law.²⁸² Criminal law is generally considered "state-specific," with significant variations in substantive law, practice, and procedure among the states. On the other hand, bankruptcy law is derived primarily from federal statutes; therefore, one would expect practice in the area to be relatively uniform across state lines. Whether either of these assumptions is true may be revealed in this comparison. If this comparison reveals no major substantive differences between state specialty certification requirements, then the state-specific argument loses credibility.

After twenty years, twenty-one states have adopted some form of specialist recognition, other states are considering the idea, and several national, private organizations also are certifying experts across state lines. More and more attorneys are practicing in multiple jurisdictions and across state lines. The next step would seem to be for states to effect some type of reciprocal recognition of specialty certifications or, more efficiently, take a new look at the merits of a national certification program. This comparison might provide a useful tool for a discussion on simplification and standardization toward that end.

A. *Criminal Law Specialty: State-by-State Comparison*

The ABA's Model Standards will be the gauge by which this Article measures individual state standards, because the Standards reflect a generally accepted approach to particular specialty practices.²⁸³ The Model Plan suggested general minimum standards for all proposed spe-

BANKR. STDS.]; CALIFORNIA BD. OF LEGAL SPECIALIZATION, STATE BAR OF CAL., STANDARDS FOR CERTIFICATION AND RECERTIFICATION OF PERSONAL AND SMALL BUSINESS BANKRUPTCY LAW SPECIALISTS (1992) [hereinafter CAL. BANKR. STDS.]; BOARD OF LEGAL SPECIALIZATION, STATE BAR OF N.M., STANDARDS FOR LEGAL SPECIALIZATION: BANKRUPTCY LAW (1994) [hereinafter N.M. BANKR. STDS.]; BOARD OF LEGAL SPECIALIZATION, NORTH CAROLINA STATE BAR, CERTIFICATION STANDARDS FOR THE BANKRUPTCY LAW SPECIALTY (1994) [hereinafter N.C. BANKR. STDS.]; BANKRUPTCY LAW SPECIALIZATION ADVISORY BD., STANDARDS AND PROCEDURES FOR CERTIFICATION, RECERTIFICATION AND DECERTIFICATION (1992) [hereinafter S.C. BANKR. STDS.]; TEXAS BD. OF LEGAL SPECIALIZATION, STATE BAR OF TEX., STANDARDS FOR CERTIFICATION IN BANKRUPTCY LAW (1988) [hereinafter TEX. BANKR. STDS.], reprinted in STATE PLAN BOOK, *supra* note 3, at 473. Some states have divided this specialty into consumer and business bankruptcy law. See, e.g., *id.* § I.G. Unlike the treatment of criminal law specialties, the bankruptcy comparison will combine requirements for both subspecialties, primarily because the ABA's Model Standards for Bankruptcy Law are based on federal bankruptcy code sections that do not distinguish between the knowledge and skills needed for consumer and business bankruptcy law.

281. See *supra* notes 24-42 and accompanying text.

282. See *supra* note 52 and accompanying text.

283. See *supra* notes 123-25 and accompanying text.

cialties,²⁸⁴ while the Model Standards for Criminal Law proposed more detailed requirements specifically for that field.²⁸⁵ The Model Standards cover six topics, only two of which—standards 4 and 5—will be discussed in any detail. Standard 4 contains the performance requirements for specialist recognition.²⁸⁶ Standard 5 provides that continued specialist recognition and recertification are dependent on a demonstration that the applicant has, during the initial period of certification, met the minimum standards for recognition.²⁸⁷

The first three standards create the specialty field, define it, and acknowledge the authority of the specialization plan.²⁸⁸ The Model Standards define criminal law practice as legal practice “dealing with the prosecution or representation of persons at all stages of criminal proceedings, whether federal or state, including, but not limited to, the protection of constitutional rights.”²⁸⁹ The sixth standard provides the specialty committee with the flexibility to ask the Board to waive particular requirements, “if circumstances so warrant,” and to condition that waiver on the applicant’s compliance with substitute requirements.²⁹⁰

The individual state standards reference their respective state plans, and reiterate some of the minimum criteria in them.²⁹¹ The state spe-

284. See *supra* note 163 and accompanying text.

285. See MODEL CRIM. STDS., *supra* note 221, § 4.

286. For a discussion, see *infra* notes 292-404 and accompanying text.

287. See MODEL CRIM. STDS., *supra* note 221, § 5. For a discussion, see *infra* notes 405-20 and accompanying text.

288. See *id.* §§ 1-3.

289. *Id.* § 2.

290. *Id.* § 6.

291. For example, all require that the applicant be admitted, active, and in good standing with the bar. See ARIZ. CRIM. STDS., *supra* note 177, § I.A; CAL. CRIM. STDS., *supra* note 279, § II.A; FLA. CRIM. STDS., *supra* note 276, § 6-8.1; N.J. PLAN, *supra* note 3, § 1:39-2; N.M. CRIM. STDS., *supra* note 199, § 4 (referring the reader to § 19-203 of the state plan, which contains that requirement); N.C. CRIM. STDS., *supra* note 279, § .2505; TEX. CRIM. STDS., *supra* note 192, § I.C. (also requiring an applicant to have a main office in the state).

The Arizona, California, and Texas standards repeat some of the state plans’ limitations on the specialty programs. For example, they reiterate that they cannot restrict a specialist’s practice to the specialty area and cannot require other attorneys to be certified in order to practice in the specialty area. See ARIZ. CRIM STDS., *supra* note 177, at preamble; CAL. CRIM STDS., *supra* note 279, at preamble; TEX. CRIM STDS., *supra* note 192, § I.A-B.

Another example of duplicate provisions is the rule on what “title” a certified specialist may use in advertisements. See FLA. CRIM STDS., *supra* note 279, § 6-8.1 (“Board Certified Criminal Trial Lawyer,” which connotes a “lawyer[] who practices criminal law and has the special knowledge, skills, and proficiency to be properly identified to the public as [a] certified criminal trial . . . lawyer[]” and “Board Certified Criminal Appellate Lawyer”); N.M. CRIM STDS., *supra* note 199, § 1 (“Board Recognized Specialist in Criminal Law”); N.C. CRIM. STDS., *supra* note 279, § .2503 (“Board Certified Specialist in Criminal Law,” “Board Certified Specialist in Criminal Appellate Practice,” and “Board Certified Specialist in State Criminal Law”).

There are also the following miscellaneous repetitions: (1) Clause requiring fees, see ARIZ. CRIM. STDS., *supra* note 177, § I.F; TEX. CRIM STDS., *supra* note 192, § II.D; (2) clause stating the

cialty standards also contain minor additional provisions not germane to this discussion.

1. MINIMUM STANDARDS FOR CERTIFICATION

The Model Plan suggests requiring an applicant to make satisfactory showings regarding his or her (a) substantive knowledge of the law and competence, (b) substantial involvement in the specialty field, (c) participation in continuing education, and (d) qualification through peer review.²⁹² The Model Criminal Standards repeat this requirement.²⁹³

The individual state's minimum standards provisions are the meat of specialization certification. The kind of "satisfactory showing," or documentation, an attorney must make to gain certification—what knowledge and competence the lawyer must prove—determines certification's usefulness to the profession and the public as a winnowing tool. Substantial differences in state requirements will lessen their usefulness as a measure, both within and across state lines, and will multiply the public's difficulties in determining what it is getting when it retains a specialist.

One question should be asked regarding each of the standards: Are they likely to define distinctions between certified attorneys and non-certified attorneys so as to satisfy the goals of the program? Before reviewing the standards, it is useful to recall the goals the states have set for their certification programs. California, Florida, New Mexico, North Carolina, and Texas share the goal of identifying lawyer specialists, so that the public has easier access to appropriate legal help, and lawyers have an incentive to improve their competence.²⁹⁴ Although Arizona

point in an attorney's career when he or she may submit an application, *see* ARIZ. CRIM. STDS., *supra* note 177, § II.A (four years, including at least one year of full-time practice in Arizona); TEX. CRIM. STDS., *supra* note 192, § II.A (five years of full-time practice); (3) clause declaring the length of the certification period, *compare supra* note 201 and accompanying text with ARIZ. CRIM. STDS., *supra* note 177, § I.D (five years); CAL. CRIM. STDS., *supra* note 279, § I.C (five years); TEX. CRIM. STDS., *supra* note 192, § I.F (five years)); and (4) clause establishing the grounds for revocation or denial of certification, *compare supra* note 207, and accompanying text with ARIZ. CRIM. STDS., *supra* note 177, § I.E; TEX. CRIM. STDS., *supra* note 192, §§ I.I-J., .L, I.I.E. California and New Mexico's criminal law standards repeat their plan provisions for substituting equivalent criteria for that specified in the standards. *Compare* CAL. PLAN, *supra* note 4, § 5.b.iii with CAL. CRIM. STDS., *supra* note 279, § I.D; *compare* N.M. PLAN, *supra* note 3, § 19-203.B-C with N.M. CRIM. STDS., *supra* note 199, § 6. The North Carolina standards repeat the provision allowing substitution for some of its criteria. *Compare* N.C. CRIM. STDS., *supra* note 279, § .2505(b)(1)(c), (b)(2)(c), with N.C. PLAN, *supra* note 3, § .1720(d); Telephone Interview with Alice Neece Moseley, Executive Director, Board of Legal Specialization, North Carolina State Bar (May 17, 1996).

292. *See* MODEL PLAN, *supra* note 86, § 8.

293. *See* MODEL CRIM. STDS., *supra* note 221, § 4.

294. *See supra* notes 129-30 and accompanying text.

and New Jersey have stated no specific goals, it seems reasonable to presume that they agree with the other states' limited aims.

a. Demonstrating "knowledge and competence"

The Model Plan, while suggesting that an applicant should "demonstrate . . . specialty knowledge of the law . . . and competence," does not prescribe what would be an appropriate demonstration.²⁹⁵ The Model Standards, however, address this issue by including an optional examination requirement. It provides that an applicant might be required to pass an oral or written examination that would "test [the] applicant's sufficient knowledge, proficiency and experience in substantive and procedural criminal law, pre-trial and post-trial practices and procedures, appeals, evidence, constitutional law and professional responsibility."²⁹⁶

The inclusion of an examination requirement in the Model Criminal Standards appears to have been controversial. The comment to the Model Criminal Standards presents both sides of the issue. It notes that exams provide "assurance to the public that the recognized specialist is qualified" and "give the specialization program an aura of impartiality and quality."²⁹⁷ Yet it also lists numerous arguments against requiring examination.²⁹⁸ Acknowledging that tests are of limited value in skill-oriented specialties, such as criminal trial practice, the Model Criminal Standards suggest that the "most reliable measure of competence" is the "experience and . . . track record" of the applicant. The comment then states that if there must be examinations, they should be conducted in conjunction with the specialty training programs it anticipated would develop²⁹⁹ or given as "take-homes" that include the preparation of written legal documents.³⁰⁰ The Model Criminal Standards contain a list of suitable subjects to be examined in the event testing is performed.³⁰¹

Despite this internal controversy, all of the states offering certification, except New Mexico, require a written examination.³⁰² None of the

295. MODEL PLAN, *supra* note 86, § 8.

296. MODEL CRIM. STDS., *supra* note 221, § 4.4.1. The Model Criminal Standards disapproves of "grandfathering" for leading practitioners in the first few years of a new specialty certification, but does provide for a waiver of examination, if additional, higher involvement and educational standards are imposed. *See id.*

297. *Id.* § 4.4.1 cmt.

298. *See id.* (listing the following disadvantages: exams (1) discourage participation, (2) are expensive and time-consuming, (3) may be artificial, and unreliable indicators of the taker's ability, (4) may favor more recent graduates who are fresh from testing situations, and (5) may be used to exclude certain segments of the bar).

299. *Id.*

300. *See id.*

301. *See id.* § 4.4.1 (listing "substantive and procedural criminal law, pre-trial and post-trial practices and procedures, appeals, evidence, constitutional law and professional responsibility").

302. *See* N.M. CRIM. STDS., *supra* note 199, § 4; *see also supra* note 178 and accompanying

examinations attempt to test applicants' knowledge and competence beyond what can be accomplished through multiple choice and essay questions.³⁰³ All examination states, except New Jersey, require that the applicant demonstrate knowledge in the field, but they describe that standard differently.³⁰⁴ For the most part, the states agree with the ABA's "laundry list" of exam subjects,³⁰⁵ although Florida also tests the "application of constitutional principles, and rules of criminal procedure"³⁰⁶ and North Carolina includes a number of other specific top-

text. However, New Mexico's plan does reserve the Board's right to require written or oral examinations for certification and recertification in the future.

303. Letter from Karen Schoch, Administrator, Legal Specialization, State Bar of Arizona, to author, at no. 5 (Feb. 16, 1996) (on file with author) [hereinafter Schoch Letter]; Letter from Phyllis J. Culp, Director, Legal Unit, California Board of Legal Specialization of the State Bar of California, to author, at addendum (Mar. 6, 1996) (on file with author); Telephone Interview, with Dawna Bicknell, Executive Director, Board of Legal Specialization and Education, Florida Bar (May 14, 1996) (noting that Florida's real estate specialty examination includes a sample form that applicants are expected to fill out properly); Telephone Interview with Alice Neece Moseley, Executive Director, Board of Legal Specialization, North Carolina State Bar (May 17, 1996); Telephone Interview with Gary W. McNeil, Executive Director, Texas Board of Legal Specialization (May 14, 1996).

New Jersey's exams on civil and criminal trial lawyer add a twist to the essay questions. Rather than basing the questions on written fact patterns, examiners show applicants a videotaped roleplay, pausing to ask questions. Telephone Interview with Wendy Weiss Daly, Staff Attorney, New Jersey Board on Trial Attorney Certification (Aug. 19, 1996). State officials believe this twist makes taking the exam more interesting. *Id.*

304. For example, Arizona's applicants must demonstrate "a high degree of competence," which is a level "higher than that possessed by a general practitioner who might occasionally handle a criminal matter." ARIZ. CRIM. STDS., *supra* note 177, § II.C. By passing the examination, the Arizona applicant is assumed to possess "substantially complete knowledge of substantive law and rules of practice, procedure, evidence and ethics," *id.*, and "a high degree of skill, thoroughness, preparation, effectiveness and judgment." *Id.* § II.C.2. California requires its applicants "to demonstrate knowledge of criminal law and related fields sufficient to show that an attorney has a basic knowledge of the usual procedures and substantive law that should be common to specialists in the field of law." CAL. CRIM. STDS., *supra* note 279, § II.D. Both Florida and Texas require that the applicant demonstrate "sufficient knowledge, proficiency, and experience in criminal law . . . to justify the representation of special competence to the legal profession and the public." FLA. CRIM. STDS., *supra* note 279 § 6-8.3(d); *see also* TEX. CRIM. STDS., *supra* note 192, § II.F. New Jersey merely requires "successful completion" of the exam, N.J. PLAN., *supra* note 3, at Rule 1:39-3, and North Carolina states that it tests "knowledge and ability." N.C. CRIM. STDS., *supra* note 279, § .2505(e).

305. *See* ARIZ. CRIM. STDS., *supra* note 177, § II.C.1-3; CAL. CRIM. STDS., *supra* note 279, § II.D. (stating only that passage of examination "demonstrate[s] knowledge of criminal law and related fields sufficient to show that an attorney has a basic knowledge of the usual procedures and substantive law that should be common to specialists in the field of law); FLA. CRIM. STDS., *supra* note 279, § 6-8.3(d); N.J. PLAN., *supra* note 3, at Rule 1:39-3 (not specifying exam subjects); N.C. CRIM. STDS., *supra* note 279, § .2505(e)(2); TEX. CRIM. STDS., *supra* note 192, § II.F. (stating only that passage of examination "demonstrate[s] sufficient knowledge, proficiency and experience in criminal law to justify the representation of special competence to the legal profession and to the public.").

306. FLA. CRIM. STDS., *supra* note 279, § 6-8.3(d).

ics.³⁰⁷ Unlike the other states, Texas also provides that an *oral* exam may be required of some or all applicants, as determined by the state board.³⁰⁸

The value of written examinations in testing more than memorized information and some aspects of reasoning ability has been questioned extensively elsewhere.³⁰⁹ As noted, the position of the ABA Standing Committee on Specialization is ambivalent, at best.³¹⁰ While the states may test knowledge of substantive and procedural criminal law, none of them can claim to have tested, in an objective way, applicants' "skill, thoroughness, preparation, effectiveness and judgment,"³¹¹ "proficiency,"³¹² or "ability"³¹³ through the applicants' performance.³¹⁴

None of the state certification programs has, as of yet, followed the Model Criminal Standards' performance testing suggestion. Although Florida has retained a testing expert, with the goal of improving its tests,³¹⁵ and several other states are making preliminary explorations in that direction,³¹⁶ none seem to be focusing on testing an applicant's performance skills.

Performance testing currently is used in a few state bar examinations for admission to the practice of law.³¹⁷ California was the first

307. See N.C. CRIM. STDS., *supra* note 279, § .2505(e)(2) (testing on state and federal rules of evidence and criminal procedure, constitutional law, appellate procedure and tactics, trial procedure and tactics, criminal substantive law, and the North Carolina Rules of Appellate Procedure).

308. See TEX. CRIM. STDS., *supra* note 192, § II.F. This provision has never been used. Telephone Interview with Gary W. McNeil, Executive Director, Texas Board of Legal Specialization (May 14, 1996).

309. See, e.g., Lawrence M. Grosberg, *Should We Test for Interpersonal Lawyering Skills?*, 2 CLINICAL L. REV. 349 (1996); Daniel R. Hansen, Note, *Do We Need the Bar Exam? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191 (1995); Philip C. Kissam, *Law School Examinations*, 42 VAND. L. REV. 433, 464 (1989).

310. See MODEL CRIM. STDS. *supra* note 221, § 4.4.1.

311. ARIZ. CRIM. STDS., *supra* note 177, § II.C.2.

312. FLA. CRIM. STDS., *supra* note 279, § 6-8.3(d); TEX. CRIM. STDS., *supra* note 192, § II.F.

313. N.C. CRIM. STDS., *supra* note 279, § .2505(e).

314. At best, the peer review requirement, which requires weighing comments from a number of references, may provide some indication of applicants' skill in "hands-on" application of substantive and procedural knowledge.

315. Telephone Interview with Dawna Bicknell, Executive Director, Board of Legal Specialization and Education, Florida Bar (Apr. 5, 1995).

316. Telephone Interview with Michael C. Ferguson, Member, California Board of Legal Specialization (May 17, 1996). Mr. Ferguson noted that the subject of improving testing procedures has been a recurring topic in specialization circles, but that the discussions have had few concrete results. *Id.*

317. Telephone Interview with Jane Peterson Smith, Director of Testing, National Conference of Bar Examiners (May 2, 1996). Alaska, California, and Colorado use performance testing. *Id.* Georgia, Hawaii, Iowa, Missouri, and Nevada will begin administering the NCBE's performance test in 1997. *Id.*

state to attempt it, experimenting with the idea in 1980³¹⁸ and adding a performance section to the regular bar examination in 1983.³¹⁹ An analysis of the effect of performance testing on the results of the 1983 California bar examination indicated that it had "virtually no influence on the percent [of takers] passing the exam and only a small influence on who passed."³²⁰ After ten years of performance testing, California no longer focuses its analysis of bar results on how the performance test portion compares with other parts of the exam, but the conclusions reached in 1983 do not appear to have changed.³²¹

Even though the performance component of California's bar admission examination has made little difference in who is admitted, there is reason to believe that it tests legal skills the traditional exam does not. The National Conference of Bar Examiners ("NCBE"), after observing the results of performance testing in the states where it is used currently, has developed a multi-state performance test designed to assess the following six fundamental lawyering skills: legal analysis and reasoning, fact analysis, problem-solving, communication, organization and management of a legal task, and recognizing and resolving ethical dilemmas.³²² The NCBE's multistate performance test will be administered at the February 1997 bar admissions exams in Iowa, Georgia, Hawaii, Missouri, and Nevada, raising to eight the number of states that have decided it is worth testing bar applicants on their performance skills.³²³

Given this national-level movement to expand performance testing of applicants for initial bar admission, it is useful to consider performance testing in the context of measuring the performance skills of applicants for specialist certification. Although California's 1983 analysis of its bar exam results found that performance testing made little difference in the overall admission results, its survey results indicate that performance testing might be more useful in distinguishing between the skill levels of experienced practitioners. A number of applicants who took the July 1983 California Bar Examination believed that actual legal

318. See STEPHEN P. KLEIN & ROGER E. BOLUS, GANSK & ASSOC., AN ANALYSIS OF THE RELATIONSHIP BETWEEN CLINICAL LEGAL SKILLS AND BAR EXAMINATION RESULTS (1982).

319. See STEPHEN P. KLEIN & ROGER BOLUS, AN ANALYSIS OF THE PERFORMANCE TEST ON THE JULY 1983 CALIFORNIA BAR EXAMINATION I (1984).

320. *Id.* at 11.

321. See STEPHEN P. KLEIN & ROGER BOLUS, ANALYSIS OF THE JULY 1994 EXAM ii (1995). Klein and Bolus' report on the July 1994 exam, which consisted of the multistate multiple choice test, six essay questions, and two performance test ("PT") problems, noted that "[t]he degree of agreement between readers in their evaluations of the relative quality of the written answers was about the same on an essay question as it was on a PT problem", *id.*, indicating that the scores on the performance test and those on the essay portion were somewhat, but not significantly, different.

322. See NATIONAL CONFERENCE OF BAR EXAMINERS 1997 MPT INFORMATION BOOKLET 2-3.

323. See *supra* note 317.

practice had prepared them most for the performance test component.³²⁴ Those who shared this belief did better on the performance testing part of the exam than those who did not have such experience or who felt their experience was not useful.³²⁵ Actual practice experience, then, particularly when the person is conscious of the value of that experience, appears to improve results on performance tests.

Surveys have shown that the public assumes certified lawyers are more skilled than other lawyers.³²⁶ If this is not true, then the legal certification effort loses value as a device for differentiating the quality of legal services offered by attorneys. Given the public's assumption, certification programs that do not make an effort to test skills beyond the bar admission level are supporting a misconception. Some investigation into the usefulness of performance testing for certification applicants seems warranted.

b. Demonstrating "substantial involvement"³²⁷

The Model Plan suggests that states require applicants to demonstrate substantial involvement in a specialty field through objective and verifiable standards, such as a "percentage-of-time spent" requirement, a specific number or type of matters handled within a certain period, or a combination of both.³²⁸ The Model Criminal Standards reiterates this suggestion.³²⁹ All the states with criminal law specialties, except New Jersey, have established more stringent requirements, most of which include both a percentage-of-time spent *and* high numbers of types of tasks performed.³³⁰ Overall, the substantial involvement standards may be subdivided into three areas: required total time spent in criminal law practice, required specific task experience in criminal law practice, and additional miscellaneous requirements. No state standards make any distinction between prosecution- and defense-oriented applicants for certification.

324. See KLEIN & BOLUS, *supra* note 318 at 14.

325. See *id.* at 15.

326. See *supra* notes 262-64 and accompanying text.

327. The differences between states on this criterion can be confusing without a visual aid. See Chart #1, *infra* pp. 326-28.

328. MODEL PLAN, *supra* note 86, § 8.2.

329. See MODEL CRIM. STDS. *supra* note 221, § 4.1.1-.2. Subsection 4.1.2. notes that the ABA Criminal Justice Section recommends requiring "at least" fifty criminal matters, including at least ten cases involving criminal charges subject to penalties of one year or more in confinement, at least five of which have included jury verdicts, and one appeal. *Id.*

330. See ARIZ. CRIM. STDS., *supra* note 177, § II.B; CAL. CRIM. STDS., *supra* note 279, § II.B; FLA. CRIM. STDS., *supra* note 279, at Rule 6-8.3(a); N.J. PLAN, *supra* note 3, at Rule 1:39-2(b); N.M. CRIM. STDS., *supra* note 199, § 4.1; N.C. CRIM. STDS., *supra* note 279, § .2505(b); TEX. CRIM. STDS., *supra* note 192, § II.B.

CHART #1 - CRIMINAL LAW SPECIALTY, "SUBSTANTIAL INVOLVEMENT" CRITERIA

ABA MODEL STANDARDS	ARIZONA	CALIFORNIA	FLORIDA	NEW JERSEY	NEW MEXICO	NORTH CAROLINA	TEXAS
<p>Period of inquiry: 3 years immediately preceding application.</p> <p>Attorney must show ___% of a normal full-time practice of law.</p>	<p>Period of inquiry: 6 years immediately preceding application.</p> <p>Attorney must show 50% of full-time practice in criminal law during 4 of 6 years; one-half of that 50% on AZ criminal law matters.</p>	<p>Period of inquiry: 5 years immediately preceding application.</p> <p>Attorney must show 30% in criminal law during 3 of 5.</p>	<p>Period of inquiry: 5 years full-time practice.</p> <p>Attorney must show 30% in criminal law during 3 of 5.</p>	<p>Period of inquiry: 3 years immediately preceding application.</p> <p>Attorney must show "substantial proportion of professional time" devoted to criminal law practice, by listing "litigated matters" handled.</p>	<p>Period of inquiry: 3 years immediately preceding application.</p> <p>Attorney must show 33.3% of full-time practice (40-hour week standard) in criminal law.</p>	<p>Period of inquiry: minimum of 5 years of active practice prior to application.</p> <p>Attorney must show 25% of full-time practice in criminal law, or as judge presiding in criminal court.</p>	<p>Period of inquiry: 3 years immediately preceding application.</p> <p>Attorney must show 25% of full-time practice in criminal law, or as judge presiding in criminal court.</p>
<ul style="list-style-type: none"> handled at least ___ criminal matters (ABA Criminal Justice Section recommends 50); participated materially in the trial of at least ___ cases involving criminal charges subject to penalties of one year or more in confinement (ABA §: 10), at least ___ of which have included jury verdicts (ABA §: 5); and participated 	<ul style="list-style-type: none"> 5 felony jury trials submitted; 5 other full criminal trials submitted; 25 crim/juvenile matters (where public offense charged); Any two of the following: <ul style="list-style-type: none"> 5 full hearing on motions to suppress involving oral testimony; 3 petitions or answers filed in AZ S.Ct. or AZ C.A.; 3 appeals 	<ul style="list-style-type: none"> 5 felony jury trials submitted; 5 additional jury matters (criminal misconduct charged) to disposition in CA Justice, Municipal, or Superior Cis, or in U.S.D.C., Federal Magistrate Ct.; Any two of the following: <ul style="list-style-type: none"> 5 full hearings involving oral testimony; 3 petitions or answers filed in AZ S.Ct. or AZ C.A.; 3 appeals 	<ul style="list-style-type: none"> 15 felony jury trials (Committee can consider "involvement in protracted litigation" if full number not achieved); 5 additional jury trials; 5 additional criminal trials. 	<ul style="list-style-type: none"> 10 contested actions, over the course of applicant's career, "sufficiently submitted to trier of fact" to constitute, in judgment of Board, qualifying litigated matters (charges having potential penalties of at least one year in prison, money damages over \$10,000, substantial non-money damages, or damages of equal significance, and involving a mini- 	<ul style="list-style-type: none"> 5 felony jury trials; 2 appellate briefs or petitions for relief, demonstrating substantial and writing effort; One of the following: <ul style="list-style-type: none"> 50 criminal matters to final disposition; 10 appellate briefs as principal author; 10 felony non-jury trials; 30 evidentiary 	<ul style="list-style-type: none"> During entire legal career, 5 felony jury trial submitted; 10 additional jury trials submitted; 50 additional criminal matters to disposition in state district or superior court, or U.S.D.C.; One of the following: <ul style="list-style-type: none"> 2 oral appearances before NC C.A. or U.S.C.A.; 3 written appeals in any appellate court 	<ul style="list-style-type: none"> Any three of the following: <ul style="list-style-type: none"> 5 state felony jury trials; 10 state misdemeanor jury trials; 3 federal jury trials; 5 state appeals; 5 federal appeals.

CHART #1 - CRIMINAL LAW SPECIALTY, "SUBSTANTIAL INVOLVEMENT" CRITERIA

ABA MODEL STANDARDS	ARIZONA	CALIFORNIA	FLORIDA	NEW JERSEY	NEW MEXICO	NORTH CAROLINA	TEXAS
materially in the appeal of — criminal matters (ABA §: 1).	(briefs filed) in U.S.Ct., U.S.C.A., AZ S.Ct., or AZ C.A.; - 5 additional felony trials to disposition (no pleas, or submission on facts).	tions or answers filed in extraordinary writ proceedings to decision in U.S.S.Ct., U.S.C.A., U.S.D.C., CA S.Ct., CA C.A., CA Superior Ct; - 3 appeals (briefs filed by all parties) in U.S.S.Ct., U.S.C.A., U.S.D.C., CA S.Ct., CA C.A., CA Superior Ct; - 10 additional jury trials to decision.	Judicial service in court of general jurisdiction - criminal may substitute for 2 of the 3 years ("for good cause shown"), but not the year immediately preceding application.	Attorney must submit a "brief summary" on nature of each "contested actions" tried during the preceding 3 years. If number exceeds 30 matters, applicant may select 10 from each year.	hearings in criminal cases or a combination of evidentiary and felony non-jury trials; - Extensive work in post-conviction litigation or civil rights cases involving substantial criminal law issues; - 3 years presiding over criminal cases, on a regular basis.	(attorney must certify had primary responsibility for preparation of record and brief); - 25 additional criminal trials submitted in any jurisdiction.	Board can require additional information on preceding and on other: <ul style="list-style-type: none"> • state and federal non-jury trials; • state and federal guilty pleas; • state and federal post-conviction remedies; • juvenile proceedings; • dismissals;
	Must furnish information regarding nature of legal services and identify type of criminal law issues involved and frequency of applicant's involvement. First, information requested on application form; supplementation may be required by	Alternative qualification procedure available.				During 5 years immediately preceding (additional task experience): <ul style="list-style-type: none"> • Participating in jury trial of one or more cases (verdict not required); • 75 court appearances in substantial non-jury proceedings in any jurisdiction. 	

CHART #1 - CRIMINAL LAW SPECIALTY, "SUBSTANTIAL INVOLVEMENT" CRITERIA

ABA MODEL STANDARDS	ARIZONA	CALIFORNIA	FLORIDA	NEW JERSEY	NEW MEXICO	NORTH CAROLINA	TEXAS
	committee.			matters" over course of career, showing substantial involvement in criminal law practice. (Rules list details required.)		diction; <ul style="list-style-type: none"> • An average of 500 hours/year in criminal law practice (minimum of 400 in any year); Alternative qualification procedure available in special circumstances.	<ul style="list-style-type: none"> • grand jury "no bills," • cases decided on pre-trial motions with evidence presented; • probation or parole revocations; • other experience.

i. "Time spent"

The Model Plan's suggested minimum "time-spent" requirement is twenty-five percent.³³¹ The Model Criminal Standards offers suggestions for determining what percentage, if any, might be required,³³² but also notes that the ABA did not unanimously recommend this criterion.³³³ As column two of Chart #1 indicates, five of the seven states include a percentage-of-time requirement that is at or above the suggested minimum.³³⁴ California and New Jersey rely solely on task requirements.³³⁵ The same client, looking for a criminal trial specialist in all seven states at the same time, might obtain someone whose minimum years in practice ranged from three to six, and whose percentage of time spent on criminal law matters ranged from "substantial" to fifty percent. The "time spent" requirement, by itself,

331. See MODEL PLAN, *supra* note 86, § 8.2 (requiring that 25% of a full-time practice be spent handling criminal law matters in the three years preceding application).

332. See MODEL CRIM. STDS., *supra* note 221, § 4.1.1 cmt. (suggesting that consideration "be given to the nature of this specialty, opportunities available to practitioners in large and small, rural and city firms and to public defenders and prosecuting attorneys, the degree of specialization which has developed in this specialty field and the desired level of the specialization program").

333. See *id.* ("The ABA Section of Criminal Justice . . . recommends that this standard not be used.").

334. Arizona demands that applicants spend 50% of four of the six years immediately preceding application on criminal law matters and specifies that 25% of each year's 50% must involve Arizona criminal law. See ARIZ. CRIM. STDS., *supra* note 177, § II.B (also requiring that one of the four years be the year immediately preceding application). Florida requires that applicants spend 30% of five years working on criminal law matters and that three years of those years immediately precede application. See FLA. CRIM. STDS., *supra* note 279, § 6-8.3(a)(1). It also allowing committee to substitute judicial service in a court of general criminal jurisdiction for two of those three years, but not the year immediately preceding the application. See *id.* § 6-8.3(a)(3)). Assuming a 40-hour work week, New Mexico demands 33.3% of three years. See N.M. CRIM. STDS., *supra* note 199, § 4.1.1. Texas requires 25% of the three years immediately preceding application. See TEX. CRIM. STDS., *supra* note 192, § II.B.1 (allowing applicants to work all three years as a judge handling criminal law matters).

North Carolina does not have a percentage-of-time requirement. See N.C. CRIM. STDS., *supra* note 279, § .2505(b)(1) (forbidding an attorney from applying for specialization certification until he or she has been admitted to practice for at least five years). Instead it requires applicants to demonstrate both certain task experiences over the course of their legal careers and certain task experiences within the five years immediately preceding application. See *id.* § .2505(b)(1)(A)-(B). To satisfy this latter set of task requirements, applicants must have spent an average of 500 hours per year practicing criminal law with a minimum of 400 hours in any year. See *id.* § .2505(b)(1)(B)(iii). Assuming a 40-hour work week and a 50-week work year, this amounts to 12 weeks of full-time criminal law practice or, effectively, a 24% requirement.

335. In California, the attorney must have handled the appropriate number of matters within the five years immediately preceding application. See CAL. CRIM. STDS., *supra* note 279, § II.B.1.a. In New Jersey, an attorney may not apply for specialization certification until he or she has been admitted to practice in New Jersey for at least five years. See N.J. PLAN, *supra* note 3, § 1:39-2(a). Thereafter, the lawyer must show through task documentation that he or she has "devoted a substantial proportion of professional time" to criminal law practice, both over his or her entire career and within the immediately preceding three years. N.J. REGS., *supra* note 151, at Reg. 202:1.

has little relevance to the skill or expertise the client might expect to receive. Only when reviewing the required tasks the attorney must have performed to be certified is it likely that a client might receive relevant information on skills the attorney may have acquired.

ii. *Experience required within the “immediately preceding” period of “time spent”*

All seven states specify certain minimum tasks the lawyer must have performed in the relevant period.³³⁶ In every certification state, the attorney must have been “lead” or “principal” counsel of record, and had primary responsibility for preparing and presenting the matter submitted for credit.³³⁷ As Chart #1 indicates, most states distinguish between the following different types of work experience: (1) trials (divided into felony jury, other jury, and non-jury categories), (2) other criminal and juvenile matters (including lesser difficulty tasks, such as motions and other hearings), and (3) appeals.³³⁸ Most require an attorney to have performed a specific number of tasks in the various categories.³³⁹ New Jersey does not, requiring instead a showing of substantial time devoted to the “preparation of litigated matters,” and the handling of a minimum of ten unspecified types of “contested” actions.³⁴⁰

336. See ARIZ. CRIM. STDS., *supra* note 177, § II.B; CAL. CRIM STDS., *supra* note 279, § II.B; FLA. CRIM. STDS., *supra* note 279, at Rule 6-8.3(a)(2)(3); N.J. PLAN, *supra* note 3, at Rule 1:39-2(b); N.M. CRIM. STDS., *supra* note 199, § 4.1.2-3; N.C. CRIM. STDS., *supra* note 279, § .2505(1); TEX. CRIM. STDS., *supra* note 192, § II.B.3.a.

337. Arizona, California, New Jersey, and New Mexico define the term “principal counsel.” See, e.g., ARIZ. CRIM. STDS., § II.B (stating “‘principal counsel of record’ means an attorney who presents the case or proceeding to the court or jury during its entire course or a substantial part thereof”); see also CAL. CRIM. STDS., *supra* note 279, at attachment; N.M. CRIM. STDS., *supra* note 199, § 4.1.2. Most of the other states, while not providing express definitions, interpret “substantial involvement” as requiring primary responsibility for a listed matter. See N.J. PLAN, *supra* note 3, § 1:39-2(b); Telephone Interview with Gary W. McNeil, Executive Director, Texas Board of Legal Specialization (May 14, 1996).

338. See ARIZ. CRIM. STDS., *supra* note 177, § II.B; CAL. CRIM STDS., *supra* note 279, § II.B; FLA. CRIM. STDS., *supra* note 279, at Rule 6-8.3(a)(2)(3); N.J. PLAN, *supra* note 3, at Rule 1:39-2(b); N.M. CRIM. STDS., *supra* note 199, § 4.1.2-3; N.C. CRIM. STDS., *supra* note 279, § .2505(1); TEX. CRIM. STDS., *supra* note 192, § II.B.3.a.

339. See ARIZ. CRIM. STDS., *supra* note 177, § II.B; CAL. CRIM. STDS., *supra* note 279, § II.B; FLA. CRIM. STDS., *supra* note 279, § 6-8.3(a); N.M. CRIM. STDS., *supra* note 199, § 4.1.3; N.C. CRIM. STDS., *supra* note 279, § .2505(b)(1)(A)-(C); TEX. CRIM. STDS., *supra* note 192, § II.B.

The task requirements for New Mexico and North Carolina listed in the chart and discussed here are those an applicant must have completed within the five years immediately preceding application for certification. See N.M. CRIM. STDS., *supra* note 199, § 4.1.3; N.C. CRIM. STDS., *supra* note 279, § .2505(b)(1)(B). North Carolina’s standard also requires additional tasks that may have been completed during the applicant’s entire career. See N.C. CRIM. STDS., *supra* note 279, § .2505(b)(1)(A). When comparing the numbers of required tasks, the author does not distinguish between tasks based on when the standards require them to be completed.

340. New Jersey’s standards require that applicants handle “at least ten contested actions sufficiently submitted to the trier of fact so as to constitute in the judgment of the Board qualifying

Not all states require past performance in all categories of work. For example, Arizona, California, Florida, New Mexico, and North Carolina all require completion of a specific number of the different types of trials,³⁴¹ while Texas, although differentiating between types of trials, allows attorneys to qualify as specialists through any combination of three types of trials and two types of appeals.³⁴²

With regard to the trials submitted for credit, three states specify that they must have been full trials—fully presented and submitted to the trier of fact for final decision.³⁴³ Even assuming that, in application,

litigated matters for the purposes of this rule.” N.J. PLAN, *supra* note 3, § 1:39-2(b)(1). Additionally, over his or her career, the applicant must show “primary responsibility . . . for a minimum of ten contested actions in New Jersey, at least six of which were venued in Superior Court or U.S. District Court.” N.J. REGS., *supra* note 151, at Reg. 202:1(b). During the three years immediately preceding application for certification, the applicant must have “devoted a substantial proportion of professional time to the preparation of litigated matters.” *Id.* at Reg. 202:1(a). The Regulations of the Board on Trial Attorney Certification elaborate on these criteria. The Regulations define a “contested action” as one that is “adversarial in nature and involve[s] substantial charges, claims, issues, or consequences.” *Id.* at Reg. 202:2(a). The regulation includes the following examples: (1) an indictable offense; (2) a claim or demand that exposes defendant to penalties over \$25,000; (3) a claim involving substantial public issues or a party’s exposure to substantial adverse consequences; (4) any other matters the Board deems comparable. *See id.* The Regulations define a “litigated matter” as a contested action or “[a]ny other matter tried before a court, agency, or arbitrator.” *Id.* at Reg. 202:2(b).

To satisfy the “contested action” and “litigated matter” requirements, the applicant must provide “a brief summary” of the nature of each matter. *Id.* at Reg. 202:3(a)-(b) (limiting applicants to 10 summaries per year). The summary of the contested actions must include the following details about the actions: (1) the caption and docket number of the case, (2) the date of disposition, (3) the forum, (4) the name of judge or other officer, (5) the nature of the action or proceeding, (6) the amount in controversy, (7) the principal issues involved, (8) significant pretrial or post-trial motions, (9) significant discovery problems or techniques required, (10) the point at which the matter terminated, (11) applicant’s role in the proceedings, (12) the outcome of proceedings, (13) the names and addresses of all attorneys, and (14) any additional information the applicant deems relevant. *See id.* at Reg. 202:3(b). The applicant’s “substantial showing” of “litigated matters” requires substantially the same detailed listing. *See id.* at Reg. 202:3(a). In all, New Jersey requires that the 10 “contested actions” occupy the lawyer for “a minimum of thirty trial days in Superior Court or U.S. District Court.” *Id.* at Reg. 202:1(c).

341. *See* ARIZ. CRIM. STDS., *supra* note 177, § II.B; CAL. CRIM. STDS., *supra* note 279, § II.B.1; FLA. CRIM. STDS., *supra* note 279, § 6-8.3(2); N.M. CRIM. STDS., *supra* note 199, § 4.1.2-3; N.C. CRIM. STDS., *supra* note 279, § .2505(b)(1)(A)-(B); *see also* Chart #1, *infra* pp. 754-56, at col. 3.

342. *See* TEX. CRIM. STDS., *supra* note 192, § II.B.3.a (providing that the applicant must have handled, as lead counsel, the “minimum number of cases in at least 3 of the 5 categories listed hereinafter: (1) 5 State Felony Jury Trials; (2) 10 State Misdemeanor Jury Trials; (3) 5 Federal Jury Trials; (4) 5 State Appeals; (5) 5 Federal Appeals.”).

343. *See* ARIZ. CRIM. STDS., *supra* note 177, § II.B; CAL. CRIM. STDS., *supra* note 279, § II.B.; N.C. CRIM. STDS., *supra* note 279, § .2505(b)(1)(A). New Mexico requires applicant to be “principal counsel”—defined as presenting the case in its entirety or a substantial portion of it to a jury. *See* N.M. CRIM. STDS., *supra* note 199, § 4.1.2. Florida and Texas don’t specifically state this requirement. Florida requires 20 of its 25 required trials to have been fully presented; the other five must have been fully prepared for trial. Telephone Interview with Linda Cook, Florida Board of Legal Specialization (May 14, 1996). In Texas, the requirement that trials must have

all the states apply that same condition to the required trial activities, the variance in the sheer number of required trials provides little basis for comparing the experiences of different attorneys.

Jury trial experience. Felony charges involve the most serious penalties upon conviction. The process of jury selection and the jury's presence during trial presentation also complicate the lawyer's work immensely. Given these attributes, felony jury trials are assumed to require the most demanding preparation, proofs, and presentation, and test an attorney's skills at the highest level. Successful presentation of cases to a jury, not necessarily a successful result for the client, is most likely to indicate expertise. Arizona, California, New Mexico, and North Carolina require five felony jury trials to a jury.³⁴⁴ Florida requires fifteen,³⁴⁵ and Texas allows attorneys to qualify by the combination of trials and appeals noted, which might include five state felony trials, or it might include none.³⁴⁶ Similarly, New Jersey's "contested matters" requirement might include felony jury trials, or it might not.³⁴⁷

Jury trials involving non-felony charges also involve significantly more work, judgment, and planning than would the same trial before a judge. Arizona, California, Florida, North Carolina, and Texas require a specific number of jury trials, separate from the required felony jury trials.³⁴⁸ New Jersey and New Mexico do not require any additional jury trials.³⁴⁹

With regard to jury trial experience alone, then, a state certified criminal law specialist might have had a minimum of five³⁵⁰ (Arizona) or a minimum of twenty (Florida).³⁵¹

been fully presented is assumed. Telephone Interview with Gary W. McNeil, Executive Director, Texas Board of Legal Specialization (May 14, 1996). New Jersey's standard is set forth *supra* note 340.

344. See ARIZ. CRIM. STDS., *supra* note 177, § II.B(1); CAL. CRIM. STDS., *supra* note 279, § II.B.1.a(1); N.M. CRIM. STDS., *supra* note 199, § 4.1.2 (also requiring that one of those trials have been handled within the two years preceding application); N.C. CRIM. STDS., *supra* note 279, § .2505(b)(1)(A)(i).

345. FLA. CRIM. STDS., *supra* note 279, § 6-8.3(a)(2).

346. See *supra* note 339.

347. See *supra* note 340 and accompanying text.

348. See ARIZ. CRIM. STDS., *supra* note 177, § II.B(2); CAL. CRIM. STDS., *supra* note 279, § II.B.1.a(2) (requiring five jury trials); FLA. CRIM. STDS., *supra* note 279, § 6-8.3(a)(2) (requiring 15 felony jury trials and five undesignated jury trials); N.C. CRIM. STDS., *supra* note 279, § .2505(b)(1)(A)(ii), (iv)(c) (requiring 10 jury trials); TEX. CRIM. STDS., *supra* note 192, § II.B.3.a (accepting 10 state misdemeanor and three federal jury trials). Texas' standards also state that its board can require additional information on the tasks an attorney lists. See TEX. REGS., *supra* note 177, § IV.C.

349. See N.J. PLAN, *supra* note 3, at Rule 1:39-2(b); N.M. CRIM. STDS., *supra* note 199, § 4.1

350. See ARIZ. CRIM. STDS., *supra* note 177, § II.B(1).

351. See FLA. CRIM. STDS., *supra* note 279, at Rule 6-8.3(a)(2).

Other trials and criminal matters. Comparing states becomes even more difficult outside the jury trial requirement. How does one compare the non-jury trial of a misdemeanor with a difficult evidentiary hearing involving the presentation of testimony? States lump these proceedings into a category of experience called "criminal or juvenile matters." Arizona requires twenty-five criminal or juvenile matters,³⁵² California requires forty,³⁵³ and North Carolina requires fifty.³⁵⁴ New Mexico requires that an applicant have a set amount of experience in one category of different criminal law activities, which includes criminal matters, non-jury trials, appeals, and judicial service.³⁵⁵ All these variations make it even more difficult for the client to know exactly what experience any particular certified specialist has had.

Miscellaneous task requirements. Arizona, California, and North Carolina include still another category of required experience in their standards. Arizona requires fulfillment of any two, of four, categories of other activities;³⁵⁶ California requires satisfaction of any two, out of

352. See ARIZ. CRIM. STDS., *supra* note 177, § II.B(3).

353. See CAL. CRIM. STDS., *supra* note 279, § II.B.1.a(3). California defines "criminal matter" as:

- (1) A case (including a juvenile court proceeding pursuant to sections 601 and 602 of the Welfare and Institutions Code) [involving delinquents and wards of the court] in which the commission of a public offense is charged; or (2) a matter or proceeding ancillary to a case, such as a hearing after judgment involving violation of probation, a trial to determine sanity, motions and hearings to suppress evidence, etc. The following shall not be considered as criminal matters: military court-martial, proceedings conducted pursuant to the Lanterman-Petris-Short Act [involving involuntary detentions of the mentally ill], and grand jury proceedings.

Id. at attachment.

354. See N.C. CRIM. STDS., *supra* note 279, § .2505(b)(1)(A)(iii).

355. See N.M. CRIM. STDS., *supra* note 199, § 4.1.3 listing six different types of activity:

- A. Been principal counsel in at least fifty (50) criminal matters reaching final disposition; or
- B. Been the principal author of at least ten (10) appellate briefs; or
- C. Been principal counsel in at least ten (10) felony non-jury trials; or
- D. Been principal counsel in at least thirty (30) evidentiary hearings in criminal cases or combination of evidentiary hearings and felony non-jury trials; or
- E. Worked extensively in post-conviction litigation or civil rights cases involving substantial criminal law issues; or
- F. Presided over criminal cases as a judge on a regular basis for at least three (3) years.

356. See ARIZ. CRIM. STDS., *supra* note 177, § II.B(4), listing the following activities:

- (a) Five (5) hearings on motion to suppress in which memoranda were submitted and in at least two of which oral testimony was given; or
- (b) Three (3) petitions or answers filed in special action proceedings in the following courts: Arizona Supreme Court, Arizona Court of Appeals, or
- (c) Three (3) appeals in the following courts in which briefs were filed by appellants and respondents: United States Supreme Court, United States Court of Appeals, Arizona Supreme Court, Arizona Court of Appeals; or

three, categories;³⁵⁷ and North Carolina requires completion of one of three different types of activity.³⁵⁸ Some of these additional items include tasks that were included in an earlier category;³⁵⁹ however, they are clearly additional requirements, and any single item would not receive credit under the two separate categories.

An attorney's failure to perform the required number of various tasks is not a complete barrier to certification in California, North Carolina, and Texas. California provides that its board may accept substitutions for the stated requirements, if the applicant demonstrates that those activities are equal in required skill and effort to those listed.³⁶⁰ North Carolina provides for a partial waiver of the total

(d) Five (5) additional felony trials which have resulted in final disposition other than by submission or plea.

357. See CAL. CRIM. STDS, *supra* note 279, § II.B.1.a(4):

(a) Five (5) hearings, pursuant to section 1538.5 of the Penal Code [relating to the propriety of search warrants], in which oral testimony was taken and in which decisions have been rendered, and three (3) petitions or answers filed in extraordinary writ proceedings in which decisions after hearing have been rendered in the following courts: United States Supreme Court, United States Court of Appeals, United States District Court, California Supreme Court, California Court of Appeal, California Superior Court; or

(b) Three (3) appeals in the following courts in which briefs were filed by appellants and respondents: United States Supreme Court, United States Court of Appeals, United States District Court, California Supreme Court, California Court of Appeal, California Superior Court; or

(c) Ten (10) additional jury trials submitted to the jury for decision, regardless of the nature of the offense.

358. See N.C. CRIM. STDS., *supra* note 279, § .2505(b)(1)(A)(iv):

(a) two oral appearances before an appellate court of the State of North Carolina or the United States; or

(b) three written appearances before any appellate court in which the applicant certifies that he or she had primary responsibility for the preparation of the record on appeal and brief; or

(c) 25 additional criminal trials in any jurisdiction which were submitted to the judge or jury for decision.

359. For example, one of the choices on North Carolina's list is an additional 25 criminal trials in any jurisdiction. See *id.* § .2505(b)(1)(A)(iv)(c).

360. See CAL. CRIM. STDS., *supra* note 279, § II.B.2. An applicant treading that path must show:

a. That the applicant has had substantial involvement in other areas of law practice requiring similar skills as criminal trial practice, such as:

(1) Litigation in contested civil matters involving jury trials;

(2) Appellate practice in either criminal or noncriminal matters in proceedings in which decisions after hearing have been reached; and

(3) Practice in a government agency in which the practitioner is engaged in activities substantially equivalent to criminal law practice.

b. That the applicant has engaged in research, writing and/or special studies of criminal law and procedure; and

c. That the applicant possesses some, but not all, of the criminal law practice task requirements of section II.B.1. above; or

number of tasks.³⁶¹ Texas allows an applicant to take the specialization examination, even without the full number of tasks required, where the applicant has “demonstrated unusual or exceptional experience.”³⁶²

iii. *Additional miscellaneous provisions*

Each state’s application form specifies the information the attorney must furnish to the committee to show he or she has completed the tasks that fulfill the different required categories of experience. In addition, Arizona, New Jersey, and Texas require, or provide that the specialty committee may request, additional information about the tasks listed in the application and other types of tasks.³⁶³

Summary. All the certification states have attempted to particularize the task experience expected of a legal specialist in criminal law. To do so, they have created specialty committees composed of lawyers who have considerable experience in the field and who select the tasks and their required numbers with an understanding of what skills they entail. As we see, however, while there is general

d. Any combination of section II.B.2.a., b. and c. herein, which the applicant can show amounts to a substantial equivalent of the criminal law practice task requirements of section II.B.1. above; or

e. Any combination of section II.B.2.a., b. and c. herein, although not amounting to a substantial equivalent of the criminal law practice task requirements of section II.B.1. above, and

(1) Where the geographical location of the applicant prohibits his or her completing the criminal law practice task requirements of section II.B.1. above, or

(2) The type of practice of the applicant prohibits his or her completing the criminal law practice task requirements of section II.B.1. above, and

(3) Where the exclusion of the applicant from certification as a result of section II.B.2.e(1) or (2) herein would amount to arbitrary exclusion of a practitioner.

361. See N.C. CRIM. STDS., *supra* note 279, § .2505(b)(1)(C), which provides:

[U]pon recommendation by the specialty committee and approval by the board, where the profession or the geographical location of an applicant prohibits his or her completing the requirements in Rule .2505(b)(1)(A) and (b) [sic] above, and the applicant shows substantial involvement in other areas of law requiring similar skills, or has engaged in research, writing, or teaching special studies of criminal law and procedure, to include criminal appellate law, said applicant may substitute such experience for one year of the five required years of Rule .2505(b)(1)(B)(iii) above and must meet all of the requirements of Rule .2505(b)(1)(A)(iv) above and three-fifths of the remaining requirements of Rule .2505(b)(1)(B) above.

362. See TEX. CRIM. STDS., *supra* note 192, § II.B.3.b. According to Gary McNeil, this provision is used in situations where the applicant is clearly qualified, but for reasons connected with particular legal positions, could not complete the actual tasks list. For example, a prosecutor may have been assigned to the trial division of an office and has two or three times the number of jury trials required, but has not been able to fulfill the required number of criminal appeals; or an attorney may have been caught up in a “monster” case that thoroughly tested his or her skills, but preempted time for fulfilling the specific tasks required. Telephone Interview with Gary W. McNeil, Executive Director, Texas Board of Legal Specialization (May 14, 1996).

363. See ARIZ. CRIM. STDS., *supra* note 177, § II.B; N.J. PLAN, *supra* note 3, § 1:39-2(b); TEX. CRIM. STDS., *supra* note 192, § II.B.2.

agreement across states on the names of those tasks, there is no evident reason for the difference in numbers.

Is an attorney who handled fifteen felony jury trials during a five year period more skilled than an attorney who handled only five in a six-year period? Or is the attorney who performs so extensively in the shorter period of time reacting rather than planning, having had little time to reflect on and hone his or her skills. Each program, intended to promote public access to legal services and improve lawyer competence, says to the public, "Trust us to judge what is needed." Yet the difference in numbers is more likely due to the particular ideas held by each specialty committee as to what experience creates a specialist, than to whether those numbers are valid indicators of skill or competence, or are understood by outsiders to be such.

The variation in numbers may present a problem for certification programs in the future. Although the practice of criminal law still involves a heavy concentration of trial work, there is more and more pressure from the courts to dispose of cases through other means, such as plea bargaining. Unless this trend changes, it will become more and more difficult for new attorneys to attain the required numbers. Where does that prospect leave the certification effort?

Could the certification programs do a better job at communicating their standards to the public and the bar? Yes, they could achieve much simply by using the same numbers. As noted earlier, the public assumes that a specialist has higher skills and more training than a nonspecialist.³⁶⁴ Unless the legal profession adopts national standards, institutes a training program akin to postgraduate medical residencies in specialty areas, or arranges to observe applicants at work, assuring "substantial involvement" must come down to a "numbers" game. The problem is determining what minimum threshold of task experience is sufficient to "ensure" "competence."

Standardizing the numbers may seem to be primarily a cosmetic change. Even with standardization, there will be barriers to actual uniformity, such as the fact that each specialty committee judges an applicant's adequacy based on its particular legal community and practice standards, the fact that each legal problem contains unique facts and circumstances which vary the amount of skill required or gained by an attorney in the handling of any particular case and the fact that there are substantive and procedural differences in state criminal laws. However, national agreement on the numbers would heighten credibility and lessen confusion for the potential client who investigates behind the

364. See *supra* notes 262-64 and accompanying text.

“certificate.”³⁶⁵ Assuming that specialty committees continue to make the same effort in selecting applicants for recognition as specialists, conformity in the numbers need not result in a decline in specialist quality.

The adoption of standardized numbers leaves the unsophisticated potential client, who doesn't know to inquire about what lies behind the standards, no worse off. For that client, the particular numbers are almost irrelevant. Beyond knowing that a certified specialist has had “lots” of experience, it seems likely that a client facing particular charges might be more interested in knowing how many trials involving the same charges and similar facts the lawyer has handled, how successful that lawyer was in minimizing consequences for his or her client in those trials, and how much the lawyer charges, than whether that specialist has handled five or fifteen felony jury trials, or five or fifty nonjury trials and “criminal matters.” This other type of information is not made more accessible by the existence of certification.

c. Demonstrating “knowledge” through continuing legal education

The Model Criminal Standards follow the Model Plan in suggesting that programs require an average of ten hours of continuing education in each of the three years preceding an application for certification.³⁶⁶ A comment in the Standards suggests that state standards are the appropriate place to identify possible equivalents for attendance at educational programs, such as teaching or writing, and to proclaim whether substitutions for CLE programs will be allowed.³⁶⁷

Except for Arizona, all the certification states require a showing of continuing education in the specialty field within the three years immediately preceding the application.³⁶⁸ They generally require between

365. A consumer is not likely to need the help of criminal law specialists in multiple states. However, certified specialists, and certification programs generally, will benefit if consumer has a good experience with a certified specialists and can feel knowledgeable and comfortable in telling a relative or friend in another state to look for a certified specialist because they all have to meet the same standards.

366. Compare MODEL CRIM. STDS., *supra* note 221, § 4.2 cmt. with MODEL PLAN, *supra* note 86, § 8.3.

367. See MODEL CRIM. STDS., *supra* note 221, § 4.2 cmt. The Model Criminal Standards also suggest providing for the situation in which appropriate CLE has not been available in the jurisdiction, making it impossible for a lawyer to have fulfilled the requirements. See *id.*

368. See CAL. CRIM. STDS., *supra* note 279, § II.C.1.a; FLA. CRIM. STDS., *supra* note 279, § 6-8.3(c)(1); N.J. PLAN, *supra* note 3, § 1:39-2(d)(1); N.M. CRIM. STDS., *supra* note 199, § 4.2; N.C. CRIM. STDS., *supra* note 279, § .2505(c)(1); TEX. CRIM. STDS., *supra* note 192, § II.C. Arizona has a mandatory CLE requirement for all attorneys and refers to those records to determine whether or not a certification applicant is in compliance. See Schoch Letter, *supra* note 303, at 1.

forty and forty-five educational hours during that period,³⁶⁹ which is higher than the ABA suggests, although New Jersey's requirement parallels the ABA's—thirty hours.³⁷⁰ Many states are specific about CLE content, providing lists of topics that educational programs must cover³⁷¹ and of educational activities that are comparable to program attendance.³⁷²

The states differ in the methods by which CLE credit may be earned outside attendance at an approved course. For example, most states provide credit to those who teach CLE programs,³⁷³ who write or edit published articles relating to the specialty,³⁷⁴ and who teach in a law school or other graduate level program presented by a recognized pro-

369. California requires 42 units in the approved curriculum for criminal law specialists. See CAL. CRIM. STDS., *supra* note 279, § II.C.1.a (defining "unit" as one 60-minute hour of attendance or three hours of self-study). Florida requires 45 hours of "approved" CLE in the criminal law area. See FLA. CRIM. STDS., *supra* note 279, § 6-8.3(c)(1). New Mexico requires 45 hours of board-accredited CLE in criminal law subjects. See N.M. CRIM. STDS., *supra* note 199, § 4.2. North Carolina requires 40 hours of CLE on criminal law. See N.C. CRIM. STDS., *supra* note 279, § .2505(c)(1), and Texas requires 40 hours of board-approved programs, see TEX. CRIM. STDS., *supra* note 192, § II.C.1.

370. Compare N.J. REGS., *supra* note 151, at Reg. 204:1 with MODEL CRIM STDS., *supra* note 221, § 8.3.

371. California specifies four areas of program coverage: (1) evidence, (2) trial advocacy, (3) substantive criminal law and procedure, and (4) writs, appeals, and ancillary proceedings. See CAL. CRIM. STDS., *supra* note 279, § II.C.1.a. North Carolina's requirement is similar to California's. It mandates only a specified number of hours in general topics: 34 hours in skills "pertaining to criminal law, such as evidence, substantive criminal law, criminal procedure, criminal trial advocacy, criminal trial tactics, and appellate advocacy," N.C. CRIM. STDS., *supra* note 279, § .2505(c)(1)(A), and six hours in "ethics and criminal law." *Id.* § .2505(c)(1)(B).

372. California's standards provide for credit to those who teach CLE programs, see CAL. CRIM. STDS., *supra* note 279, § II.C.1.b; who write or edit published articles in the field, see *id.* § II.C.2.c; and who teach in a law school or other "graduate level program presented by a recognized professional association," *id.* § II.C.2.d. New Jersey allows credit for teaching programs for trial attorneys or on trial practice; participating in symposia, seminars, or lectures; participating in ABA and New Jersey Bar Association specialized functions, and on Supreme Court committees "dealing with specific problems of substantive or procedural trial law," or other professional committees; and other activities approved by the state board. N.J. REGS., *supra* note 151, at Reg. 204:1. Texas gives credit for teaching or taking a criminal law course, speaking at a CLE symposium or program on criminal law, writing books or professional articles on criminal law, working on professional committees dealing with specific problems of substantive or procedural criminal law, and "such other educational experience as the Board shall approve." TEX. CRIM. STDS., *supra* note 192, § II.C.2.

373. See ARIZ. REGS., *supra* note 176, § 4.C(2); CAL. CRIM. STDS., *supra* note 279, § II.C.1.b; FLA. POLICIES, *supra* note 197, at Policy 5.05; N.J. PLAN, *supra* note 3, at Rule 1:39-2(d)(2); N.C. PLAN, *supra* note 3, § .1905(a); RULES AND REGULATIONS OF THE BOARD OF LEGAL SPECIALIZATION § 6.6 (1989) [hereinafter N.M. REGS.]; TEX. CRIM. STDS., *supra* note 192, § II.C.2.a.

374. See ARIZ. REGS., *supra* note 176, § 4.C(3); CAL. CRIM. STDS., *supra* note 279, § II.C.2.c; FLA. POLICIES, *supra* note 197, at Policy 5.05; N.J. PLAN, *supra* note 3, § 1:39-2(d)(2); N.C. PLAN, *supra* note 3, § .1905(b); N.M. REGS., *supra* note 373, § 6.7; TEX. CRIM. STDS., *supra* note 192, § II.C.2.a.

fessional association.³⁷⁵ California specialists may accrue one-third of their educational credits through "self-verified listening" to audiotapes or videotapes of approved programs,³⁷⁶ or by "self-study," which does not include reading advance sheets or texts used in routine practice.³⁷⁷ Florida, too, is generous in allowing half of its CLE requirement to be met by "self-study" activities.³⁷⁸ New Jersey allows credit for watching videotaped replays of CLE courses, but only if the replay is "given by a recognized sponsor and viewed in a structured setting."³⁷⁹ The other states tend toward New Jersey's more strict approach, limiting the number of CLE hours that may be earned outside of course attendance.³⁸⁰

The availability of "equivalents" for CLE program attendance reduces the ability of a specialty committee to adequately judge whether an attorney has been exposed to the information a specialist should know. Even if one looks only at CLE programs, it is unlikely that specialty committees will investigate the details of every program listed by an applicant. The topics specified by some states are general in scope.³⁸¹ To perform a detailed level of screening, committees would have to severely limit the number of programs they approved for credit and require all first-time applicants to attend those specific programs. In fact, the best method of assuring a consistent degree of communicated information is a postgraduate legal curriculum providing education in prescribed areas to every budding specialist. Such a core curriculum

375. See CAL. CRIM. STDS., *supra* note 279, § II.C.2.d; FLA. POLICIES, *supra* note 197, at Policy 5.05; N.J. PLAN, *supra* note 3, § 1:39-2(d)(2); N.C. PLAN, *supra* note 3, § .1905(a); TEX. CRIM. STDS., *supra* note 192, § II.C.2.a.

376. CAL. CRIM. STDS., *supra* note 279, § II.C.2.a.

377. *Id.* § II.C.2.b.

378. Telephone Interview with Linda Cook, Florida Board of Legal Specialization (May 14, 1996).

379. See N.J. REGS., *supra* note 151, at Reg. 204:2.

380. Arizona requires that five of the 15 required hours be earned through program attendance; allows a maximum of 7.5 hours to be earned through a combination of teaching, writing, and in-house CLE; and permits the three required hours of professional responsibility to be earned through self-study. See ARIZ. REGS., *supra* note 176, § 4.A(1)(c). Florida limits "home study" to one-third of the total required hours. Letter from Jenny Lawhon, Administrative Secretary, Board of Legal Specialization and Education, Florida Bar, to author, at no. 6 (Feb. 27, 1996) [hereinafter Lawhon Letter]. New Mexico only gives self-study credit for watching videotapes or listening to audiotapes of board-approved programs. See N.M. REGS., *supra* note 372, § 6.5. North Carolina provides that only two hours of CLE per year may be in the form of self-study involving videotapes, audiotapes, or transcripts of lectures from qualified CLE courses. See N.C. STATE BAR RULES ch. I.D. § .1905(c) [hereinafter N.C. REGS.]. Texas allows a maximum of five hours of self-study, see TEX. REGS., *supra* note 177, § VI.A.1, and requires details about the attorney's studies to be submitted, see *id.* § VI.C. An applicant's assertion of "general self-study" hours will not be sufficient. *Id.*

381. See *supra* note 371 and accompanying text.

would provide a shared foundation of knowledge that subsequently might be "updated" with individual programs.

Although several certification programs have existed long enough to have created a body of approved CLE topics that are repeated over time, few have done so, even informally.³⁸² Continuing legal education that satisfies specialization requirements may have been obtained at board-generated programs or CLE programs presented by other CLE providers. Content comparisons between such programs, while theoretically possible, presents such great difficulty that it is unlikely that a detailed comparison would ever be performed by a volunteer committee assessing the qualifications of an applicant. Assessing the content of a limited number of programs comprising a "specialization preparation" sequence would be possible, however, and because all who attend would be exposed to the same program content and delivery, the committee could be assured that relevant information was being disseminated. Coordination between the states on the content of such programs would further standardization of specialty education.

d. Demonstrating "qualification" through "peer review"

The Model Criminal Standards require that an applicant show qualification for certification by submitting references from peers, and from attorneys and judges with or before whom an applicant has presented cases.³⁸³ The comment to Section 4.3 notes that the ABA Section on Criminal Justice opposes this criterion on the basis that "those lawyers who most forcefully protect their client's rights may be unfairly denied

382. Steve Adams, a CLE entrepreneur in the field of California family law, is unusual in recognizing the need for programs geared toward specialization certification and making a point of providing them.

383. See MODEL CRIM. STDS., *supra* note 221, § 4.3. The Model Plan suggests requiring five references and giving the Board the authority to seek out additional sources of information. See MODEL PLAN, *supra* note 86, § 8.4. Noting an objection to this criterion on the ground that "it may create an 'old boy network,'" the Standards assert that "with appropriate forms and used in conjunction with additional standards," peer review may be the "best method of determining qualification as most of the characteristics of a qualified specialist cannot be tested by examination." MODEL CRIM. STDS., *supra* note 221, § 4.3 cmt. The comment refers to the definition of "legal competence," formulated by the ALI-ABA publication, *A Model Peer Review System*, as a guide for creating such forms and evaluating the responses of references:

Legal competence is measured by the extent to which an attorney (1) is specifically knowledgeable about the fields of law in which he or she practices, (2) performs the techniques of such practice with skill, (3) manages such practice efficiently, (4) identifies issues beyond his or her competence relevant to the matter undertaken, bringing these to client's attention, (5) properly prepares and carries through the matter undertaken, and (6) is intellectually, emotionally, and physically capable.

Id.

favorable recommendations.”³⁸⁴

Despite the Section’s opposition, all the certification states require an applicant to submit names of attorneys and judges as references for the applicant’s reputation and abilities.³⁸⁵ The states’ basic reference criteria are similar, although the number of names required varies from five to eight.³⁸⁶ All programs use state-standardized reference forms to obtain comments.³⁸⁷ In six states, the board may send reference forms to lawyers and judges it selects, in addition to those whose names the applicant submits.³⁸⁸ California requires its commission to select four additional judges or attorneys to provide references.³⁸⁹ California, North Carolina, and Texas also require substantial additional reference

384. MODEL CRIM. STDS., *supra* note 221, § 4.3 cmt. Apparently, there was some concern that there would be discrimination against those attorney applicants who represented highly controversial defendants.

385. See ARIZ. CRIM. STDS., *supra* note 177, § II.D; CAL. CRIM. STDS., *supra* note 279, § II.F.1; FLA. CRIM. STDS., *supra* note 279, § 6-8.3(b); N.J. PLAN, *supra* note 3, at Rule 1:39-2(c); N.M. PLAN, *supra* note 3, § 19-203.D; N.C. CRIM. STDS., *supra* note 279, § .2505(d); TEX. CRIM. STDS., *supra* note 192, § I.J.-K.

386. Arizona requires six references: two attorneys practicing in the same area; two judges from any Arizona or federal trial court before whom applicant has appeared in a criminal proceeding within the preceding two years; and two Arizona attorneys with whom applicant has tried a criminal case. See ARIZ. CRIM. STDS., *supra* note 177, § II.D. California requires eight references: four attorneys practicing in the same area, one California or federal trial court judge before whom the applicant has appeared in criminal proceedings within the preceding two years, and three California attorneys with whom the applicant has tried a criminal case. See CAL. CRIM. STDS., *supra* note 279, § II.F(1). Florida requires six references: four attorneys substantially involved in criminal law and familiar with applicant’s practice, and two judges before whom applicant has appeared within the preceding two years or before whom applicant has tried a criminal case to jury verdict. See FLA. CRIM. STDS., *supra* note 279, § 6-8.3(b)(1)-(2). New Jersey requires five members of the bench or bar, who can attest to the applicant’s competence in trial practice, and one of whom was the applicant’s adversary in a case within the preceding three years. See N.J. PLAN., *supra* note 3, § 1:39-2(c). New Mexico requires seven references: one district or appellate court judge, four attorneys (two of whom opposed the applicant in evidentiary hearings), and two former clients. See N.M. CRIM. STDS., *supra* note 199, § 4.3. North Carolina requires six: four attorneys of “generally recognized stature” in the field and two state judges from different jurisdictions before whom applicant has appeared within the preceding two years. See N.C. CRIM. STDS., *supra* note 279, § .2505(d)(3)(A)(i), (ii). Texas requires five: four attorneys practicing in the same geographic area (one of whom must be a lawyer with whom or against whom the applicant has tried a criminal case within the immediately preceding two years) and one judge of any Texas court before whom applicant has appeared in a criminal law matter within the preceding two years. See TEX. CRIM. STDS., § I.J. The mix of references may not contain persons who are or have been associated professionally with the applicant, see source cited *supra* note 384, and two states—Arizona and California—prohibit references for whom the applicant has acted as a reference. See ARIZ. CRIM. STDS., *supra* note 177, § II.D; CAL. CRIM. STDS., *supra* note 279, § II.F(1).

387. Although the information requested bears great similarity, as might be expected, there is no standardization of forms across state lines. See *infra* notes 391-95 and accompanying text.

388. See ARIZ. CRIM. STDS., *supra* note 177, § II.D; FLA. CRIM. STDS., *supra* note 279, § 6-8.3(b)(3); N.J. PLAN, *supra* note 3, at Rule 1:39-2(c); N.M. REGS., *supra* note 373, § 7.6; N.C. CRIM. STDS., *supra* note 279, § .2505(d)(2); TEX. CRIM. STDS., *supra* note 192, § I.J.

389. See CAL. CRIM. STDS., *supra* note 279, § II.F(1).

information from their applicants.³⁹⁰

As noted, each state has created its own vehicle for garnering peer references. Six of the states, all but Arizona,³⁹¹ require references to respond to questions by writing brief comments and checking the appropriate boxes.³⁹² The states' forms first ask for general information about each reference, presumably to determine the credibility of the response.³⁹³ Once the reference has cleared these hurdles, information about the applicant is solicited.³⁹⁴ All six forms ask for substantially the

390. California requires the names and addresses of the opposing counsel, the judge, and any co-counsel in the most recent two (a) jury trials, (b) preliminary hearings, (c) appellate matters, and (d) administrative hearings handled by the applicant. *See id.* § II.F(1)(a)-(d) (also requiring copies of applicant's appellate briefs. North Carolina requires the applicant to list names and addresses of opposing counsel, co-counsel, and judges in (a) the last five jury trials, (b) the last five non-jury trials or procedures, and, (c) if applicant has participated in appellate matters, the last two appeals. *See* N.C. CRIM. STDS., *supra* note 279, § .2505(d)(3)(A)(iii)-(v). North Carolina also requires copies of all briefs filed by applicant or, if applicant has not prepared any appellate briefs, copies of two separate trial court memoranda submitted to a trial court within the last three years and prepared by applicant. *See* N.C. CRIM. STDS., § .2505(d)(3)(A)(v)-(vi). Texas requires the names and addresses of all judges before whom applicant has appeared in criminal law matters within the preceding two years. *See* TEX. CRIM. STDS., *supra* note 192, § I.K; *see also* N.J. REGS., *supra* note 151, at Reg. 202:3(b) (requiring substantially similar information from its applicants in connection with the "ten contested actions" in its task experience requirement).

391. At this time, Arizona uses a short letter. Directed to the named reference, it encloses a copy of Arizona's standards and asks that the respondent give an "opinion regarding the applicant's demonstrated ability to perform in this area." Criminal Law Advisory Comm'n, State Bar of Ariz., Letter to References 1 (on file with author). Arizona currently is developing a questionnaire for references that would bring it into line with the other states. *See* Letter from Karen Schoch, Administrator, Legal Specialization, State Bar of Arizona, to the author 1 (Nov. 9, 1995) (on file with author).

392. *See* California Bd. of Legal Specialization, State Bar of Cal., Independent Inquiry and Review Form (Aug. 1995) (on file with author) [hereinafter Cal. Form]; Board of Legal Specialization and Educ. of the Fla. Bar, Criminal Trial Attorney Reference Form (on file with author) [hereinafter Fla. Form]; Board on Trial Attorney Certification, Supreme Court of N.J., Reference Form (on file with author) [hereinafter N.J. Form]; New Mexico Bd. of Legal Specialization, Statement of Reference (on file with author) [hereinafter N.M. Form]; North Carolina State Bd. of Legal Specialization, 1995 Reference Form (on file with author) [hereinafter N.C. Form]; Texas Bd. of Legal Specialization, Confidential Statement of Reference (on file with author) [hereinafter Tex. Form].

393. Florida's form, for example, is representative. It asks references for their name, their firm's name, their position in the firm, their telephone number; the jurisdictions in which they are admitted, their years of admission, their membership numbers, their major areas of practice, and their experience in the practice of criminal trial law. *See* Fla. Form, *supra* note 391, at Questions 1-2, 4, 9, 10. To weed out extreme partiality of the sort forbidden by the standards, the reference is asked whether or not he or she has applied for certification and used the applicant as a reference, whether the reference is related to the applicant or has been associated with the applicant in the practice of law, and how the reference knows the applicant. *See id.* at Questions 3, 5-7.

394. Again, Florida's form is representative. The form asks what opportunity the reference has had to form an opinion of the applicant's "knowledge, skills and proficiency in the practice of criminal trial law." *Id.* at Question 11. Then the form asks whether he or she knows of anything that might impair the applicant's ability to practice, *see id.* at Question 13, or knows of incidents which "reflect a lack of knowledge, skills and proficiency," *id.* at Question 14, or constitute

same information.³⁹⁵

While one might assume that the references submitted by the applicant must be favorable ones, only California and North Carolina, which both require substantial additional reference information from applicants, make any statement regarding this.³⁹⁶ Other states merely require positive votes from a quorum of the committee.³⁹⁷ Several states also publish the names of applicants in their bar journals, providing interested parties with the opportunity to comment.³⁹⁸ The usefulness of

conduct that was "undignified or discourteous toward the Court, opposing counsel, witnesses or applicant's client," *id.* at Question 15. The form also asks the reference to rate the applicant as "outstanding," "above average," "average," "below average," or "poor," with regard to the following:

- a. Preparation
- b. Resourcefulness
- c. Knowledge of criminal substantive law
- d. Knowledge of criminal procedural law
- e. Effectiveness of court presentations
- f. Consideration of clients' interests
- g. Reputation in legal community for ability to try a criminal case
- h. Reputation in legal community for ethical conduct
- i. Opinion of applicant's ability to try a criminal case
- j. Opinion of applicant's ability to try a complex criminal case.

Id. at Question 12. Finally, the reference is asked whether he or she recommends the applicant for board certification. *See id.* at Question 16. Generally, committees will contact those references who have provided questionable or negative opinions.

395. Compare Cal. Form, *supra* note 392, with Fla. Form, *supra* note 392, and N.J. Form, *supra* note 392, and N.M. Form, *supra* note 392, and N.C. form, *supra* note 392, and Tex. Form, *supra* note 392.

396. North Carolina states that "completed peer reference forms must be received from at least five of the references." N.C. CRIM. STDS, *supra* note 279, § .2505(d)(3). It is unclear whether the five responses must be favorable ones. It also unclear whether they all must be from references the applicant listed, or whether they may also be from references the Advisory Board independently solicited.

California provides that "[t]he applicant must receive a favorable recommendation from eight (8) of the references." CAL. CRIM. STDS., *supra* note 279, § II.F(1). In all, California requires the applicant to submit eight references and the committee to solicit four additional judge and attorney references. *See id.* The specialty committee seeks additional information if the applicant receives two negative reports or serious questions are raised by any of the responses. *See Culp Letter, supra* note 244, at attachment.

397. *See Miller, supra* note 197 at no. 11; Letter from Morrow to author, at 2 [hereinafter Morrow Letter]; Schoch Letter, *supra* note 303, at no. 10.

398. Publication is mandatory in Florida and New Mexico. *See FLA. POLICIES, supra* note 197, at Policy 2.04(i); N.M. REGS., § 7.7. Florida has been publishing applicant names for only two years; in that time, the office has received "very few" comments on anyone. Telephone Interview with Dawna Bicknell, Executive Director, Board of Legal Specialization and Education, Florida Bar (May 14, 1996). New Mexico, with a much smaller bar membership, has received "about a half dozen responses" over the years. *See Morrow Letter, supra* note 397, at 2. California originally required publication of applicants' names, but deleted that provision in 1993. *See Culp Letter, supra* note 244, at attachment (noting that comments were received only "occasionally").

Arizona publishes applicants' names and "occasionally" receives comments as a result. *See Schoch Letter, supra* note 303, at 2. South Carolina publishes the names and has received only two comments in the past nine years. *See Miller Letter, supra* note 197, at no. 2.

publication is limited, however, since only those who have access to the forum are solicited.

Given the work load of most attorneys, it speaks well of the legal profession that attorneys have been willing to respond to these inquiries at all.³⁹⁹ Without a detailed comparison of multiple responses, however, the quality, comprehensiveness, and consistency of any response are of concern. Unless a reference is a participant in the certification program, which most attorneys are not,⁴⁰⁰ there is little incentive to provide a reasoned and thoughtful response. In addition, different members of the specialty committee will interpret the responses differently, each having their own reactions to the language used by references. Such diversity demands that the review be somewhat superficial.

The Model Criminal Standards note that the peer review requirement is the specialty board's best opportunity to gain knowledge about an applicant's applied skill, level of preparedness, manner of conducting business, and the like.⁴⁰¹ Attorneys and judges who work with the applicant have had an opportunity to learn, over varying periods of time, details about the applicant's character and performance. However, in addition to the points raised earlier,⁴⁰² an attorney candidate is likely to be more assiduous during formal presentations in court or during contacts with lawyer peers. Those attorneys and judges are not likely to know the way in which an attorney ordinarily deals with clients, out of the public eye.

An attorney's partners, staff, and clients, however, are probably most familiar with his or her communication skills, or "bedside manner." Of those groups, clients are likely to be the best acquainted with the relevant information and the least subject to partiality or inhibition. The type of information solicited from clients would be of a different sort than that provided by professional peers or judges. Clients, for example, would not be asked about the attorney's knowledge of substantive or procedural law. Instead, clients could relate whether the attorney had responded to the client's questions in a timely fashion, had explained the course and purpose of his or her actions on behalf of the client and the options available to the client at various points in the rep-

399. Discussions with specialization program directors indicate that they have had little difficulty in obtaining fairly detailed responses from references.

400. Compare *supra* note 83 and accompanying text with *infra* notes 472-73 and accompanying text. Texas, with 17 designated specialties, has certified the highest percentage of its active bar, 9.6%. See DEPARTMENT OF RESEARCH & ANALYSIS, STATE BAR OF TEX., A DEMOGRAPHIC PROFILE OF THE STATE BAR OF TEXAS MEMBERSHIP 2 (2d ed. 1995) [hereinafter TEX. MEMBERSHIP SURVEY].

401. See MODEL CRIM. STDS., *supra* note 221, § 4.3 cmt.

402. See *supra* Part III.C.4.

resentation, had involved the client in decision-making of the sort mandated by Rule 1.2 of the ABA Model Rules of Professional Responsibility, and had shown care and concern about the client's problems.

Yet certification programs, on the whole, ignore the relevant information clients can provide. Furthermore, only one state, New Mexico, mentions non-substantive skills in its criminal law standards. It states that applicant must meet the stated requirements and "otherwise possess[] sufficient legal competence in the . . . field of practice, measured as follows: . . . the extent to which a lawyer . . . (3) manages such practice efficiently, . . . (5) properly prepares and carries through matters undertaken, and (6) is intellectually, emotionally, and physically capable."⁴⁰³ New Mexico also is unique among the certifying states because it requires references from former clients.⁴⁰⁴ However, unless New Mexico asks those client references about their attorney's qualities in language that elicits detailed responses, and the specialty committee takes those responses into consideration, it is not clear that the language is more than window dressing. Peer references are limited in their ability to provide this type of information.

Although the thought of being reviewed by clients generally strikes terror into the hearts of most attorneys, perhaps with good cause, any concern over bad reviews from disgruntled clients could be minimized by allowing the applicant to select the client, because the attorney is unlikely to name someone with whom the attorney does not have a good relationship.⁴⁰⁵

2. RECERTIFICATION REQUIREMENTS

Each state provides standards for recertification after a certain period of time.⁴⁰⁶ Most certify attorneys for a five-year period.⁴⁰⁷ New Jersey, however, has a period of certification of seven years.⁴⁰⁸ The

403. N.M. CRIM. STDS., *supra* note 199, § 1.1.

404. *See* Morrow Letter, *supra* note 397, at 2. Even in that state, however, only the criminal law specialty has imposed this requirement.

405. This rather common-sense assertion may not be accurate, given the fact that several state specialization program directors have received bad recommendations from references submitted by the attorney. However, when an attorney is not sensitive enough to realize that a particular judge or attorney is likely to give a bad recommendation, the loss is not a significant one. The same would be true with client references.

406. *See* ARIZ. CRIM. STDS., *supra* note 177, § III; CAL. CRIM. STDS., *supra* note 279, § III; FLA. PLAN, *supra* note 279, at Rule 6-8.4; N.M. CRIM. STDS., *supra* note 199, § 5; N.C. CRIM. STDS., *supra* note 279, § .2506; TEX. CRIM. STDS., *supra* note 192, § III.

407. *See* ARIZ. PLAN., *supra* note 3, § 8; CAL. CRIM. STDS., *supra* note 279, § I.C; FLA. CRIM. STDS., *supra* note 279, § 6-3.6(a); N.M. CRIM. STDS., *supra* note 199, § 5; N.C. CRIM. STDS., *supra* note 279, § .2506; TEX. CRIM. STDS., *supra* note 192, § III(A).

408. *See* N.J. PLAN, *supra* note 3, § 1:39-7.

Model Criminal Standards suggest that an applicant for recertification be required to meet the same standards set for initial recognition, except that no re-examination should be required.⁴⁰⁹

Generally, the states' requirements for recertification track those required for initial certification.⁴¹⁰ None of the states require re-examination.⁴¹¹ Arizona's recertification requirements provide an example. To demonstrate continuing "substantial involvement," the criminal law specialist need document only twenty-five criminal or juvenile matters, and *either* five criminal trials *or* a combination of five other activities over the five-year period.⁴¹² For initial certification, that Arizona attorney had to prove completion of five felony jury trials, five other criminal trials, twenty-five criminal or juvenile matters, and the handling of two other matters from a list of four items, each of which must have been performed a specific number of times within four of the preceding six years, including the year immediately preceding the application.⁴¹³ Arizona does not require a new peer review process for recertification.⁴¹⁴ In the area of continuing legal education, Arizona requires specialists to show attendance at a minimum of fifteen program hours per year in the specialty area during each certification period.⁴¹⁵

Texas increases its recertification requirements in two areas. For initial certification an applicant must show that at least twenty-five percent of her time over the preceding three years was spent on criminal law matters.⁴¹⁶ For recertification, the specialist must demonstrate that

409. See MODEL CRIM. STDS., *supra* note 221, § 5 (noting that periodic review of credentials is necessary to assure a specialist's continued competence at that level and mentioning that the ABA Criminal Justice Section recommends re-examination, as well).

410. Compare ARIZ. CRIM. STDS., *supra* note 177, § III, with *id.* § II.E.; CAL. CRIM. STDS., *supra* note 279, § III, with *id.* § II; FLA. CRIM. STDS., *supra* note 279, § 6-8.3, with *id.* § 6-8.4; N.J. PLAN., *supra* note 3, § 1:39-2 to -4, with § 1:39-7.

411. See ARIZ. CRIM. STDS., *supra* note 177, § III; FLA. CRIM. STDS., *supra* note 279, § 6-8.4; N.M. CRIM. STDS., *supra* note 199, § 5; N.C. CRIM. STDS., *supra* note 279, § .2506; TEX. CRIM. STDS., *supra* note 192, § III. California does allow an applicant to satisfy the recertification CLE requirement by taking an examination instead, see CAL. CRIM. STDS., *supra* note 279, § III.C.3, and New Jersey allows its board to impose additional requirements on the applicant, including examination, if that is deemed appropriate, see N.J. PLAN., *supra* note 3, § 1:39-7.

412. See ARIZ. CRIM. STDS., *supra* note 177, § II.B.

413. See *id.*

414. See *id.* § III.

415. See *id.* § II.E; see also ARIZ. REGS., *supra* note 176, § 4.B(1)-(2). Arizona rules provide that a course:

shall have significant intellectual and/or practical content and its primary objective shall be to increase the attendee's professional ability as a specialist. . . . [It shall] deal with matters directly related to the specialization field . . . and . . . shall be directed toward the development of advanced skills in the area of specialization.

Id. Arizona also grants CLE credit for writing articles and teaching CLE courses. See *id.* § 4.C.(2)-(3).

416. See TEX. CRIM. STDS., *supra* note 192, § II.B.1.

she has spent twenty-five percent of her full-time practice *in each year* of the preceding certification period practicing in the area of criminal law.⁴¹⁷ Texas' CLE requirement for initial certification was forty hours over three years.⁴¹⁸ For recertification, the requirement is seventy-five hours over the five-year period, with no more than forty hours accrued in any calendar year.⁴¹⁹ In contrast, North Carolina reduces its CLE recertification requirement slightly to sixty-five hours over a five-year certification period⁴²⁰ compared to the initial certification requirement which requires forty hours in three.⁴²¹

B. *Bankruptcy Law Specialty: State-by-State Comparison*

Six states certify bankruptcy specialists.⁴²² Of those six, five also certify criminal law specialists.⁴²³ As might be expected of sub-parts to an overall plan, an intrastate comparison of the criminal law and bankruptcy standards shows that the ABA Model Bankruptcy Standards vary significantly from the model Criminal Standards only in one respect—the minimum standards the attorney must meet in the specialty area. There are only slight differences in the other general requirements of both specialties. For example, New Mexico requires a criminal law applicant to have spent one-third of her time on criminal law matters, while a bankruptcy applicant must have spent one-fourth of her time on bankruptcy matters.⁴²⁴ Similarly, Texas' requirements also differ—it requires a twenty-five percent practice emphasis in criminal law and thirty percent in bankruptcy (two-thirds of it in a subspecialty area).⁴²⁵

South Carolina does not certify criminal law specialists, but the organization of its bankruptcy standards generally conforms with those of the other states.⁴²⁶ All state standards refer to their individual state plan for authorization,⁴²⁷ and all generally have the same minimum stan-

417. *See id.* § III.C.1.

418. *See id.* § II.C.

419. *See id.* § III.D.

420. *See* N.C. CRIM. STDS., *supra* note 279, § .2506(a)-(c).

421. *See id.* § .2505(c)(1).

422. *See* ARIZ. BANKR. STDS., *supra* note 280; CAL. BANKR. STDS., *supra* note 280; N.M. BANKR. STDS., *supra* note 280; N.C. BANKR. STDS., *supra* note 280; S.C. BANKR. STDS., *supra* note 280; TEX. BANKR. STDS., *supra* note 280.

423. Arizona, California, New Mexico, North Carolina, and Texas certify criminal law specialists. *See supra* note 279 and accompanying text.

424. *See* N.M. CRIM. STDS., *supra* note 199, § 4.1.1; N.M. BANKR. STDS., *supra* note 280, § 4.1.1(a).

425. *See* TEX. CRIM. STDS., *supra* note 192, § II.B.1; TEX. BANKR. STDS., *supra* note 280, § II.B.1.

426. *See generally* S.C. BANKR. STDS. *supra* note 280.

427. *See* ARIZ. BANKR. STDS., *supra* note 280, at introduction; CAL. BANKR. STDS., *supra* note 280, at introduction; N.M. BANKR. STDS., *supra* note 280, §§ 1, 3; N.C. BANKR. STDS., *supra* note

dards for applying for certification⁴²⁸ and for recertification.⁴²⁹ Since the same office staff must administer the program for all specialties, this similarity is not surprising. The point of having committees in each specialty area is to provide for specific differences between specialty areas.⁴³⁰

1. MINIMUM STANDARDS FOR CERTIFICATION

The Model Bankruptcy Standards propose that a lawyer seeking certification in bankruptcy law have represented parties in five different performance areas: (1) adversary proceedings or plenary actions, (2) appeals, (3) client counseling concerning the preparation of specified documents, (4) representation at confirmations, closings or consummations concerning those documents, and (5) creditors' remedies proceedings.⁴³¹ In the first category, the lawyer must have performed sixteen bankruptcy activities a specified number of times.⁴³² Categories three and four comprise seven activities in bankruptcy practice.⁴³³ The

280, § .2204; S.C. BANKR. STDS., *supra* note 280, at introduction; TEX. BANKR. STDS., *supra* note 280, at introduction.

428. *See* ARIZ. BANKR. STDS., *supra* note 280, § II; CAL. BANKR. STDS., *supra* note 280, § II; N.M. BANKR. STDS., *supra* note 280, § 4 (referring to N.M. PLAN, *supra* note 3, § 19-203, for minimum standards); N.C. BANKR. STDS., *supra* note 280, § .2205 (referring to N.C. PLAN, *supra* note 3, § .1720); S.C. BANKR. STDS., *supra* note 280, § II; TEX. BANKR. STDS., *supra* note 280, § II.

429. *See* ARIZ. BANKR. STDS., *supra* note 280, § III; CAL. BANKR. STDS., *supra* note 280, § III; N.M. BANKR. STDS., *supra* note 280, § 7; N.C. BANKR. STDS., *supra* note 280, § .2206; S.C. BANKR. STDS., *supra* note 280, § IV; TEX. BANKR. STDS., *supra* note 280, § III. None of the states require re-examination after the initial certification period, although California makes it an option for the applicant, *see* CAL. BANKR. STDS., *supra* note 280, § III.C.2, and Arizona requires it only if there has been a break in certification status, *see* ARIZ. BANKR. STDS., *supra* note 280, § III. South Carolina's standards provide "that requirements for recertification shall not exceed the requirements for original certification." S.C. BANKR. STDS., *supra* note 280, § IV.B (declaring CLE an exception). Thus, South Carolina *could* require re-examination for recertification. In practice, it does not.

430. *See supra* note 158 and accompanying text.

431. *See* STANDING COMM. ON SPECIALIZATION, AMERICAN BAR ASS'N, MODEL STANDARDS FOR BANKRUPTCY LAW, § 4.1.2 (1990) [hereinafter MODEL BANKR. STDS.].

432. *See id.* § 4.1.2.A. These activities include:

objections to discharge or determinations of dischargeability; fraudulent conveyances; preferential transfers; avoidance of non-purchase money, non-possessory lien in consumer goods; avoidance of unperfected or unrecorded transfer by a hypothetical bona fide purchaser or lien creditor; equitable subordinations; modifications of automatic stay; sales, use or leases of property; assumptions or rejections of lease or other executory contract; extensions of secured or unsecured credit; involuntary petitions under Chapters 7 or 11; objections to the allowance of claims; evaluations of a trustee or examiner; conversions or dismissals; turnovers of property; and reclamations.

Id.

433. *See id.* § 4.1.2.C. These activities include:

1. . . . voluntary petitions under Chapters 7, 8 [sic], 9, 11, or 13;

acceptable types of activities to fulfill category five—creditors' remedies proceedings—are five in number.⁴³⁴ The tasks contained in these categories are drawn from different sections of the U.S. Bankruptcy Code.⁴³⁵

a. Demonstrating "knowledge and competence"

Three states further divide bankruptcy law into subspecialties. New Mexico, North Carolina and Texas certify specialists in "consumer bankruptcy" and in "business bankruptcy" law.⁴³⁶ Five of the six bankruptcy certification states provide for a written examination in order to demonstrate the required knowledge and competence in the subject area.⁴³⁷ As was the case with the criminal law specialty, none of the examinations include performance testing. New Mexico remains the

2. . . . schedules of assets and liabilities and statements of affairs under Chapters 7, 8 [sic], 9, 11 or 13;

3. . . . disclosure statements under any reorganization chapter of the Bankruptcy Code;

4. . . . plans of reorganization under any reorganization Chapter of the Bankruptcy Code;

5. . . . assignments for the benefit of creditors or other similar documents;

6. . . . receivership or other similar state court pleadings;

7. . . . loan or debt moratorium, composition, extension, reaffirmation, redemption or other restructuring agreements.

434. See *id.* § 4.1.2.E (including "replevin, attachment, garnishment; mortgage foreclosure (either judicial or by power of sale); forcible detainer or eviction; debt action or promissory note, lease, guaranty or chattel paper; [and] non-judicial sale of collateral under Article 9 of the Uniform Commercial Code").

435. For example, the Model Bankruptcy Standards item "fraudulent conveyances," *id.* § 4.1.2.A.2, comports with 11 U.S.C. § 548 (1994); "modifications of automatic stay," *id.* § 4.1.2.A.7, comes from 11 U.S.C. § 362(d) (1994); and "assumptions or rejections of lease or other executory contract," *id.* § 4.1.2.A.9, appears in 11 U.S.C. § 365 (1994).

436. N.M. BANKR. STDS., *supra* note 280, § 2; N.C. BANKR. STDS., *supra* note 280, § .2201; TEX. BANKR. STDS., *supra* note 280, § II.B.3.

437. Arizona will accept, in lieu of the state examination, passage of an American Bankruptcy Board of Certification exam taken within three months of the application for certification. See ARIZ. BANKR. STDS., *supra* note 280, § II.C. The applicant still must pay the state examination fee, however. See *id.*

California provides an alternative to passing the written examination. An applicant may avoid taking the exam if, within the preceding three years, the applicant has (1) been principal author of three articles or one book that "constitutes a substantial and scholarly contribution to the advancement of the practice of personal and small business bankruptcy law;" (2) taught 15 units of approved bankruptcy courses; and (3) participated substantially as a member of a committee or subcommittee of "a recognized professional association, in the study, analysis or drafting of personal and small business bankruptcy law." CAL. BANKR. STDS., *supra* note 280, § II.E.

South Carolina's regulations require an applicant to pass an "oral interview/examination" prior to taking the written examination. S.C. BANK. STDS., *supra* note 280, § II.D. In practice, this requirement has been used, not as an added examination, but as an interview to "weed out" applicants who "clearly cannot achieve a passing score on the written examination." Miller Letter, *supra* note 197, at no. 12; see also N.C. BANKR. STDS., *supra* note 280, § .2205(e); TEX. BANKR. STDS., *supra* note 280, § II.F.

only state that does not require an applicant to pass an examination.⁴³⁸ North Carolina specifies that the examination will test the subspecialty selected by the applicant;⁴³⁹ Texas' bankruptcy standards do not mention differences in the sub-specialty examinations, but the practice has been to divide examination content—one-half to general bankruptcy knowledge and one-half to issues in the particular sub-specialty.⁴⁴⁰

b. Demonstrating "substantial involvement"⁴⁴¹

The states with bankruptcy specialties vary significantly, from each other and from the ABA model, in the requirements to demonstrate "substantial involvement." For example, Arizona lists thirty-three different categories of client representation, the first sixteen of which duplicate some of the ABA Model Standards' categories,⁴⁴² and requires applicants to have performed tasks in at least thirteen of them.⁴⁴³ North Carolina's standards impose only a certain number of "hours in bankruptcy law practice"⁴⁴⁴ while Texas requires an applicant to have spent thirty percent of her full-time practice in bankruptcy law, with twenty percent of that practice involving work in the subspecialty area, either serving individual or business clients,⁴⁴⁵ and also requires performance of a specific number of listed tasks.⁴⁴⁶

438. See N.M. Bankr. Stds., *supra* note 280, § 5 (although New Mexico's board reserves the right to impose a written or oral examination in the future).

439. See N.C. BANKR. STDS., *supra* note 280, § .2205(e)(2).

440. Telephone Interview with Gary W. McNeil, Executive Director, Texas Board of Legal Certification (May 14, 1996). If an applicant wishes to become certified in both subspecialties, as approximately 40% of certified bankruptcy specialists have done as of 1995, he or she must take the general portion, plus both sub-specialty components. See *id.*

441. See Chart #2, *infra* pp. 351-57.

442. Compare ARIZ. BANKR. STDS., *supra* note 280, § II.B(1)(16), with MODEL BANKR. STDS., *supra* note 430, § 4.1.2.A. All of the additional tasks on Arizona's list seem relevant to U.S. bankruptcy law, rather than to a state bankruptcy statute.

443. See ARIZ. BANKR. STDS., *supra* note 280, § II.B (listing, in addition to the ABA's proposed categories: five reaffirmations; five motions for abandonment; three examinations of debtors under Rule 2004; one revocation of an order of confirmation of a Chapter 11 or 13 plan; 20 voluntary petitions with schedules and statements, under Chapter 7; 10 voluntary petitions with schedules and statements under Chapter 11 or 13; five confirmations of plans under Chapter 13; three disclosure statements and reorganization plans under Chapter 11; three requests for administrative priority of claim; three objections to claimed exemptions; two replacement lien applications; three applications for the proceeds of sale of a debtor's assets; two proceedings to determine the validity, priority, or extent of a lien or other interest in property; one application for injunctive or declaratory relief; three trustee representations; three bankruptcy-related adversary proceedings or contested matters of a type other than above described; and two bankruptcy-related appeals).

444. N.C. BANKR. STDS., *supra* note 280, § .2205(b)(1) (requiring an average of 500 hours per year in bankruptcy practice within the five years immediately preceding application, with no less than 400 hours occurring in any one year).

445. See TEX. BANKR. STDS., *supra* note 280, § II.B.3.

446. The consumer bankruptcy subspecialists must have represented debtors or creditors in a

CHART #2 - BANKRUPTCY LAW SPECIALTY, "SUBSTANTIAL INVOLVEMENT" CRITERIA

ABA MODEL STANDARDS	ARIZONA	CALIFORNIA	NEW MEXICO	NORTH CAROLINA	SOUTH CAROLINA	TEXAS
During 3 years preceding application, applicant shall have performed:	Within 4 of 6 years, including year immediately preceding, 13 of following performed:	Within 3 years of application, at least 30 of any combination of the following, at least 25 of which took place in bankruptcy court in no fewer than 15 different cases: a. The plaintiff or defendant in an adversary proceeding as defined in Part VII of the Rules of Bankruptcy Procedure; c. The moving party or a named respondent in any other contested matter as defined in Rule 9014 of the Rules of Bankruptcy Procedure; f. The judgment creditor or judgment debtor in a contested exemption dispute under Article 2 or 4 of Ch. 4, Div. 2, Title 9 of the Code of Civil Procedure;	Within 3 years of application (consumer specialty) or 5 years of application (business specialty), 25% of full-time practice (40-hr week) in bankruptcy law in NM Bankruptcy Court	Within 5 years preceding application, applicant has devoted an average of at least 500 hours per year to bankruptcy law practice, but not less than 400 hours in any one year.	Within 5 years immediately preceding application, 35% of time practicing bankruptcy law and time devoted to bankruptcy law equals 35% of full-time (40-hr week) practice.	Within 3 years immediately preceding application, 30% of time in bankruptcy law practice. <i>Consumer specialty:</i> 20% of total time must be spent representing non-business debtors or creditors. Applicant must show 15 contested matters, at least 8 in bankruptcy court. <i>Business specialty:</i> 20% of total time spent representing business debtors or creditors, plus performance in 12 of the following 30 categories:

(1) — objections to discharge or determinations of dischargeability

2

2

CHART #2 - BANKRUPTCY LAW SPECIALTY, "SUBSTANTIAL INVOLVEMENT" CRITERIA

ABA MODEL STANDARDS	ARIZONA	CALIFORNIA	NEW MEXICO	NORTH CAROLINA	SOUTH CAROLINA	TEXAS
(2) — fraudulent conveyances	2					*
(3) — preferential transfers	2					(see below) *
(4) — avoidances of non-purchase money, non-possessory liens in consumer goods	2					(see below)
(5) — avoidance of unperfected or unrecorded transfer by a hypothetical bona fide purchaser or lien creditor	1					*
(6) — equitable subordination	1					(see below)
(7) — modifications of automatic stay	4					1
(8) — sales, use or leases of property	4					4
(9) — assumptions or rejections of lease or other executory contract	3					4
(10) — extensions of secured or unsecured credit	2					3
(11) — involuntary petitions under Ch 7 or 11	2					2 (post-petition)
						2

CHART #2 - BANKRUPTCY LAW SPECIALTY, "SUBSTANTIAL INVOLVEMENT" CRITERIA

ABA MODEL STANDARDS	ARIZONA	CALIFORNIA	NEW MEXICO	NORTH CAROLINA	SOUTH CAROLINA	TEXAS
(12) — objections to the allowance of claims	4	• 1 representing the objecting party				4
(13) — evaluations of a trustee or examiner	• 2 appointments of trustee or examiner					2
(14) — conversions or dismissals	3					(contested appts) 3
(15) — turnovers of property	3					3
(16) — reclamation	1					1
B. Represented appellant or appellee in no fewer than — appeals items listed in A.	• 2 appeals relating to the above described					2
C. Counseled clients concerning, and prepared, no fewer than — of following categories:						
(17) — voluntary petitions under Ch 7, 8 [sic], 9, 11 or 13	<ul style="list-style-type: none"> • 20 voluntary petitions under Ch 7, with schedules and statements • 10 voluntary petitions under Ch 11 or 13, with schedules and statements 	<ul style="list-style-type: none"> • 1 representing debtor in voluntary or involuntary case under B. Code • 1 representing petitioning creditors in involuntary case under B. Code 	<p><i>Consumer Bankruptcy specialty:</i></p> <ul style="list-style-type: none"> • 15 contested matters, no more than seven of the same type, and at least 2 under Ch. 7 and 2 under Ch. 13. Majority filed in U.S.D.C.N.M. (Alternatively, applicant may have appeared as trustee in 50 cases each of preceding 3 years (1/2 NM cases.)) 			<ul style="list-style-type: none"> • 5 voluntary petitions with schedules and statements of Debtors engaged in business, under Ch. 7 • 5 voluntary petitions with schedules and statements under Ch. 9, 11, 12 or 13 of Debtors engaged in business

CHART #2 - BANKRUPTCY LAW SPECIALTY, "SUBSTANTIAL INVOLVEMENT" CRITERIA

ABA MODEL STANDARDS	ARIZONA	CALIFORNIA	NEW MEXICO	NORTH CAROLINA	SOUTH CAROLINA	TEXAS
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Business Bankruptcy specialty:

- Applicant shall list significant bankruptcy cases open and pending within the 5 years preceding application, with a description of applicant's responsibilities in each delineated.

(18) — schedules of assets and liabilities and statements of affairs under Ch. 7, 8 [sic], 9, 11 or 13

(19) — disclosure statements under any reorganization chapter of B. Code

(20) — plans of reorganization under any reorganization chapter of B. Code

(21) — assignments for benefit of creditors or other similar documents

(22) — receivership or other similar state court pleadings

(23) — loan or debt moratorium, composi-

- (see immediately preceding, which would include such schedules and statements)
- 3 disclosure statements and plans of reorganization under Ch. 11
- 3 under Ch. 9, 11 (see immediately preceding), 12 or 13 of Debtor engaged in business

CHART #2 - BANKRUPTCY LAW SPECIALTY, "SUBSTANTIAL INVOLVEMENT" CRITERIA

ABA MODEL STANDARDS	ARIZONA	CALIFORNIA	NEW MEXICO	NORTH CAROLINA	SOUTH CAROLINA	TEXAS
tion, extension, reaffirmation, redemption or other restructuring agreements						
D. Represented clients in no fewer than — confirmation, closing, or other consummations of any transactions listed in C. above	<ul style="list-style-type: none"> • 5 confirmations of Ch 13 plans • 2 revocation of order of confirmation of Ch. 11 or 13 plan 					<ul style="list-style-type: none"> • 1 revocation of an order of confirmation of plan under Ch. 9, 11, 12 or 13 • 5 confirmation hearings of plans under Ch. 9, 11, 12, 13 • 1 contested modification of plan under Ch. 9, 11, 12, 13 of Debtor engaged in business
E. Represented parties in following creditors' remedies proceedings:						
(24) — replevins						
(25) — attachments						
(26) — garnishments						
(27) — mortgage foreclosure (either judicial or by power of sale)						
(28) — forcible detainer or eviction		<ul style="list-style-type: none"> • 1 representing plaintiff or defendant in a contested attachment dispute under Chapters 4, 5 or 6 of Title 6.5 of CA C.C.P. 				

CHART #2 - BANKRUPTCY LAW SPECIALTY, "SUBSTANTIAL INVOLVEMENT" CRITERIA

ABA MODEL STANDARDS	ARIZONA	CALIFORNIA	NEW MEXICO	NORTH CAROLINA	SOUTH CAROLINA	TEXAS
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(29) — debt action or promissory note, lease, guaranty or chattel paper

(30) — non-judicial sale of collateral under Art. 9 of UCC

- (*) 2 avoidance actions under the B Code, including any combination of: fraudulent conveyances, preferential transfers, 1 avoidance of an unperfected or unrecorded transfer by a hypothetical bona fide purchaser or lien creditor, 1 recovery of a setoff, or post-petition transfers. (See ABA list, nos. 2,3,5)
- 5 motions for abandonment
- 3 examinations under R 2004
- 3 contested requests for allowance and/or payment of an administrative priority of claim
- 2 proceedings to determine the validity, priority or extent of a

CHART #2 - BANKRUPTCY LAW SPECIALTY, "SUBSTANTIAL INVOLVEMENT" CRITERIA

ABA MODEL STANDARDS	ARIZONA	CALIFORNIA	NEW MEXICO	NORTH CAROLINA	SOUTH CAROLINA	TEXAS
lien or other interest in property of a Debtor engaged in business						
<ul style="list-style-type: none"> • 1 complaint for injunctive or declaratory relief 						
<ul style="list-style-type: none"> • 3 representations of the trustee of a Debtor engaged in business 						
<ul style="list-style-type: none"> • 3 bankruptcy related adversary proceedings or contested matters of a type other than as above described of a Debtor engaged in business 						
<ul style="list-style-type: none"> • representation of official committees in 2 business bankruptcy cases 						
<ul style="list-style-type: none"> • preparation and presentation of a paper at a State Bar approved seminar or institute dealing with a business bankruptcy topic 						

c. Demonstrating “knowledge” through continuing legal education

The specific number of CLE hours a lawyer must have accrued prior to application varies from zero in Arizona⁴⁴⁷ to sixty in South Carolina and Texas.⁴⁴⁸ States also differ in the types of activities that qualify to fulfill the CLE requirement: Most states provide that an applicant may substitute teaching or writing in the bankruptcy area for all or part of the requirement.⁴⁴⁹ California, North Carolina, and Texas also allow self-study or study resulting in an advanced degree to count toward the required hours.⁴⁵⁰ Arizona and California specify that three and six hours, respectively, of the total CLE must have focused on professional responsibility or legal ethics.⁴⁵¹

minimum of 15 contested matters, at least eight of which were in bankruptcy court, within the three years preceding their application. *See id.* § II.B.3.a. The business bankruptcy subspecialists, in the same three-year period, must have completed at least 12 of 30 listed categories of tasks, which include duplicates of some items on the ABA’s list and the following: recovery of a setoff; post-petition transfers; five abandonment motions; three examinations under Rule 2004; one revocation of an order of confirmation of a plan under either Chapters 9, 11, 12, or 13; one contested modification of a plan under either Chapters 9, 11, 12, and 13 of a debtor engaged in business; five voluntary petitions, with schedules and statements of debtors engaged in business, under Chapter 7; five voluntary petitions, with schedules and statements under Chapters 9, 11, 12, or 13 of debtors engaged in business; five confirmation hearings of plans under Chapters 9, 11, 12, or 13 of a debtor engaged in business; preparation of three disclosure statements and plans of reorganization under Chapter 11; three contested requests for allowance and/or payment of an administrative priority of claim; preparation of three reorganization plans under Chapters 9, 12, or 13 of a debtor engaged in business; two proceedings to determine the validity, priority, or extent of a lien or other interest in property of a debtor engaged in business; one complaint for injunctive or declaratory relief; three representations of the trustee of a debtor engaged in business; three bankruptcy-related adversary proceedings or contested matters of a type other than above described of a debtor engaged in business; two appeals from the bankruptcy Court; official committees’ representations in two business bankruptcy cases; and the preparation and presentation of a paper at a state bar approved seminar or institute dealing with a business bankruptcy topic. *See id.* § II.B.3.b.2. An applicant who served as a judge or trustee must have participated in 12 of the 30 areas. *See id.* § II.B.3.b.3.

447. Arizona’s CLE requirements apply only to certified specialists, not applicants. *See* ARIZ. BANKR. STDS., *supra* note 280, § II.E; Schoch Letter, *supra* note 303, at no. 1.

448. *See* S.C. BANKR. STDS., *supra* note 280, § II.C (requiring accrual within the immediately preceding five years); TEX. BANKR. STDS., *supra* note 280, § II.C (requiring accrual within the immediately preceding three years). California requires 45 60-minute hours within three years. *See* CAL. BANKR. STDS., *supra* note 280, § II.C. New Mexico requires consumer specialists to complete 30 hours within three years, *see* N.M. BANKR. STDS., *supra* note 280, § 4.1.1(f), and for business specialists to complete 45 hours within three years, *see id.* § 4.2.1(d). North Carolina requires 36 hours within 3 years. *See* N.C. BANKR. STDS., *supra* note 280, § .2205(c).

449. *See* ARIZ. REGS., *supra* note 176, § 4(A); CAL. BANKR. STDS., *supra* note 280, § II.C; N.M. REGS., *supra* note 373, §§ 6.6-.7; N.C. REGS., *supra* note 380, § .1905(a)-(b); TEX. BANKR. STDS., *supra* note 280, § II.C. Only South Carolina does not give credit for teaching or writing.

450. *See* CAL. BANKR. STDS., *supra* note 280, § II.C.2; N.C. REGS., *supra* note 379, § .1905(c)-(d); TEX. BANKR. STDS., *supra* note 280, § II.C.2.

451. *See* ARIZ. BANKR. STDS., *supra* note 280, § II.E; CAL. BANKR. STDS., *supra* note 280, § II.C.1.

d. Demonstrating "qualification" through "peer review"

States also vary in their requirements for demonstrating "qualification" through "peer review." The total number of names an applicant may be required to submit ranges from as few as five, in South Carolina and Texas,⁴⁵² to as many as ten, in North Carolina.⁴⁵³ In some combination of lawyers and judges,⁴⁵⁴ references must be people who are familiar with the applicant's work, but who are not current partners, associates, or relatives of the applicant.⁴⁵⁵ All states authorize the specialty committee to inquire independently of other sources.⁴⁵⁶ However, only New Mexico is required to publish applicants' names in the monthly bar association publication, giving notice and opportunity for comments from completely independent sources.⁴⁵⁷ South Carolina voluntarily publishes the names of applicants.⁴⁵⁸ Texas also requires the applicant to list the names and addresses of all judges before whom the applicant has appeared within the preceding two years.⁴⁵⁹ North Carolina requires that completed forms be received from at least five of the ten required references.⁴⁶⁰

No inquiry is made of an applicant's current and former clients, or of anyone who might have insight into the attorney's law practice management skills or "bedside manner." New Mexico's standards for the

452. See S.C. BANKR. STDS., *supra* note 280, § I.K.; TEX. BANKR. STDS., *supra* note 280, § I.J.

453. See N.C. BANKR. STDS., *supra* note 280, § .2205(d) (requiring that at least five completed forms be returned). As for the other states, Arizona requires five, see ARIZ. BANKR. STDS., *supra* note 280, § II.D; California requires six, with each reference asked to submit the names of two additional persons "familiar with the applicant's reputation," see CAL. BANKR. STDS., *supra* note 280, § II.F(1); and New Mexico requires eight, five of whom are New Mexico practitioners, N.M. BANKR. STDS., *supra* note 280, § 6.1.

454. North Carolina is alone in prohibiting the use of bankruptcy court judges as references. See N.C. BANKR. STDS., *supra* note 280, § .2205(d)(1).

455. See ARIZ. BANKR. STDS., *supra* note 280, § II.D; CAL. BANKR. STDS., *supra* note 280, § II.F.1; N.M. BANKR. STDS., *supra* note 280, § 19-203.D; N.C. BANKR. STDS., *supra* note 280, § .2205(d)(2); S.C. BANKR. STDS., *supra* note 280, § I.K; TEX. BANKR. STDS., *supra* note 280, § I.J. In addition, South Carolina prohibits members of the Specialization Advisory Board and the Commission on Continuing Lawyer Competence from acting as references. See S.C. BANKR. STDS., *supra* note 280, § I.K. Moreover, after January 1, 1996, it will require that one reference be a certified bankruptcy specialist. See *id.*

456. See ARIZ. BANKR. STDS., *supra* note 280, § II.D; CAL. BANKR. STDS., *supra* note 280, § II.F.2; N.M. BANKR. STDS., *supra* note 280, § 6.1; N.C. BANKR. STDS., *supra* note 280, § .2205(d); S.C. BANKR. STDS., *supra* note 280, § I.K; TEX. BANKR. STDS., *supra* note 280, § I.J.

457. See N.M. REGS. *supra* note 373, § 7.7. As with the criminal law specialty, few responses have been received. See *supra* note 398.

458. See Miller Letter, *supra* note 197, at no. 5. Mr. Miller reports that, in the nine years he has been involved with the program, only two comments have been received in response to publication; one was positive, the other negative. See *id.*

459. See TEX. BANKR. STDS., *supra* note 280, § I.K.

460. See N.C. BANKR. STDS., *supra* note 280, § .2205(d).

bankruptcy specialty do not track its criminal law specialty standards in this regard.

2. RECERTIFICATION REQUIREMENTS

All certifications in bankruptcy are for a five-year period,⁴⁶¹ and none require re-examination for continued recognition. California, New Mexico, and North Carolina all require that during the five-year certification period, specialists maintain the standards established for initial certification.⁴⁶² Arizona, South Carolina, and Texas make minor changes in their requirements for continued recognition.⁴⁶³

C. Summary of Plan Comparison: "State Specific" Versus "National" Practices

This section began with several questions: How do the individual committees in each specialty field apply the general standards set by the certification boards? Are there significant differences evident in the application of specific standards between "state" and "national" subject areas? Would standardization of certification requirements across state lines interfere with the goals of certification programs? Subsections A and B above indicated that there are many, minor, differences in the state requirements in each of the specialty areas. Based on the written standards, however, none of these differences results from substantive or procedural differences in the law in a particular state. In fact, the terminology of the requirements is remarkably similar. Any substantive differences would appear in the individual review of applicants' petitions by specialty committees in each state, when committee members use their own experience and knowledge of state practice as a guide in making decisions. Given that realization, the argument that coordination and standardization of the specific requirements would improve the programs' ability to communicate their message to the public gains strength.

461. See ARIZ. BANKR. STDS., *supra* note 280, § I.D; CAL. BANKR. STDS., *supra* note 280, § I.C; N.M. BANKR. STDS., *supra* note 280, § 7.1.1(a); N.C. BANKR. STDS., *supra* note 280, § .2206; S.C. BANKR. STDS., *supra* note 280, § IV.A; TEX. BANKR. STDS., *supra* note 280, § III.A.

462. See CAL. BANKR. STDS., *supra* note 280, § III.; N.M. BANKR. STDS., *supra* note 280, § 7.1.1(a); N.C. BANKR. STDS., *supra* note 280, § .2206.

463. Arizona does not require applicants for recertification to perform the specific list of tasks again; it merely asks for details on "the nature of legal services" engaged in during the period of certification, and identification of the bankruptcy issues involved and their frequency. See ARIZ. BANKR. STDS., *supra* note 280, § III. South Carolina specifically states that recertification requirements cannot be more stringent than those for initial certification, but increases the number of CLE hours required each year from 10 to 15. See S.C. BANKR. STDS., *supra* note 280, § IV.B.-C. Texas increases the number of required CLE hours from 20 to 25 per year. See TEX. BANKR. STDS., *supra* note 280, § III.D.

Certification programs utilize four categories of requirements to try and assure that certified attorneys are, in fact, more skilled and knowledgeable than noncertified lawyers: A showing of (1) knowledge and competence, (2) substantive involvement in the field, (3) continuing education and (4) positive peer review. Focusing first upon the required showing of knowledge and competence, which in most states means passing an examination, one can see merit in the belief that substantive and procedural differences in state laws must be accommodated. State legislatures and courts do not standardize their operations with each other and there are real differences in statutory law and court rules.⁴⁶⁴

However, such differences do not foreclose national standards in certification. State bar examinations for admission to practice have managed to standardize some basic requirements of knowledge in the multi-state examination that is administered by virtually all states.⁴⁶⁵ A similar approach could work in connection with certification. An examination might be written nationally, yet administered and graded by each state according to state-specific laws and rules. The National Board of Trial Advocacy certifies criminal law specialists nationally, and has created an exam that satisfies its constituent member groups as to the exam's validity in testing specialty knowledge. There is no reason why an otherwise standardized examination could not include a state-created "local practice" section, in which multiple-choice and essay questions tested knowledge of local law and practice.

A second examination-related topic was raised earlier, and should be restated here, in connection with the certification of experienced practitioners. If the consumer of legal services expects a certified attorney to possess higher skills than other attorneys, there is little excuse for not investigating the usefulness of an exam component that tests performance. As noted, several states, notably California, have been using performance testing in initial admissions for a number of years.⁴⁶⁶ Reviews of California's results, and the efforts of the National Conference of Bar Examiners to develop a multi-state performance examination, provide some indication that such testing could be of significance in gauging the expertise of applicants for certification.

Comparing the substantive involvement criteria applied by the

464. In the criminal law field, however, there is an overlay of "national" law requirements resulting from the application of constitutional rights and privileges to criminal defendants. To some degree, criminal law is national, created by the U.S. Supreme Court and applied in each state by local courts.

465. Indiana, Iowa, Louisiana, and Washington state do not currently use the multistate bar examination, although Iowa will begin using it in February 1997. See Jane Peterson Smith, *The MBE Specifications Review Project*, B. EXAMINER, Feb. 1996, at 4, 4.

466. See *supra* notes 318-23 and accompanying text.

states is confusing even to those who are legally-trained. For example, it is difficult to believe that the nature of criminal law practice is so much easier in Arizona than Texas that Arizona's committee requires fifty percent of an applicant's time to be spent in criminal law practice activity, while Texas requires only twenty-five percent.⁴⁶⁷ Similarly, it is equally difficult to believe that practice in New Jersey is so much less complicated than in North Carolina that New Jersey can require documentation of only ten "contested matters"⁴⁶⁸ while North Carolina's committee requires five felony jury trials, ten non-felony jury trials, ten "other" jury trials, fifty additional "criminal matters," and one of three other types of practice activity (oral or written appellate work or twenty-five additional criminal trials in any jurisdiction).⁴⁶⁹

However, continuing legal education requirements are less widely spread, most states requiring from forty to forty-five hours in the specialty field.⁴⁷⁰ In looking at peer review requirements, it is difficult to understand why California needs twelve references (eight from the applicant and four selected by the committee) to assure adequate peer review, while Texas manages with only five.⁴⁷¹ Similar points could be made with regard to the bankruptcy specialty, perhaps with even more force, since much of bankruptcy work takes place in the federal court system.

Standardizing requirements for specialist recognition, and making the suggested modifications to the standards, could have multiple beneficial effects for the programs, the lawyer specialists, and the public.

First, the marketing of legal specialists would be easier for both the certification program and the certified specialists, since the definition of a legal specialist would be simpler, more clearly stated and more easily understood. The public would know what it is getting, and that what it is getting is the same, whether you are in California, Texas, or North Carolina.

Second, the quality level of the certification would be improved if the examination administered to certification applicants were expanded to include a test of performance skills, thereby making it more comprehensive of the skills needed in practice.

Third, the certification would be more complete in its assessment of an applicant's skills if references from applicants' clients were obtained and used in deciding whether to grant certification. It has been recog-

467. See section two of Chart #1, *supra* pp. 752-54, to compare the states' practice requirements.

468. See *supra* note 340 and accompanying text.

469. N.C. CRIM. STDS., *supra* note 279, § .2505(b)(1)(A).

470. See *supra* note 369 and accompanying text.

471. See *supra* notes 386, 388-89 and accompanying text for the comparison.

nized for some time that many of the complaints against attorneys, both those made to bar association disciplinary committees and in malpractice actions, relate in large part to a lawyers' communication and office administration skills.⁴⁷² To ignore this facet of an attorney's work in deciding whether or not to give a professional "stamp of approval" through certification is to convey the belief that the profession doesn't care about these matters.

V. PROGRESS AND IMPLICATIONS OF CERTIFICATION

At the end of 1995, there were 16,065 lawyers certified as specialists by the nine states that are the subject of this Article.⁴⁷³ In addition, 2,744 lawyers have been certified by private organizations, some of whom have received state or ABA approval to advertise their certifications.⁴⁷⁴ The number of certified attorneys has been growing slowly, but steadily, and it appears that specialization certification is here to stay.

The "look" of specialization certification may not remain the same, however. Since 1990, no state has established an internal certification program of the sort described here. Recent state movement on certification has been limited to rules recognizing the certifications granted by private certifying organizations approved under the ABA's review process.⁴⁷⁵ Additionally, as noted earlier, there are still 29 states without any certification provisions whatsoever.⁴⁷⁶ The ABA itself is studying the possibility of creating a "private certification entity" that would perform administrative tasks for ABA sections that wish to certify lawyers

472. See, e.g., STANDING COMM. ON LAWYERS' PROFESSIONAL LIABILITY, AMERICAN BAR ASS'N, PROFILE OF LEGAL MALPRACTICE (1986) (concluding from survey of over 30,000 malpractice claims that administrative and client relations errors—missing deadlines, failing to return phone calls, procrastination—comprised 42% of all claims).

473. See Schoch Letter, *supra* note 303, at no. 4 (Arizona: 734); Culp Letter, *supra* note 244, at no. 2 (California: 3039); Lawhon Letter, *supra* note 380, at enclosure, p. 5 (Florida: 2792); Zulli Letter, *supra* note 274, at 1 (Louisiana: 262); Letter from Jeremy F. Perlin, Staff Counsel, Standing Committee on Specialization, American Bar Association to author 2 (Aug. 22, 1996) (on file with author) (New Jersey: 1343); *id.* (New Mexico: 129); Telephone Interview with Alice Neece Moseley, *supra* note 141 (North Carolina: 349); Letter from Harold L. Miller to author, *supra* note 197, at no. 3 (South Carolina: 230); Letter from Jeremy F. Perlin to author, *supra*, at 3 (Texas: 7187).

In addition, state programs that are not a part of this Article have certified 732 attorneys. See *id.* at 2 (stating that state certification programs have issued 16,797 specialty certificates).

474. See Letter from Jeremy F. Perlin to author, *supra* note 473, at 2.

475. For example, Tennessee will compare the criteria of private certifying organizations with state standards before granting specialization recognition and has drafted additional requirements tailored to state concerns. See TENNESSEE COMM'N ON CONTINUING LEGAL EDUC. AND SPECIALIZATION, REGULATIONS FOR CERTIFYING ORGANIZATIONS, § 10.4 (1993).

476. See STATE STATUS REPORT, *supra* note 117.

as specialists in a field of law.⁴⁷⁷

There are numerous questions that must be answered to determine whether the existing effort is worth while. Who are these lawyers? What do we know about the value of certification status to them? Do they advertise? Have their practices, or clients, changed as a result of certification, and in what ways? Does their recognition as specialists improve access to legal services by the public? Has the existence of certification programs encouraged improved competence in the profession? Is there any indication of what, if any, changes have occurred in the cost of legal services in the states that have certified specialists?

There are answers for some of the simplest questions. Three of the most populous states, with the largest specialization certification programs and the highest numbers of certified specialists—California, Florida, and Texas—are also three of the earliest entrants into certification. In the past five years, their state bars have conducted surveys of their total memberships, and of their certified specialists.⁴⁷⁸ Although these surveys were not coordinated between the states, so that the data can be compared only roughly, they do provide some useful information on the overall effect of specialization certification on the profession.

We do not know, unfortunately, much about the effect of lawyer certification programs outside the profession, since none of these states has conducted any surveys of public or client knowledge of, or reaction to, the existence of certified legal specialists.⁴⁷⁹ The Tennessee Board of Legal Certification, as part of its certification program implementation, funded a survey of its population in 1995.⁴⁸⁰ Although the

477. See AMERICAN BOARD OF LEGAL SPECIALISTS, INC., BUSINESS PLAN, EXECUTIVE SUMMARY (draft Apr. 12, 1996).

478. In 1991, California conducted another survey of its entire membership, and, in conjunction, the specialization certification program conducted a parallel survey of its members. See SUSAN H. RUSSELL & CYNTHIA L. WILLIAMSON, SRI INT'L SRI PROJECT 2310, DEMOGRAPHIC SURVEY OF THE STATE BAR OF CALIFORNIA (1991) [hereinafter 1991 CAL SURVEY]; see *infra* notes 512-32 and accompanying text. In 1991, Florida initiated a membership survey, see MIKE J. GARCIA, LONG RANGE PLANNING COMM'N, FLORIDA BAR, RESULTS OF THE 1993 MEMBERSHIP ATTITUDE SURVEY (1993) [hereinafter 1993 FLA. SURVEY], and in 1993, the Board of Legal Specialization and Education followed suit, see MIKE J. GARCIA, BOARD OF LEGAL SPECIALIZATION AND EDUC., FLORIDA BAR, RESULTS OF THE 1995 BOARD CERTIFIED LAWYERS' SURVEY (1995) [hereinafter 1995 FLA. SURVEY]. See *infra* notes 534-57 and accompanying text. Texas conducted a 1994 membership survey that provides comparative data on the total membership and certified specialists. See 1995 TEX. MEMBERSHIP SURVEY, *supra* note 400; see also *infra* notes 558-68, and accompanying text.

479. Although CAL. POLICIES, *supra* note 177, § P, noted that "[a]t an appropriate point, a survey of the public and lawyers should be made to aid in evaluating the program and in determining whether the goals of the program are being met and whether the program should be modified," no survey of the public has been accomplished.

480. See TENNESSEE COMM'N ON CONTINUING LEGAL EDUC. AND CERTIFICATION, "TENNESSEANS' ATTITUDES TOWARDS ATTORNEYS AND ATTORNEY ADVERTISING" (1995)

responses are not based on an existing state program, they do provide some interesting current information on public ideas about lawyer certification, particularly when juxtaposed with results of a 1986 ABA survey conducted in Minnesota and Florida.⁴⁸¹

Before looking at the current shape of specialization certification in these three states, and extrapolating it to the rest of the certification experience, it may be useful to put that information in context. As noted earlier, the California Bar Association conducted a survey of its membership in 1969 to acquire information useful in deciding whether to begin a pilot certification program.⁴⁸² Florida and Texas did not. The survey revealed membership attitudes toward specialization certification, collected opinions on the specific form a certification program should take, and provided demographic information on the pool of potential specialists.⁴⁸³ Unfortunately, no state conducted a survey to determine public opinions or ideas about whether a lawyer certification program would be useful to consumers or, if so, what such a program should look like.

A. Pre-Certification Program Data—California

The 1969 California survey of bar membership revealed that two-thirds of all California lawyers viewed themselves as specialists.⁴⁸⁴ Since there was no generally accepted definition for what constituted a legal specialist at that time, the self-identification is problematic. An attorney who voluntarily limits work to one or a few fields of practice may consider him or herself a specialist without necessarily possessing skills in those areas that differ measurably from those of any other lawyer.⁴⁸⁵

(surveying 1554 Tennessee adults selected through a random digit dialing method) [hereinafter TENN. SURVEY].

481. See *infra* note 534 and accompanying text.

482. See *supra* notes 77-78 and accompanying text.

483. See Committee on Specialization, *supra* note 77, at 155-57, 183-85.

484. See *id.* at 144. More than two percent of the respondents named 12 fields of law as primary specialties: Negligence (11.1%), probate and trusts (8.8%), business and corporations (7.8%), criminal law (7.4%), real property (5.3%), tax (4.3%), estate planning (4.1%), worker's comp (3.3%), patent (2.9%), local government (2.7%), administrative law (2.2%), and divorce (2.1%). See *id.* at 171-72.

485. One of the first questions that certification programs had to answer was how to distinguish a specialist from a competent practitioner practicing in the same area. As discussed earlier in connection with specialty attorney advertising, the certification programs have been careful about setting definitions that compare the skills of certified lawyers with those of lawyers who are not certified, because they fear political problems within the bar and potential liability to the public. See *supra* notes 249-72 and accompanying text. An ALI-ABA publication suggested the following definition in 1973:

A legal specialist is *more competent* in his field of specialty than the nonspecialist, as measured by knowledge, skills, and experience. . . . [T]he quality of legal

However subjective the identification, California's results are comparable to the claims of lawyers in other states for which some data exists. A 1975 Illinois State Bar Association survey reported that forty-eight percent of its members claimed to practice in a specialty field, while fifty-one percent claimed to be general practitioners with one or more specialties.⁴⁸⁶ In a 1981 Wisconsin Bar Association survey, fifty-eight percent of Wisconsin lawyers claimed to practice in a specialty field.⁴⁸⁷ Whether the remaining findings of California's survey can be attributed as easily to lawyers across the country is questionable, although a comparison of California's survey findings with the eventual shape of the Model Plan and the individual state plans indicates that such attribution may not be unreasonable.

Many of the concerns about formal recognition of specialization expressed by lawyers in the debates on the subject within the ABA were itemized in Part I of this Article.⁴⁸⁸ California's 1969 survey contained questions intended to discover the extent of these concerns within its membership. For example, on the issue of state versus national certification standards, a majority of California lawyers believed that certification standards should be handled locally.⁴⁸⁹ This supports the ABA's decision to cease efforts to create a national program.

A major concern expressed in the ABA debates was that clients would be harmed by specialist certification.⁴⁹⁰ Those concerns did not surface in California's survey, perhaps because questions on these specific topics were not addressed. However, three-fourths of the attorney respondents believed that the public would benefit generally from a lawyer certification program.⁴⁹¹ Two-thirds of the respondents thought that certification was not necessary to help lawyers identify lawyer specialists.⁴⁹² Interestingly, while only fifty-six percent of lawyers thought cer-

services he provides for clients in his specialty are higher than the competence nonspecialists possess and the quality of work they provide in similar circumstances.

Petrey, *supra* note 29, at 568 (citing Johnstone, *An Introduction to Specialization and Certification*, 4 ALI-ABA CLE REV., Apr. 13, 1973, at 4, col. 1). This is not very helpful when attempting to set specific criteria.

486. *See id.* at 567.

487. *See* Nakamura, *supra* note 79, at 13 (reporting on a 1981 Wisconsin Bar Association survey).

488. *See supra* notes 43-59 and accompanying text.

489. Seventy-one percent stated that certification should be handled locally, while only 15.5% thought a national program would be best. *See* Committee on Specialization, *supra* note 77, at 152.

490. *See supra* notes 48-50 and accompanying text (citing a narrowing of vision and a reduction in the availability of generalist attorneys).

491. *See* Committee of Specialization, *supra* note 77, at 147.

492. *See id.* at 183.

tification would make a "general improvement in legal competence," almost seventy percent thought certification would improve the "standards of specialty practice."⁴⁹³ Additionally, sixty-three percent thought certification would "improve the public image of the bar generally."⁴⁹⁴ Although fifty-four percent of attorneys did not expect to benefit personally from certification, almost two-thirds believed that other lawyers would benefit.⁴⁹⁵

Worries about the effect of certification on the competition for clients had been stated in ABA discussions and seem reflected in the California responses.⁴⁹⁶ Almost fifty-four percent of respondents believed that general practitioners would be harmed by a certification program.⁴⁹⁷ Although questions were not asked so that the specific bases for the fear could be determined, two questions did ask whether the respondent knew lawyers "who represent themselves as specialists . . . whose qualifications or competence you personally doubt" (almost sixty-one percent knew only a "few") and whether a certified specialist should be "required to return the referred client to the referring attorney for all matters," (almost forty percent said "yes") or "all matters in fields other than his specialty" (seventy-six percent said "yes"). These responses reveal both an altruistic and a selfish basis for anticipated harm. They indicate there was little fear that specialists would prove incompetent and quite a bit of fear that specialists would steal clients from generalists' referrals.

This fear of client theft does not seem to be borne out by the practices of those attorneys identifying themselves as specialists. When asked how they obtained their clients, two-thirds of the specialists reported receiving some referrals from clients, just over fifty percent received referrals from other lawyers and on the basis of their general reputation, and about forty percent obtained referrals from other professionals.⁴⁹⁸ More than half of the specialists stated that they did not accept additional work from clients who were referred to them for specialty work by other attorneys "without the consent of the referring lawyer."⁴⁹⁹ One-third of the specialists even reported that, without the referring attorney's consent, they would accept additional work only

493. *Id.* at 148.

494. *Id.* at 148 (1969).

495. *See id.* at 147.

496. *See supra* note 45 and accompanying text.

497. *See* Committee on Specialization, *supra* note 77, at 148 (noting that the "belief [was] fairly evenly distributed among various groupings within the Bar").

498. *See id.* at 145 (noting that "clients are the only *major* source of specialty referrals").

499. *Id.* at 149 (58%).

within the specialty area of the original referral.⁵⁰⁰

Another fear expressed in the national debate—that sole practitioners would be disadvantaged in their ability to specialize—did not seem to be borne out in California. More than half of sole practitioners and lawyers in offices of less than ten lawyers were self-designated specialists,⁵⁰¹ although the number was eighty percent for lawyers in firms with more than ten members.⁵⁰² The related fear that those practicing in smaller population areas would suffer by specialist recognition also seems to have had little validity. California's survey responses did show that a higher proportion of urban practitioners were self-identified specialists than was the case in areas with populations less than 500,000 but the difference was not significant—the two most populous counties contained more than fifty-eight percent of all lawyers and only sixty-two percent of the specialists.⁵⁰³

Other questions in the survey inquired about possible limitations on practice in specialty areas. More than eighty-four percent of the entire bar said that specialists should not be restricted to practice in their specialty field.⁵⁰⁴ Ninety percent opposed limiting the number of specialties a lawyer could hold.⁵⁰⁵ Eighty-six percent did not think nonspecialists should be prohibited from practicing in a field designated as a specialty.⁵⁰⁶ As noted earlier, the Model Plan and all of the state plans specifically state that certification creates no barriers to practice.⁵⁰⁷ These responses indicate that the decision to protect the traditional, "generalist" role of the lawyer as one able to perform any legal service was politically sound.

Finally, the survey asked a number of questions concerning the preferred form of a certification program. Almost seventy-nine percent of the bar thought it should include an experience requirement, with the majority of the group favoring certification only after three (forty-one percent) or five years (almost thirty-eight percent) of practice.⁵⁰⁸ Sixty

500. *See id.* (36.5%).

501. *See id.* at 144. Solo practitioners and members of nonpartnership associations made up 39% of the California bar in 1969. *See id.* Of that group, 53.1% considered themselves specialists. *See id.*

502. *See id.*

503. *See id.* at 146.

504. *See id.* at 150 (noting that nonspecialists opposed such limitation by a margin of three to one).

505. *See id.* at 151.

506. *See id.*

507. *See supra* note 146 and accompanying text.

508. *Id.* at 152-53 (noting that, of the attorneys polled, more than 63% had practiced in their specialty for more than five years, 19% had practiced between three and five years, and 18% had practiced for less than three years, and suggesting that the high numbers in favor of a three-year period reflected the sizable population of young attorneys in the bar).

percent of the bar favored the imposition of special educational requirements,⁵⁰⁹ dividing almost down the middle between the choice of a prescribed curriculum of CLE or law school training and an apprenticeship program.⁵¹⁰ More than seventy-five percent felt an examination should be required for certification, and sixty percent of those believed there should be both oral and written examinations.⁵¹¹ To the question whether there should be periodic re-examination to maintain a certification, sixty-seven percent answered "no."⁵¹²

B. *Post-Certification Program Data in California, Florida, and Texas*

California. The California State Bar conducted a demographic survey of a sampling of its entire membership in 1991.⁵¹³ The California Board of Legal Specialization also surveyed all certified attorneys, using the same questionnaire as the California State Bar.⁵¹⁴ At that time, approximately two percent of active California attorneys were certified in a specialty.⁵¹⁵ The 1991 membership survey did not focus on attitudes toward specialization. Therefore, it is impossible to compare directly the 1991 and 1969 data to determine whether the earlier opinions remain. However, the survey does provide interesting demographic data for comparison between the certification states.

The 1991 survey responses indicated that seventy-seven percent of bar members were in for-profit (private) legal practice,⁵¹⁶ compared with slightly more than eighty percent in 1969.⁵¹⁷ Forty-two percent of the California bar consisted of sole practitioners and attorneys in firms with fewer than ten attorneys.⁵¹⁸ At the same time, seventy-two percent of certified specialists were solo and small office practitioners.⁵¹⁹ Thus,

509. *See id.* at 153. Almost equal percentages of specialists and nonspecialists shared this opinion. *See id.*

510. *See id.* (46.3% preferring a prescribed curriculum of CLE or law school training versus 40.3% preferring an apprenticeship program).

511. *See id.*

512. *Id.* at 187.

513. *See* 1991 CAL. SURVEY, *supra* note 478. The 28-item survey was mailed to a random sample of 14,300 active bar members (out of 106,913 total active members), and a 73% response rate was achieved. *See id.* at S-1. Among the questions asked was one designed to determine the percentage of time respondents spent in particular practice areas. *See id.* at S-7.

514. *See* SURVEY OF CERTIFIED SPECIALISTS PRESENTATION (Oct. 2, 1992) (on file with author).

515. *See* Memorandum from John Schooling, Chair, Board of Legal Specialization, to Board Committee on Admissions and Competence, State Bar of California 3 (Nov. 23, 1992) (on file with author).

516. *See* 1991 CAL. SURVEY, *supra* note 478, at S-2. Corporate in-house counsel comprised another seven percent, and government service constituted 11%. *See id.*

517. *See* Committee on Specialization, *supra* note 77, at 142.

518. *See* SURVEY OF CERTIFIED SPECIALISTS PRESENTATION, *supra* note 514, at 6.

519. *See id.*

the percentages indicate that fears of disadvantage to these groups through specialization certification were needless.

Three-quarters of California's active attorneys worked in two metropolitan areas, Los Angeles and San Francisco, in 1991, with the remaining quarter working in medium or low-density areas.⁵²⁰ In contrast, only fifty-eight percent of 1969 practitioners were located in those two areas.⁵²¹ Twenty-eight percent of sole practitioners were located in Los Angeles and San Francisco in 1991,⁵²² while the 1969 survey reported that almost half of the sole practitioners were located in Los Angeles County.⁵²³ These figures indicate that sole practitioners in California have become more evenly distributed among different population densities.

Fears that urban specialists might be at a competitive advantage also seem misplaced. In 1991, sixty-eight percent of certified specialists came from high-density areas, comparable to seventy-one percent of the entire bar.⁵²⁴ There was similar comparability (fourteen percent versus fifteen percent) in medium-density geographic areas.⁵²⁵ The only disparity occurred in low-density areas, where eighteen percent of certified specialists could be found, among only eleven percent of the total bar population.⁵²⁶

With regard to the percentage of California attorneys who deem themselves specialists, whether certified or not, the 1991 data is more difficult to correlate with the 1969 survey. The bar, as a whole, had 106,913 active members in 1991.⁵²⁷ A total of 10,499 attorneys responded to the survey,⁵²⁸ approximately ten percent of the bar. Question fourteen of the 1991 survey listed 31 practice areas and asked respondents to indicate those areas in which they practiced and the percentage of time spent in each area.⁵²⁹ The four areas in which a large number of attorneys spent a significant amount of practice time included

520. See 1991 CAL. SURVEY, *supra* note 478, at S-3. The survey used ZIP codes to separate respondents into high- (Los Angeles and San Francisco), medium- (Sacramento and San Diego), and low-density (all other locations) areas. See *id.*

521. See Committee on Specialization, *supra* note 77, at 155.

522. See 1991 CAL. SURVEY, *supra* note 478, at S-4. Thirty-four percent of solo practitioners were located in low-density areas, and 24% were located in medium-density areas. See *id.*

523. See Committee on Specialization, *supra* note 77, at 143.

524. See SURVEY OF CERTIFIED SPECIALISTS PRESENTATION, *supra* note 514, at 7.

525. See *id.*

526. See *id.*

527. See 1991 CAL. SURVEY, *supra* note 478, at 4.

528. See *id.*

529. The 1991 survey listed 32 areas of law (31 specific subjects and one "other areas—specify"). The Report then calculated in descending order the "mean hours per week spent on each area by those bar members who spent at least some time on that area. *Id.* at 66.

three of the six then-existing certification specialties.⁵³⁰ Extrapolating to the entire lawyer population from the survey respondents who spent an average of more than twelve hours per week⁵³¹ engaged in law practice in just these four areas suggests that a minimum of thirty-seven percent and a maximum of seventy-five percent of California attorneys could be considered "specialists,"⁵³² at least as far as "time spent" in the practice

530. The most specialized areas of law practice included: Criminal prosecution (36.1 mean hours per week by 467 respondents), personal-injury-defense practice (18.6 mean hours per week by 1574 respondents), workers' compensation law (18.5 mean hours per week by 793 respondents), criminal defense (17.9 mean hours per week by 1484 respondents), domestic/family law (12.7 mean hours per week by 1755 respondents), and personal injury-plaintiff (12.2 mean hours per week by 2421 respondents). *See id.* at 67 tbl. III-10.

Criminal law, workers compensation law, and family law were designated specialties; personal injury law was not. *See* Letter from Phyllis J. Culp to author, *supra* note 244, at no. 2.

The other certified specialties were immigration and nationality law (8.6 mean hours per week by 345 respondents); probate, estate planning and trust law (7.5 mean hours per week by 1454 respondents in estate and trust planning, and 6.7 mean hours per week by 1546 respondents in probate and trust administration); and taxation law (10.8 mean hours per week by 943 respondents). *See* 1991 CAL. SURVEY, *supra* note 478, at 67 tbl. III-10; Letter from Phyllis J. Culp to author, *supra* note 244, at no. 2. Personal and small business bankruptcy law became a designated specialty in 1993. *See id.* at no. 1. The 1991 survey reported that 1637 respondents spent 8.1 mean hours per week in that practice area. *See* 1991 CAL. SURVEY, *supra* note 478 at 67 tbl. III-10. Appellate law became a designated specialty in 1995. *See* Culp Letter, *supra* note 244, at no. 1.

531. Twelve hours per week is more than 25% of a 40-hour work week, which is the Model Plan's suggested minimum percentage-of-time requirement. *See* MODEL PLAN, *supra* note 86, § 8.2.

532. While a "mean" is an average, meaning that some number of these attorneys spent less than the stated hours per week in the particular practice area, this "guesstimate" is probably not far off the mark as a comparison.

California had certified 281 attorneys as specialists in criminal law. *See* STATE BAR OF CAL., CALIFORNIA CERTIFIED LEGAL SPECIALISTS 7-14 (1991) [hereinafter DIRECTORY]. Of the survey respondents, 1951 engaged in a substantial amount of criminal law practice. *See* 1991 CAL. SURVEY, *supra* note 478, at 67 tbl. III-10 (467 practicing criminal prosecution 36.1 mean hours per week, and 1484 practicing criminal defense 17.9 mean hours per week). If we assume that these respondents are representative of the percentage of the bar as a whole that practices in the criminal law field, then up to 19% of the entire bar (or over 20,000 attorneys) practices criminal law, and one percent of them are certified specialists.

In the workers' compensation area, there were 397 certified specialists in 1991, *see* DIRECTORY, *supra* at 55-65, and 793 survey respondents who practiced in the area, *see* 1991 CAL. SURVEY, *supra* note 476, at 67 tbl. III-10. Using the same calculations as with criminal law practitioners, above, eight percent of the bar (or just over 8000 attorneys) practice in the field of workers' compensation law, and five percent of them are certified specialists. Survey respondents spent 18.5 mean hours per week per person in the area of workers' compensation law. *See id.*

The survey revealed that the third largest practice area was personal injury law, which is not a designated specialty. *See id.* The survey split the area between defense and prosecution orientations. *See id.* Approximately 15% of the survey sample spent 18.6 mean hours per week in the area of personal injury defense work, and 23% of the sample spent 12.1 mean hours per week in personal injury plaintiff's work. *See id.* Extending those results to the entire bar, up to 40,000 lawyers might consider themselves "specialists" in personal injury law.

Domestic relations, or family law, was the only other practice area with a mean hours per week total over 25%. *See id.* (12.7 mean hours per week). There were 1755 respondents in this

area is concerned. This compares well with the two-thirds of the bar who were self-designated specialists in the 1969 survey.⁵³³

Florida. Although Florida conducted several formal inquiries of its members between 1984 and the present,⁵³⁴ it is the 1993 Membership Attitude Survey⁵³⁵ and the 1995 Board Certified Lawyers' Survey⁵³⁶ that provide the best information on the current status of certification in Florida. At the time of the 1993 survey, there were 49,026 members of the bar.⁵³⁷ Approximately three-quarters (seventy-six percent) of these members were employed in private practice.⁵³⁸ Additionally, ninety-five percent of certified specialists were in private practice.⁵³⁹

The 1993 survey asked respondents to indicate whether they were certified. Seven percent of those responding answered in the affirmative.⁵⁴⁰ The separate survey of certified specialists, in 1995, revealed that seventy-one percent were employed in offices with 10 or fewer attorneys.⁵⁴¹

More than half of Florida's certified specialists, fifty-five percent, practice in high-density communities, with the remaining forty-five per-

category, 17% of the survey sample. *See id.* Based on the survey, of the entire bar, up to 17,000 lawyers might consider themselves family law specialists. At that time, California had 701 certified family law specialists, one percent of the entire bar. *See* DIRECTORY, *supra*, at 15-32.

533. *See* Committee on Specialization, *supra* note 77, at 144.

534. For example, a May 1986 survey of Florida specialists provided other "food for thought" in attempting to answer some of the questions that would help evaluate the certification programs. *See* Florida Certification Survey Results (May 1986) [Editor's Note: Pages will be treated as if they were numbered sequentially]. The survey showed that (1) respondents' two main reasons for participating in the program were "peer recognition" and "personal satisfaction," *id.* at 4; (2) 56.3% of the respondents advertised their certification status, most often in "Martindale-Hubbell" and the "Yellow Pages," *see id.* at 5; (3) 22% of the respondents believed they had received an economic advantage from certification, while 61.6% did not, *see id.* at 5; (4) 56.2% agreed that certification had enhanced their proficiency, 37.8% did not, *see id.*; (5) 88.5% agreed that "[t]he public does not understand the difference between certification and designation," 5.4% disagreed, *id.*; (6) 76.8% believed that fewer than 25% of their current clients, and 83% believed that fewer than 25% of their new clients, knew about their certification status, *see id.* at 6; (7) 91% believed that fewer than 25% of their referrals came as a result of their status as a specialist, *see id.*

The 1986 survey found that 65% of certified specialists were sole practitioners, or practiced in offices of less than 11 lawyers, and 35.1% practiced in firms of over 10 lawyers. *see id.* at 7. Eighty-three percent of the responding certified specialists practiced in urban areas; 14.3% practiced in suburban locations; and 2.7% practiced in rural areas. *See id.*

535. *See* 1993 FLA. SURVEY, *supra* note 478.

536. *See* 1995 FLA. SURVEY, *supra* note 478.

537. Telephone Interview with Dawna Bicknell, Executive Director, Board of Legal Specialization and Education, Florida Bar (May 14, 1996).

538. *See* 1993 FLA. SURVEY, *supra* note 478, at 15.

539. *See* 1995 FLA. SURVEY, *supra* note 478, at 8.

540. *See* 1993 FLA. SURVEY, *supra* note 478, at 23 (noting that this is a two percent increase from 1991).

541. *See* 1995 FLA. SURVEY, *supra* note 478, at 8.

cent located in medium and low-density areas.⁵⁴² Among the general bar population, the demographic distribution is sixty-two percent in high density areas and thirty-eight percent in medium and low-density areas.⁵⁴³

In 1993, the Florida Bar began a "Certification Awareness Campaign" to promote its certification program to the public and the bar. The campaign used newspaper and magazine advertisements, newspaper articles, public service announcements and talk show interviews on television and the radio.⁵⁴⁴ Florida has made no effort to learn the effect of its campaign in the public arena. There is, however, evidence indicating that the campaign has been only somewhat effective in informing the general bar about the certification program. Only forty-three percent of general bar respondents had seen Florida Bar-sponsored advertisements for the certification program,⁵⁴⁵ and most of those (fifty-eight percent) were seen in bar publications.⁵⁴⁶ Despite this, twenty-two percent of respondents indicated an intent to become certified in the future.⁵⁴⁷

In contrast, sixty-nine percent of certified lawyers were familiar with the program's "Certification Awareness Campaign."⁵⁴⁸ Even among that most-interested group, however, more than half (fifty-five percent) had not seen any element of the campaign personally.⁵⁴⁹

Survey responses indicated there is concern among certified specialists about the need to increase public awareness of the certification program. In response to a question asking for comments or suggestions regarding the awareness campaign, twenty percent of respondents had contributions.⁵⁵⁰ Of those, the most common comment was reduced by survey evaluators to "needs more exposure/increase ads."⁵⁵¹ A number of written comments concerning the campaign indicated a belief that the message needed to be more simple.⁵⁵²

542. See *id.* at 9 (classifying cities with populations over 250,000 as high-density).

543. See 1993 FLA. SURVEY, *supra* note 478, at 62.

544. See *id.* at 15.

545. See 1993 FLA. SURVEY, *supra* note 478, at 24.

546. See *id.* at 25.

547. See *id.* at 24.

548. See 1995 FLA. SURVEY, *supra* note 478, at 14.

549. See *id.* at 15.

550. See *id.* at 19.

551. Of the 249 respondents, 49 made this comment. See *id.* Otherwise, 34 respondents thought "good job/continue the effort," 34 thought "ineffective campaign," 32 "ha[d] not seen ads/unaware of campaign," and 22 suggested "more television advertisements." *Id.*

552. The comments included the following: "We need more advertising about what being 'board certified' means;" "Do more advertising about specialization which is geared to the public—not necessarily to other attorneys. The program needs to be explained simply;" "There needs to be much more focus on public advertising so that the average citizen knows what 'board certified' means;" "Should be made more specific and less general. For example, how a board

As noted earlier,⁵⁵³ the profession is divided on the issue of advertising. That division also appears within the Florida bar. Sixty-four percent of the general bar membership stated that lawyer advertising has a negative effect on the profession. In contrast, only nine percent believed that it had a positive effect on members' professional lives and careers.⁵⁵⁴ Additionally, sixty-two percent believed that lawyer advertising had a negative effect on the general public.⁵⁵⁵

Certified attorneys share this negative attitude toward advertising. Advertising ranks fifth in importance among the benefits of certification (behind professional enhancement, enhanced credibility, benefit to practice, and attorney referrals).⁵⁵⁶ Use of the status in advertising by Florida specialists is limited, with only thirty-eight percent stating their certified specialist designation in commercial efforts directed to the public.⁵⁵⁷ Only seven percent of specialists had received client inquiries as a result of advertising their status.⁵⁵⁸

Texas. Like California and Florida, Texas has a large bar membership. A 1995 survey indicated that the legal population totaled 59,256 at the end of 1994.⁵⁵⁹ As of 1995, approximately nine percent of active Texas lawyers were certified in one or more specialties.⁵⁶⁰ As is the case in California and Florida, the majority of Texas lawyers, almost seventy-five percent, are in private practice.⁵⁶¹

Solo practitioners constitute the largest group of private practitioners (thirty-five percent).⁵⁶² Another twenty-four percent practice in offices of two to five lawyers.⁵⁶³ Seventy percent of Texas attorneys practice in counties with large cities (over 250,000 population).⁵⁶⁴ For certified attorneys, the percentage in large cities is approximately seventy-six percent.⁵⁶⁵

certified tax attorney differs from an accountant. How a board certified will, trust and estate attorney differs from someone who calls himself an 'estate planner.'" *See id.* at 33.

553. *See supra* notes 46, 90 and accompanying text.

554. *See* 1993 FLA. SURVEY, *supra* note 478, at 46.

555. *See id.* at 47.

556. *See* 1995 FLA. SURVEY, *supra* note 478, at 12. The ability to increase fees was sixth in importance. *See id.*

557. *See id.* at 21. Otherwise, among certified specialists, 62% used the phrases "board certified" or "specialist" on stationery, 57% used them on business cards, 45% explained the certification verbally to clients. *See id.*

558. *See id.* at 18.

559. *See* 1995 TEX. MEMBERSHIP SURVEY, *supra* note 400, at 1.

560. *See id.* at 2.

561. *See id.* at 10.

562. *See id.*

563. *See id.*

564. *See id.* at 17-21 tbl.3.

565. State Bar of Tex., Number of Attorneys and Number of Board Certified Attorneys in Major Texas Counties Table 1.1 (1996) (on file with author) [hereinafter Tex. Table].

Texas has, by far, the largest number of fields designated as specialties—seventeen.⁵⁶⁶ This probably helps to explain why it has certified such a large percentage of its bar membership. Although the 1995 Texas survey did not ask any specific questions about attitudes toward certification, a 1987 membership survey did inquire about attitudes toward various Texas Bar programs and activities, including Board certification.⁵⁶⁷ That data indicated that only two percent of the membership was unaware of the program, and sixty-eight percent felt it was worthwhile.⁵⁶⁸ The highest ratings came from metropolitan areas (seventy-four percent of respondents believed the program to be worthwhile), while the lowest were from more rural areas (even so, sixty-one percent thought the program worthwhile).⁵⁶⁹

Comparisons. While the survey data from the three states differs in some areas of coverage, there are significant similarities. Despite the fact that the years covered are disparate, ranging from 1991 to 1995, these similarities provide some interesting information about the effect of certification within the profession. Approximately three-quarters of the bar membership in each state was employed in private practice—seventy-six percent in Florida,⁵⁷⁰ seventy-seven percent in California,⁵⁷¹ and seventy-four percent in Texas.⁵⁷²

The distribution of certified specialists in small offices and solo practice is also quite comparable. In California, seventy-two percent of certified specialists were employed in offices with ten or fewer attorneys⁵⁷³ compared to seventy-one percent in Florida.⁵⁷⁴ The Texas figures, however, are not as clear. A majority, almost sixty percent, of Texas private practitioners is employed in solo practice or offices of two to five lawyers.⁵⁷⁵ Although this total is lower than those for California and Florida, it does not include those lawyers who practice in offices with six to ten attorneys, as did the California and Florida surveys. As a result, the total percentages may be quite comparable.

It appears, therefore, that fears of disadvantage to solo and small

566. See TEXAS BD. OF LEGAL SPECIALIZATION, STANDARDS FOR CERTIFICATION, 2 (listing administrative law; bankruptcy law, business and consumer; civil appellate law; civil trial law; consumer law; criminal law; estate planning and probate law; family law; immigration and nationality law; labor law; oil, gas, and mineral law; personal injury trial law; real estate law, commercial, farm/ranch, and residential; and tax law).

567. See Memorandum from Cynthia L. Spanhel to Gary McNeil dated (Nov. 2, 1989).

568. See *id.* at 1.

569. See *id.* at 2.

570. See *supra* note 538 and accompanying text.

571. See *supra* note 516 and accompanying text.

572. See *supra* note 561 and accompanying text.

573. See *supra* note 519 and accompanying text.

574. See *supra* note 541 and accompanying text.

575. See *supra* notes 562-63 and accompanying text.

office practitioners with formal specialization recognition were unfounded.

The "rural-versus-urban" concern about advantages also appears not to be borne out. Three-fourths of California's bar population,⁵⁷⁶ sixty-eight percent of its certified specialists, were located in high-density areas.⁵⁷⁷ Sixty-two percent of Florida's bar practices in high-density areas,⁵⁷⁸ which also house fifty-five percent of Florida's certified specialists.⁵⁷⁹ Seventy percent of Texas attorneys,⁵⁸⁰ and almost seventy-six percent of its certified specialists,⁵⁸¹ practice in high-density communities.

The similarities between these states on such basic issues may justify general conclusions from additional data collected by only one state. For example, although the California program has made recent efforts to expand knowledge about the certification program both to the bar and to the public,⁵⁸² it did not include questions in its 1991 survey to determine the effect of previous efforts. Nor did Texas inquire about the use of advertising by certified specialists, and their experience of its effectiveness in its 1995 survey. Florida's surveys, which do ask such questions, conclude that the legal profession, on the whole, continues to disapprove of commercial advertising by attorneys.⁵⁸³ Instead, only thirty-eight percent of Florida's certified specialists state their status in public advertising.⁵⁸⁴ Few certified specialists obtain any significant number of client inquiries attributable to their certification status,⁵⁸⁵ and most believe that the major benefit from certification is peer recognition.⁵⁸⁶

576. See *supra* note 520 and accompanying text.

577. See SURVEY OF CERTIFIED SPECIALISTS PRESENTATION, *supra* note 514, at 7.

578. See 1993 FLA. SURVEY, *supra* note 478, at 62.

579. See 1995 FLA. SURVEY, *supra* note 478, at 9.

580. See 1995 TEX. MEMBERSHIP SURVEY, *supra* note 400, at 17-21 tbl.3.

581. See Tex. Table, *supra* note 565, at 1.

582. The California program created public service announcements for television and radio; contributed speakers to a radio program called *Your Legal Rights*, which answers listeners' questions; produces the *Legal Specialization Digest* for its members and other interested parties; publishes and distributes an annual *California Legal Specialist Directory*; provides new certified specialists with text for a press release on their accomplishments for submission to the local newspaper; sends specialist lists to business organizations whose members are likely to need legal specialists in particular fields, an effort called "Business to Business;" and sends a list of specialists in an area to anyone who calls and asks for the information. Telephone Interview with Phyllis J. Culp, Director, Legal Unit, Office of Certification, State Bar of California (May 14, 1996).

583. See *supra* note 553-55 and accompanying text.

584. See 1995 FLA. SURVEY, *supra* note 478, at 21.

585. See *id.* at 18.

586. See *supra* note 556 and accompanying text.

C. *Comparing Pre-Certification and Post-Certification Data: What Indication of Progress Toward Stated Goals?*

The ABA Model Plan sets three goals for a certification program: easier consumer access to legal services, improved competence among attorneys, and lower costs of legal services.⁵⁸⁷ Since most of the certification states have formally adopted the first two goals,⁵⁸⁸ with only New Mexico adopting the third,⁵⁸⁹ this subsection focuses on those first two goals, and attempts to answer the following questions: First, is there evidence that consumer access to appropriate legal services providers has been made easier by the existence of certification programs? Second, has the existence of certification programs improved the competence of attorneys in those states? Since none of the surveys discussed above made an effort to answer these questions, any conclusions must be drawn from circumstantial evidence.

1. IMPROVED ACCESS TO LEGAL SERVICES

Whether the existence of specialization certification has created better access to appropriate lawyers for people who need them depends on what consumer group is considered. Certainly, more knowledge about attorneys and their practice areas is available to consumers generally since state certification programs were developed. Some of that information has been disseminated through the use of advertising by certification programs and by individual certified attorneys.⁵⁹⁰ However, most of the increased legal advertising has resulted from court decisions allowing it,⁵⁹¹ and is generated by attorneys who are not certified as specialists. That combination, plus the confusing restrictions that exist on the use of certain words to describe a practice in certification and non-certification states,⁵⁹² reduces the impact of information to consumers about certification.

Little work has been done to determine the extent to which certification programs have entered the public consciousness. In 1986, when most legal specialization certification programs were in their infancy, a survey conducted by the ABA in Minnesota and Florida revealed that more than ninety percent of the public was aware that attorneys specialized in certain areas of law.⁵⁹³ Since Minnesota's limited certification

587. See *supra* note 127 and accompanying text.

588. See *supra* note 129 and accompanying text.

589. See *supra* note 130 and accompanying text.

590. See, e.g., *supra* notes 544, 557, 582 and accompanying text.

591. See *supra* notes 84-85 and accompanying text.

592. See *supra* notes 249-72 and accompanying text, discussing the use of words like "specialty," "specialist," "concentrate in," and "practice limited to."

593. See PUBLIC PERCEPTION SURVEY, *supra* note 262, at 18.

program began in 1985, and Florida's program in 1982, it seems safe to say that this public knowledge probably did not result from efforts of the state certification programs.⁵⁹⁴ In fact, seventy-three percent of the Florida survey respondents did not know whether their state imposed any requirements before a lawyer could call him or herself a specialist.⁵⁹⁵ It is much more likely, given the responses of certified attorneys to questions about how their clients find them,⁵⁹⁶ that knowledge of the existence of medical specialists, and exposure to attorney advertising generally,⁵⁹⁷ created these beliefs in the public mind.

That supposition is borne out by a more current survey conducted in Tennessee, whose supreme court adopted a certification plan in 1993.⁵⁹⁸ In 1995, the Tennessee Commission on Continuing Legal Education and Certification conducted a survey to determine what that state's residents thought about lawyers.⁵⁹⁹ Although the program had not been implemented, the survey found that thirty-eight percent of the public thought that lawyers in Tennessee could "be certified by the state to specialize in certain areas of law."⁶⁰⁰ Forty-three percent of the respondents did not know whether certification currently existed, and only nineteen percent knew it did not.⁶⁰¹ The eighty-one percent of citizens who were wrong, or did not know, about certification of lawyers in Tennessee is comparable to the seventy-three percent in Florida and the eighty-two percent in Minnesota back in 1986.⁶⁰² Not much seems to have changed regarding the public's knowledge about certification as it relates to specialization.

Expertise. Respondents to the ABA survey believed that legal spe-

594. The major certification programs have tried various marketing techniques, at varying levels of investment, to educate the public. For example, after observing certified attorneys' dissatisfaction with the amount of support they received from the specialization boards, Florida undertook an extensive and expensive, public awareness campaign in 1993. See *supra* note 542 and accompanying text. New Jersey's certification program also has devoted significant energy and resources to disseminating knowledge about its certified lawyers. New Jersey hired a public relations firm to create and guide a public awareness campaign. See Ilene B. Greene, Greene/Sosa Group, Inc., Monthly Project Status Report (Nov. 1991) (on file with author) (discussing plans for special headings for certified lawyers in the "Yellow Pages," general and local media releases, a promotional brochure, public service announcements, posters, and a speakers bureau).

595. See PUBLIC PERCEPTION SURVEY, *supra* note 262, at 18.

596. See *supra* note 558 and accompanying text.

597. See generally Sobelson, *supra* note 90.

598. See TENN. SUP. CT. R. 21 (1993).

599. See TENN. SURVEY, *supra* note 480.

600. *Id.* at 6. The random survey included both those who had never retained an attorney and those who had.

601. See *id.*

602. See PUBLIC PERCEPTION SURVEY, *supra* note 262, at 18.

cialists would be more efficient,⁶⁰³ have more experience,⁶⁰⁴ and have more formal education in their specialty areas than other attorneys.⁶⁰⁵ Evidence that this belief continues was provided by the Tennessee survey, in which seventy-two percent of respondents stated that it was very important (in choosing a lawyer) that he or she had passed a test about the area of law involved, had substantial experience in the area (eighty-four percent), and regularly attended continuing education programs (seventy-three percent).⁶⁰⁶

The 1986 ABA survey reveals that respondents believed that the term "specialist" implied that the person would "do a better job than a non-specialist."⁶⁰⁷ Moreover, seventy-three percent thought that attorneys should not be able to call themselves a specialist unless they had met certain standards.⁶⁰⁸ No studies have been conducted in any certification state regarding the public's understanding of the different descriptions an attorney might use. It would have been useful had the Tennessee survey included questions that attempted to learn whether respondents understood the difference between "specialization" and "certification." It is quite likely that, had such questions been asked, respondents would not have been able to distinguish between "specialization" and "certification," highlighting the difficulty and confusion caused by different terminology.

Service. The eighty-four percent of Tennesseans who believed "substantial experience" in an area was important in selecting a lawyer⁶⁰⁹ becomes even more significant when one reviews other criteria that respondents thought were "very important" in a lawyer: that the lawyer return telephone calls within twenty-four hours (eighty-six percent), and provide fee agreements describing the services to be performed (eighty-three percent).⁶¹⁰

The Tennessee data confirms the findings of prior surveys concerning the kind of information and treatment consumers desire from attorneys.⁶¹¹ Potential clients want to know what specific experience the

603. *See id.* at 18 (finding that 93.5% thought specialists would be more efficient).

604. *See id.* (finding that 95.5% said an attorney specialist had more experience).

605. *See id.* (noting that 83.5% said specialist would have additional formal education).

606. *See* TENN. SURVEY, *supra* note 597, at 7.

607. PUBLIC PERCEPTION SURVEY, *supra* note 262, at 15.

608. *See id.* at 18.

609. TENN. SURVEY, *supra* note 480, at 7.

610. *Id.* at 9.

611. *See* Curran, *supra* note 243, at 235 (concluding that people do not seek legal services because lawyers charge too much and the consumer does not know how to find a lawyer capable of handling their particular problem); *When You Need a Lawyer*, CONSUMER REPS., Feb. 1996, at 34, 35 (listing questions that reader respondents to a survey recommended other potential clients ask a potential lawyer, including, "[W]hat's your experience in this field? How have you handled matters like mine? . . . How will you keep me informed? . . . How do you charge?").

lawyer has, what the lawyer is going to do for them, and how much it will cost. They also want responsiveness to their inquiries during the representation. Certification programs, as they currently operate, can respond to only one of these consumer desires. They verify the amount of experience an attorney has. Otherwise, the potential client must be sophisticated and assertive enough to investigate behind the "certification" label to learn the answers to these questions. While a potential client can learn what an attorney can do in his or her particular situation through discussions with the attorney, the fact that an attorney is certified says nothing about his or her "efficiency" or "bedside manner," nor does it indicate potential costs for the lawyer's legal services. Specialization programs could do more to provide such information.

Publicity and Lawyer Advertising. Specialization poses a dilemma for the bar. Specialization certification will not work to improve access to legal services unless the potential consumer understands what it means. Programs have made efforts to publicize the distinctions between certified lawyers and non-certified via various media. In addition, all of the certification programs maintain lists of their certified specialists which are available to the public.⁶¹² For example, the programs distribute those lists to law libraries, public libraries, and to anyone who asks.⁶¹³

The media efforts are necessarily generalized, so they provide little of the detailed information that consumers want. However, even those generalized efforts are strenuously opposed by nonspecialists.⁶¹⁴ Most certified attorneys, who could provide the details on experience, cost, and method of operation that consumers wish, do not take particular advantage of their right to advertise, preferring to maintain traditional methods of obtaining clients.⁶¹⁵

This negative attitude toward advertising may be an unnecessary self-limitation. A Georgia study conducted in 1988-89 compared attitudes of consumers and lawyers toward lawyer advertising⁶¹⁶ and found

612. General Discussion at the Meeting of the Association of Legal Specialization Plan Executives at the 1996 National Roundtable for Lawyer Specialty Certification (Apr. 25-27, 1996).

613. *Id.*

614. For example, the Florida program produced a couple of public service announcement videotapes stating that some legal problems might be appropriate for a certified legal specialist. The program office received numerous calls and letters from non-specialists, charging it with unfair competition, with creating a new class of attorneys, with saying that specialists were more competent, and with causing segregation between attorneys. Telephone Interview with Dawna Bicknell, Executive Director, Board of Legal Specialization and Education, Florida Bar (May 14, 1996).

615. See *supra* notes 583-84 and accompanying text.

616. See Sobelson, *supra* note 90.

a significant difference between the two groups. Sixty percent of Georgia consumers agreed that lawyer advertising is good for consumers,⁶¹⁷ while only thirty-four percent of Georgia lawyers concurred.⁶¹⁸ The Tennessee survey confirms the Georgia results. Not only did eighty-one percent of respondents think a lawyer should be able to advertise, twenty-five percent said they were more likely to use a lawyer who advertised.⁶¹⁹ Furthermore, thirty-five percent said the fact of advertising would make no difference in whether or not they used a particular lawyer.⁶²⁰ Other observers, including representatives of the Federal Trade Commission,⁶²¹ also find that consumers have a positive attitude toward commercial advertising by attorneys and its usefulness in providing information about the kind and quality of legal service they can afford.⁶²²

Various investigations have revealed a short list of ways in which those who need legal help find it, including advertising.⁶²³ The most common method is word-of-mouth, via references from clients, colleagues, friends, and relatives.⁶²⁴ Florida's 1995 survey of certified lawyers indicated that most specialists were obtaining clients through those avenues, other clients and attorneys, rather than through advertising or their status as specialists.⁶²⁵ Thus, certification may improve access for some consumers indirectly by creating a broader knowledge *within the profession* about who is a certified specialist and increasing the number of referrals from nonspecialist attorneys to certified specialists.⁶²⁶

The problem with these typical dissemination methods is that they

617. *See id.* at 57.

618. *See id.* at 58. Interestingly, lawyers admitted after 1977, the year of the *Bates* decision, were less negative about advertising, *see id.* at 56, indicating that lawyers are not exempt from the influence of commercial advertising.

619. *See* TENN. SURVEY, *supra* note 480, at 10.

620. *See id.*

621. *See* *Peel v. Attorney Disciplinary Comm'n*, 496 U.S. 91, 105 (1990) (citing Federal Trade Commission's *amicus curiae* brief).

622. *See* STAFF OF FED. TRADE COMM'N, IMPROVING CONSUMER ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS ON TRUTHFUL ADVERTISING 16-18 (1984); *see also*, William E. Hornsby, Jr. & Kurt Schimmel, *Regulating Lawyer Advertising: Public Image and the Irresistible Aristotelian Impulse*, 9 GEO. J. LEGAL ETHICS 325, 336-37, 339-40 (1996) (citing numerous studies that indicate a positive public attitude toward lawyer advertising); Garth, *supra* note 9; Timothy J. Muris & Fred S. McChesney, *Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics*, 1979 AM. B. FOUND. RES. J. 179.

623. *See, e.g.*, Sobelson, *supra* note 90, at 58-59; AMERICAN B. FOUND. FINAL REPORT OF THE SPECIAL COMMITTEE TO SURVEY LEGAL NEEDS, 22-24 (1978).

624. *See* Sobelson, *supra* note 90, at 59; Hornsby & Schimmel, *supra* note 619, at 337-38.

625. *See* 1995 FLA. SURVEY, *supra* note 478, at 18.

626. This may be a minimal advance, given that two-thirds of respondents in California's 1969 survey did not feel a certification program was needed to help lawyers identify lawyer specialists. *See* Committee on Specialization, *supra* note 77, at 183.

require the potential client to know how to perform initial investigation, even before they reach a particular lawyer. This requires a certain level of sophistication which many young people and people of moderate and low income probably do not have.⁶²⁷ Even with a list of appropriate names, the consumer still must "interview" each lawyer in person to determine basic questions of experience and cost. Since this is the same action that was required of the consumer prior to the existence of certification programs, it does not appear that specialization certification programs have much of a direct effect on improving consumer access to legal services, particularly the access of those who do not already know and use lawyers.

2. IMPROVED COMPETENCE IN THE PROFESSION

The second goal espoused by certification states is improving competence in the profession. As noted earlier, becoming certified requires an attorney to jump through additional hoops—taking a second major examination, quantifying his or her legal experience, attending CLE programs, and suffering through a peer review. Assuming that these efforts recognize existing competence in the attorney, the requirements for continued certification do not assure that the attorney remains competent, as there is no re-examination and CLE attendance does only so much. Those attorneys who have become certified probably were competent as specialists, and would continue to be, even without the program. Notwithstanding the intent of twenty-two percent of Florida's non-certified attorneys to become certified,⁶²⁸ legal specialization certification has not, in twenty years, become essential to professional success as it is in the medical profession, and there is no indication that it will do so.

One of the realities limiting certification efforts to promote competence lies in the premises on which the programs were created. As noted earlier, resistance to specialist recognition within the bar has led to program limitations that undercut the importance of certification.⁶²⁹ If non-specialists are permitted to practice in specialty areas, and specialists in nonspecialty fields, with both groups able to advertise the scope of their practice, there is little to be gained by becoming certified. The Florida survey results bear this out, finding the most important benefit of certifi-

627. A followup to the ABA's 1977 survey on legal needs of the public, conducted in 1989, noted that age and income were defining factors in whether or not a person with a legal problem consulted an attorney. See Barbara A. Curran, *1989 Survey of the Public's Use of Legal Services*, American Bar Ass'n & Consortium on Legal Servs. and the Pub. in *TWO NATIONWIDE SURVEYS: 1989 PILOT ASSESSMENTS OF THE UNMET LEGAL NEEDS OF THE POOR AND THE PUBLIC GENERALLY* 79 (1989).

628. See 1993 FLA. SURVEY, *supra* note 478, at 24.

629. See *supra* notes 144-48 and accompanying text.

cation was "professional enhancement."⁶³⁰ The value of certification status seems to be primarily internal, providing personal satisfaction and credibility with other attorneys.

This "scarcity" of other benefits may be changing. At an April 1996 Roundtable on Lawyer Specialty Certification, attended by program administrators and interested others, a number of emerging advantages to certification were noted. For example, some judges seem more willing to award higher statutory fees to certified specialists, and obtaining *pro hac vice* status may be easier for a certified attorney.⁶³¹ In addition, some insurance companies are investigating the possibility of reducing malpractice insurance premiums for certified lawyers.⁶³² Should this trend continue, so that there is direct economic or professional advantage to certification, the status will become more desirable.

A second limitation on the goal of improving competence is the lack of consistency in the standard of skills and knowledge necessary for certification. With variations in state and private national certification standards, and the fact that many states have no certification programs at all, the programs can exert little influence over the profession as a whole. Even within a certification state, requirements for continued certification do not assure continued competence. Consistency is critical before the certification movement can become a respected force in the area of professional legal competence.

Such consistency could be achieved in a number of ways: standardized CLE program topics and content, akin to those in medical residencies, including both classroom and clinical components; periodic re-examination so that certified specialists would have additional incentive to keep up their knowledge and skills; inclusion of a performance test in the examination to ensure a minimal level of practical skill, along with procedural and substantive knowledge in the field; and broadening the sources of peer review to include an attorney's clients.

Each of these changes would improve the odds that a certified attorney in any state was representative of the highest current competence. The most efficient method of achieving consistency and improvement in competence, however, would be to create a national certification program that set standards in different practice areas, to be implemented by local programs. Such a move would eliminate the confusion caused by conflicting standards and descriptive language about the status, and would provide for more control over how any attorney described his or

630. See 1995 FLA. SURVEY, *supra* note 478, at 12.

631. General Discussion at the Meeting of the ABA Standing Committee on Specialization at the 1996 National Roundtable on Lawyer Specialty Certification (Apr. 25, 1996).

632. See *id.*

her practice. It would allow for improvements in testing, and in CLE development, that would be cost-prohibitive for individual state programs. A national program also would make certification available to lawyers in states that currently do not have such programs, either because of the cost or the lack of support from a significant portion of the bar. Finally, it would make certification useful across state lines for the increasing number of lawyers with interstate practices.

Certification's CLE requirement may provide an indirect benefit to improving competence in the profession, even without nationalization. Certified specialists are required to attend or participate in some number of educational programs each year. Thus, a demand is created for advanced-level programs in each specialty field. Those advanced-level programs are not restricted to certified specialists, so any attorney who wishes to attend may improve his or her knowledge in the area. This may be particularly effective in states that have mandatory CLE requirements for all licensed attorneys. How much professional benefit is gained by this effect is unknown, and there is no guarantee that even programs given approval for certification CLE credit are actually providing advanced-level information.

Another indirect way in which certification program efforts ultimately may improve attorney competence is through the application of malpractice standards. The number of such claims against lawyers has increased steadily over the past twenty years.⁶³³ The applicable standard of care an attorney must deliver in a practice area frequently relies on expert testimony concerning the "skill ordinarily exercised by practicing attorneys in particular cases."⁶³⁴

Specialization has brought with it the prospect of a higher standard of care in designated specialty fields.⁶³⁵ While only a few courts actually have applied a "specialist" standard of care as yet, observers who have studied the area conclude that the standards will be tougher for those attorneys who claim to be specialists.⁶³⁶ Those courts that have

633. See Michael P. Ambrosio & Denis F. McLaughlin, *The Use of Expert Witnesses in Establishing Liability in Legal Malpractice Cases*, 61 TEMP. L. REV. 1351, 1352 (1988).

634. Dwain E. Fagerlund, Note, *Legal Malpractice: The Locality Rule and Other Limitations of the Standard of Care: Should Rural and Metropolitan Lawyers Be Held to the Same Standard of Care*, 64 N.D. L. REV. 661, 662-63, 675 (1988).

635. See *Wright v. Williams*, 121 Cal. Rptr. 194 (Cal. Ct. App. 1975); Johannes P. Burlin, Note, *Lawyer Certification and Model Rule 7.4: Why We Should Permit Advertising of Specialty Certifications*, 5 GEO. J. LEGAL ETHICS 939, 947-48 nn. 71-75 (1992).

636. See Wilburn Brewer, Jr., *Expert Witness Testimony in Legal Malpractice Cases*, 45 S.C. L. REV. 727, 756 (1994); Ambrosio & McLaughlin, *supra* note 631, at 1366; Fagerlund, *supra* note 630, at 690; Douglas L. Getter, *Standard of Care in Malpractice Actions Against Insurance Defense Counsel: Inapplicability of the Code of Professional Responsibility*, 51 FORDHAM L. REV. 1317, 1336 (1983).

imposed a higher standard on legal specialists are adapting the traditional "locale" and "community" standards but have not distinguished between informal and certified specialists.⁶³⁷ If that lack of distinction continues, even informal specialists could be measured by formal certification standards if those standards are deemed reasonable evidence of professional expectations in the particular field of practice. Even without an express claim of specialization, it is likely that a client's "reasonable belief" that the attorney was a specialist—derived from advertisements or the attorney's statements concerning experience—will cause the attorney to be treated as a "specialist."

Such a stiffening of the standard of care in malpractice actions would meet significant objection from nonspecialists. Although there is a professional responsibility requirement that attorneys refer matters beyond their capability to other attorneys, or associate themselves with someone who has competence in the specialized area,⁶³⁸ enforcement usually has been limited to malpractice actions. If the courts were willing to use certification standards to set the standard of care in a specialty area, and those standards truly are more rigorous than general community practice standards, certification programs could be useful in improving practice standards in designated specialty areas.⁶³⁹

Even these indirect benefits would come more quickly if a single national set of standards were developed, rather than depending on individual judges and court systems, moving at different speeds and using different state standards.

VI. CONCLUSION

The recognition of legal specialists through formal certification programs probably provides some benefit within the profession and to the knowledgeable consumer. For those attorneys who have made the effort to document their practice for initial certification, and to conform

637. See, e.g., *Wright v. Williams*, 121 Cal. Rptr. 194 (Cal. Ct. App. 1975) (concerning a maritime matter); *Walker v. Bangs*, 601 P.2d 1279 (Wash. 1979) (involving a claim of malpractice in a federal maritime action); see also *Day v. Rosenthal*, 217 Cal. Rptr. 89, 102 (1985) (implying that expert testimony on the standard of care was needed where an attorney was practicing in a specialized field of law).

638. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1995); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(1) (1980). Only one state, South Carolina, has included a higher standard of care in its certification rules: "Any certified specialist or any lawyer who holds himself or herself out as a specialists [sic] in a particular field shall be held to a standard of competence set by the Supreme Court for a certified specialist in that field." S.C. PLAN, *supra* note 3, at Rule 408(i). If all states specifically incorporated that concept, and their minimum standards were modified as suggested in this article, specialist competence ultimately would be improved through the courts.

639. See S.C. PLAN, *supra* note 3, at Rule 408(i).

to the requirements for recertification, there is personal satisfaction from their successful completion of the requirements, a certain amount of professional *cachet* from the recognition by their peers, and some unmeasured economic benefit through referrals from other attorneys. The sophisticated consumer of legal services will obtain opinions from trusted colleagues and lawyers, ask questions of any specialist to whom they are referred, and generally make an informed decision about the quality of the representation they receive.

For the unsophisticated consumer, however, the certification status seems to promise more than it delivers. The public knows about specialists, and believes that the term implies quality, efficiency, and currency in legal knowledge in the specialty field. Yet the certification programs promise only that the recipient of certification has "special competence" or knowledge in an area; in some cases, programs specifically disclaim any responsibility for expertise. Further, because certification programs in some states have controlled the use of certain words implying special knowledge, *e.g.*, "specialist" and "certified specialist," a premium is placed on a consumer's ability to make fine distinctions in meaning between legal advertisements using those words and other advertisements using such words as "concentrates practice in" or "limits practice to."

The four types of standards an applicant for certification recognition must meet—knowledge, experience, continuing education, and peer review—appear more rigorous in print than they are in application, and are created and applied without much contribution from the consumers of legal services. These standards represent what the profession believes makes a good attorney, and consumer surveys indicate that they are only half the definition.

The certification examination, combined with initial CLE requirements, may assure a common, foundational base of knowledge at the time of certification in a jurisdiction, particularly in those states that do not impose mandatory CLE requirements on all practitioners. However, without re-examination one cannot determine whether certified specialists integrate new knowledge and techniques into their performance, despite CLE requirements for recertification. The specific work the applicant must have performed prior to application—the task experience standard—is complicated and confusing. And, peer review, under the circumstances, is limited in scope.

If specialization was a way of life for significant numbers of attorneys in the early 1900's, when Alfred Z. Reed was conducting his Carnegie Foundation study, it is an even stronger phenomenon in 1996. For reasons of competence, career satisfaction, and economic benefit, more

attorneys are limiting the variety of work they will accept. Since the certification programs are voluntary, however, not all attorneys who limit their practices are becoming certified. That leaves the vast majority of the bar with no competence demands beyond the examination on admission and, in those states that have them, mandatory continuing legal education requirements.

Certification programs could make some changes, even within their current structure, that would close the gap between implication and reality with regard to specialist certification. Creating post-law school programs, with strict controls over curricula and quality of instruction, would provide a more solid foundation on which to construct specialty expertise. Examining certified specialists at each recertification would help to assure knowledge, and adding a performance component to the examination could test skill and efficiency as well.

Including consumers, potential and former clients, in the deliberations on standards applied to applicants not only could assure that the standards are relevant to what consumers want from attorneys, but also would aid the profession in aligning those standards with consumer needs. The solicitation and use of client references in connection with deliberations on applications for certification could heighten the impact of public involvement on the process and could improve a lawyer's practice management techniques.

Public involvement could have other beneficial effects. The more "open" the certification process becomes, the more quickly word of exactly how it works and what it means is likely to spread among consumers and the easier it will be for potential clients to find the lawyer who is right for their particular need.

These changes could lead to improved access and improved competence within a state. Consumer access would be improved still further if the standards were consistent across the country, so that they were easier to understand and market to the public. With the increasing number of attorneys who practice across state lines, and even internationally, a consistent expectation by consumers of what certification means would require improved competence and make the status more desirable to attorneys. If the profession truly wishes to improve competence within the profession, a concerted effort aimed at all practitioners makes more sense than a patchwork of different individual criteria. The certification movement has promise, but has not yet achieved its goals.