STATE BAR SECTION NEWS: SPECIALIZATION

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[*305] Specialization in the practice of law is a growing trend, at least in the present cycle of the profession. Although all lawyers have to pass a common bar examination in order to practice law in the State of Texas, lawyers are increasingly deciding to voluntarily restrict their areas of practice rather than to practice as general practitioners. This is especially true in the large urban areas where there are larger numbers of practicing attorneys as well as potential clients. To specialize narrowly is to practice in direct competition with fewer attorneys and to be able to charge for those specialized services at a higher rate.

There are some specialties that have long been advertised in telephone and other directories and in the media. However, before the recognition of specialties by the State Bar of Texas, there was no convenient means to determine a lawyer's area of practice, much less to determine whether the lawyer was a recognized ″specialist″ in a particular area. It is still not possible to determine by reference to any directory if a lawyer chooses to practice in a certain area since lawyers have the freedom to choose any area or areas of practice they desire, with the exception that some particu-

lar courts and agencies require additional admission-to-practice requirements for lawyers appearing or practicing before them. However, with board certification in Texas came the ability to determine, by reference to a directory published by the Texas Board of Legal Specialization, which lawyers were recognized as specialists in certain areas of practice.

The Texas Board of Legal Specialization was created in 1974 and since that time has approved the following sixteen areas of specialty for board certification by qualified applicants: Administrative Law; Business Bankruptcy Law; Consumer Bankruptcy Law; Civil Appellate Law; Civil Trial 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; Commercial Real Estate Law; Farm and Ranch Real Estate Law; Residential Real Estate Law; and Tax Law.
Each area of recognized specialty is separately administered through the Board's Executive Director in coordination with an advisory commission for that specialty.

It is apparent that the task of administering these programs is enormous as there are a large number of Texas attorneys who desire to be newly board certified and an equally large number who wish to be recertified. The attorneys of the State of Texas consider the cost of the programs to be worth it. It is felt that not only are the attorneys of the State of Texas advantaged by the existence of the programs, but the public is better served for there being such a program. The public perception of a ″board certified″ attorney may be somewhat vague; however, the perception is usually that such an attorney is well **[*306]** experienced in the area of the specialty and would, therefore, produce a higher quality result than a non-board certified attorney.

This public perception is valid to the extent that those attorneys that do become board certified have met certain standards that should show their extraordinary ability to perform in that area of the law. These standards include a threshold number of years in the practice of law (normally, at least five years), a devotion to the specialty of at least a minimum percentage of the attorney's overall practice (a minimum of at least 25% specialty concentration for some specialties, more for others); a peer review by others who specialize in the same specialty; and a satisfactory passing grade on an examination in the specialty. Each year after initial certification, the board certified specialist must complete a minimum number of continuing legal education hours in the specialty; and after five years, the attorney must undergo recertification. The requirements are designed to assure that only a satisfactory quality of attorney competence in the specialty will pass the screen.

However, there are several shortcomings to the system just described. First, all specialties are not recognized in Texas for board certification. For example, there is no board certified ″intellectual property law″ program in Texas. Second, as suggested, the program is an enormous and expensive one. Texas is one of only about a dozen states that even have a board certification program. Third, there is no reciprocity in the program from one state to another even to the extent that there is state reciprocity in the practice of law generally. This is due at least in part to the lack of uniformity among the states that have programs.

Determining who should be recognized as suitably qualified is not unique to specialization and has arisen in the past in at least two other situations. The desirability of having quality standards first arose in connection with determining which law school graduates were sufficiently schooled and, therefore, qualified by education to take a state's bar examination. The second time the question of having quality standards arose was in connection with determining whether a paralegal or legal assistant was qualified by education to perform certain specialized practice duties under the supervision of an attorney. Again, the focus was on determining if the schooling that the person received was at least minimally qualified to reliably and adequately train someone in a para-

legal specialty. In both cases, the solution to establishing satisfactory uniform quality standards was through ABA accreditation by the American Bar Association.

The ABA started accrediting law schools in 1921. At the present time, there are 177 ABA accredited law schools. Every seven years, each law school must be reaccredited. The emphasis is on the basic J.D. or L.L.B. programs and not on advanced studies and degrees. Thus, accreditation applies to the law schools themselves and not to their separate degree programs. Generally, all states will accept anyone who has a J.D. degree or an L.L.B. degree from an ABA accredited law school as a candidate for sitting for that state's bar examination. The quality of the basic legal education offering is deemed adequate from each of the accredited law schools for this purpose.

The ABA started accrediting paralegal training programs in 1974. Each program -- rather than the sponsoring institutions -- is evaluated separately. Thus, a student will know in advance if a particular course of study at an institution is accredited; and potential employers will similarly know if a student has satisfactorily completed an ABA accredited course of study in the specialty. There are now 185 accredited programs.

The ABA recognized as early as 1967 that it had a role in the specialization trend of attorneys in the practice of law. Like the practice of medicine before it, by 1967 there were already many lawyers who identified themselves as specialists, for example, as ″civil trial lawyers,″ ″tax lawyers,″ etc., rather than merely as ″lawyers″ or ″attorneys.″ There was no uniformity in the use of such terms or policing of the use of such terms, except that most states soon banned the use of specialty designations unless specifically authorized in accordance with being board certified. The developments were occurring so **[*307]** fast, however, that the emphasis of the ABA in the beginning was to merely monitor what was going on at the state level, rather than to assume an activist role in the shaping of specialization. That is, the ABA determined that it should keep up with how each state handled the trend toward specialized practice and its advertisement by attorneys who used these specialization terms. For this reason, in 1967 the ABA created a Special Committee on Specialization, which rose in prominence to a Standing Committee on Specialization in 1974.

Over the years, the Standing Committee has determined that to achieve the status of a ″specialist,″ a lawyer should not only have certain educational credentials but must also have experience credentials. However, the main goal of specialization should not be to identify only the superheavyweights in a particular specialty. It should allow identification of those who have the qualifications beyond those commonly possessed by lawyers of ordinary skill practicing in the specialty. It was not the intent of the Standing Committee to favor the limiting of the practice of a specialized area of law to those who qualified as recognized and certified ″specialists″ in the area.

With these guiding principles in mind, the Standing Committee first developed a Model Plan of Specialization, adopted by the ABA in 1979, followed by specific Model Standards for the guidance of states to use in developing their own state standards in the following specialties: Admiralty; Appellate Practice; Bankruptcy Law; Business and Corporate Law; Civil Rights Law; Civil Trial Practice; Collection Practice; Commercial Law; Criminal Law; Estate Planning and Probate; Family Law; Governmental Contracts and Claims; Immigration Law; Insurance Law; International Law; Labor and Employment Law; Military Administrative Law; Patent, Trademark and Copyright Law; Personal Injury and Property Damage; Real Property Law; Securities Law; Taxation; Workers' Compensation; and Franchise Law.

Texas has enacted more areas of specialization for board certification than any other state. Some of the areas of specialty for which there are ABA Model Standards, however, are not recog-

nized for board certification by Texas or by any other state. Moreover, although states have liberally drawn from the Model Standards of the ABA, it is not uncommon for the adopted programs to be changed significantly before enactment.

The U.S. Supreme Court decision in *Peel v. Attorney Registration and Disciplinary Committee of Illinois* was a significant milestone in specialization. [1] Gary Peel advertised that he was a ″civil trial″ specialist on his letterhead by virtue of certification by the National Board of Trial Advocacy (NBTA), even though the State of Illinois did not recognize attorney specialties and had advised Mr. Peel that he could not make such a statement. Mr. Peel sued on the grounds that his first amendment right to advertise on his letterhead that he was a certified trial specialist was violated by the Illinois Code of Professional Responsibility. The U.S. Supreme Court decided in Mr. Peel's favor, but added that a state did have a role in determining whether the organization recognizing the attorney as a certified specialist was qualified to grant such a certificate. The Supreme Court found that there was a state interest in protecting against potentially misleading statements that could confuse consumers. In the case of Mr. Peel, the Supreme Court decided that the NBTA was qualified to grant certification.

Since the *Peel* decision, all states have had to face the possibility that lawyers will advertise themselves as ″certified specialists″ even though few states actually have board certification programs. States fear that lawyers will do this by virtue of receiving a certificate which in some instances may be from an organization that is little more than a ″diploma mill.″ This scary prospect has encouraged the ABA Standing Committee on Specialization to accredit organizations that certify legal specialists.

[*308] Moreover, not only in the 12 states known to have state-sponsored certification plans as of mid-1992 had state-sponsored certification plans but elsewhere, an increasing number of lawyers are claiming expert status in certain areas of law by virtue of certification as specialists by anyone willing to certify. There are only 10 states that now have mechanisms for recognizing certification by organizations approved by those states.

Beyond the state level, in August of 1992 the American Bar Association approved a resolution to adopt standards and a mechanism for accrediting private certifying organizations. This action was taken at the request of 16 state and local bar associations concerned with the proliferation of private certifiers. The Standing Committee subsequently adopted standards for accreditation in accordance with the ABA resolution mandate and in 1993 accredited the following certification programs: National Board of Trial Advocacy, Boston, MA (programs in civil trial advocacy and criminal trial advocacy); Commercial Law League of America Academy of Commercial and Bankruptcy Specialists, Chicago, IL (programs in business bankruptcy and creditors' rights); and American Bankruptcy Board of Certification, Washington, D.C. (programs in business bankruptcy and consumer bankruptcy). Many other applications and notifications of intent to apply for accreditation are in process before the Standing Committee on Specialization.

By the end of 1993, four states (New Jersey, North Carolina, South Carolina, and Tennessee) had adopted into law the recognition of ABA accreditation. In essence, a lawyer in one of these states who practices in an area in which there is an ABA-accredited program and who is subsequently certified by an accredited organization may apply for board certification with the appropriate state bar agency. In response, the state bar agency will then board certify the practitioner in the specialty and permit appropriate advertising notice in accordance with ABA Model Rule of Professional Conduct 7.4 and the particular state's corresponding rule of conduct. Thus, these

[1] 110 S. Ct. 2281 (1990).

states and the other states that adopt ABA accreditation in the future will have an effective certification program at a fraction of the cost to states that have their own state-sponsored certification program. In time, even states with their own certification programs may switch over to the ABA accreditation approval plan or adopt such an approval plan as an alternative to their own programs. By the end of 1993, 37 states and the District of Columbia had active specialization committees. The ABA accreditation program allows these committees an efficient alternative for specialization recognition of any other program.

It must be noted that the ABA is only in the start-up phase of actually accrediting organizations that offer certification programs. It may be 10 years before most of the recognized areas of specialty are represented by at least one ABA accredited organization. The ABA accreditation program is attractive to most organizations that offer certification programs because of the status accreditation gives to the organizations. Many of the inquiries from organizations seeking accreditation indicate that these organizations are upgrading their programs to meet ABA accreditation standards. Thus, the ABA accreditation program is already having the effect of improving the quality of existing specialization programs.

Has the ABA accreditation program had any impact on intellectual property lawyers? It is ironic that even though IP law is perceived as a specialty by almost everyone inside and outside of the specialty, no state has adopted the ABA Model Standards for Patent, Trademark and Copyright law into its state certification plan. The probable reason for this is that patent lawyers can identify themselves as ″patent lawyers″ regardless of state certification rules because they are authorized to do so by federal preemption under *37 C.F.R. § 10.34*. However, as the term ″intellectual property law″ becomes better known and recognized, it is anticipated that organizations will begin to certify specialists in this area and that the organizations will seek ABA accreditation. This will pressure Texas and every other state to recognize specialists in intellectual property law in accordance with the procedures outlined above.

[*309] The ABA Standing Committee on Specialization expects to be on the forefront of shaping the trends of and setting the standards for specialization. Already, organizations have attempted to create certification programs for areas too narrowly defined to be considered the specialty of a significant number of practitioners. Programs of this type, however, have been refused accreditation. Nevertheless, the Standing Committee on Specialization recognizes that the practice of law is dynamic and in a constant state of flux. Many of the changes in the practice involve specialization. Now in an infant stage, specialization will very soon exceed the present scope of the ABA accreditation of law schools and paralegal programs.

[*312] Resolution for Consideration

At the March 12, 1994 Council Meeting, the following resolution was formulated for the discussion and vote at the Annual Meeting to be held on June 24, 1994. The following resolution addresses advertising by intellectual property lawyers. It was not included in the advertising referendum proposed by the State Bar.

BE IT RESOLVED that the Intellectual Property Law Section of the State Bar of Texas recommends that Rule 7.04(a) of the Texas Disciplinary Rules of Professional Conduct be amended as follows:

Rule 7.04 Advertisements in the Public Media: (a) A lawyer shall not advertise in the public media that the lawyer is a specialist, except as permitted under Rule 7.04(b) or as follows: A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation ″patents,″ ″patent attorney,″ ″patent lawyer,″ ″registered patent attorney,″ or a substantially

similar designation.

Comment: The proposed rule is intended to parallel *37 C.F.R. § 10.34(a)*. Texas Rule 7.04 currently is broader than either the PTO regulation or ABA Model Rule 7.4. Texas Rule 7.04 now also allows any lawyer ″engaged in the trademark practice″ to use ″the designation 'trademark,' 'trademark attorney,' or 'trademark lawyer,' or any combination of those terms.″ It further authorizes a lawyer engaged ″in patent and trademark practice″ to hold himself or herself out as specializing in ″Intellectual Property Law,″ ″patents, trademarks or related matters,″ or ″patent, trademark, copyright law and unfair competition,″ or any of those terms. (The ABA model rule limits a lawyer who is admitted to practice before the PTO to describing himself or herself as a patent lawyer.) The proposed resolution is that persons admitted to practice before the PTO may describe themselves in a manner consistent with that authorized in *37 C.F.R. § 10.34(a)*.