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Isn't that special?

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History

California's was the first state bar to adopt any sort of legal specialization program, starting with a pilot project in 1970. See Michael Ferguson, "Special Treatment," Daily J. 5 (Aug. 28, 1995). The first class of specialists, approved in 1973, included Criminal Law, Tax, and Workers' Comp. In 1979 Family Law was added. In 1985, the bar approved the pilot program as permanent. Immigration was added in 1986, followed by Estate Planning in 1988 and Bankruptcy in 1994. The Board of Legal Specialization was created to run the program in 1996.

Specialization was designed with two goals in mind. First, specialization would provide attorneys with credentials to attest to their competence in a specific practice area -- i.e., for advertising and bragging rights. For example, certified specialists can advertise using the cute specialty bear logo (see accompanying graphic). Second, specialization would provide consumers with official verification of an attorney's qualifications in a specific practice area -- i.e., a public service function.

In 1994, the notion of adding Appellate Law as a certified specialization area was proposed. See "Bar Debates Appellate Law Specialty," Daily J. 2 (March 7, 1995). During discussions in the appellate community, two camps emerged. One view, held mainly by more experienced and established appellate lawyers, was that the idea ranged from silly to bad. This group felt no need for any state-sanctioned recognition of what they'd been doing for decades. Moreover, certification premised on passing a test of basic principles and having done a quantity of appellate work, without any guarantee as to the *quality* of that work, could actually mislead the public and devalue the reputation of the field. In addition, a new layer of governmental evaluation and regulation -- coming with heightened CLE requirements (36 hours of LSMCLE every three years) and new fees (a \$300 initial certification fee, \$360 in annual fees, and \$350 every five years for recertification) -- was less than appetizing. Another view, held mainly by newer appellate lawyers, was that this was a good idea that would help with branding, marketing, and a wider recognition of appellate practice as a true and respectable area of practice, and not just an adjunct to general litigation.

The pro-certification view "prevailed," and appellate specialization was approved in April 1995. For the original batch of specialists, the board allowed some proven-experienced practitioners to waive in; after that, candidates had to fill out onerous paperwork (which has since become slightly less exacting, and easier to complete given the appellate court's online docketing website) and take a test (given only in October in odd years). Thus, to earn an appellate gold star on one's ticket to practice, a lawyer had to pass the written exam (either on civil or criminal appellate basics), establish (via a point system) a history of having handled a decent number of appeals (roughly 30), obtain three peer recommendations, and have presented at least seven appellate oral arguments.

The exams were created and graded by commissions composed of volunteer specialists, such as the Appellate Law Advisory Commission (ALAC), which also reviewed the initial applications and applications for renewal. Yes, renewals: Certification is good for only five years, after which specialists must continue to demonstrate continued recent appellate practice (equating to about four appeals a year) and have completed additional hours of appellate MCLE. Similar to the bar exam, the appellate specialization exam is designed to test minimal competency. Thus, it cannot (and is not intended to) distinguish outstanding appellate lawyers from appellate dabblers -- it merely tests whether a lawyer has a basic handle on appellate fundamentals. Unlike the bar exam, the pass rate is generally very high (around 70%) -- no doubt because the takers are self-selected and highly motivated (and perhaps nerdy masochists?). See, e.g., "High Pass Rate for Legal Specialist Exam," Cal. Bar. J. (Mar. 2004). Cynics also muse that the pass rate is high because every certified specialist equals future revenue!

Milch Cow

From at least the early 2000s to about 2010 the State Bar even published a newsletter for certified specialists, the Legal Specialization Digest. Talk about "inside baseball." The Board of Legal Specialization, which had been staffed by seven full-time State Bar employees (now down to six), is entirely self-funded through the fees it collects -- and has proven itself profitable to the tune of a million dollars annually (e.g., in 2016 revenues were over \$2 million, while expenses were under \$900,000).

Alas, ALAC!

In the past few years the State Bar became intensely focused on ensuring that all of its activities furthered its primary mission. (If you look at your bar card -- assuming you bothered requesting one -- it says, in all caps: "Protection of the Public is the highest priority of the State Bar of California.") Regarding certified specialization, the million-dollar question became: Is certification of legal specialties really a public protection function (and thus within the bar's prime directive) or is it an "associational activity" that benefits attorneys in marketing their own practices (and thus not something the State Bar should be "doing")?

The seemingly obvious answer is that it's both. State Bar testing, recertification and enhanced MCLE requirements unquestionably encourage attorney competence and provide consumers with some objective measure that a lawyer has a certain level of bona fides in a given practice area. And, naturally, certification also furthers the marketing efforts of lawyers who jump through the hoops and pay the fees for it.

Given that the program was profitable -- and how often can that be said about any government program, let alone a bar program? -- and had a colorable claim to aid the general public, why in the world would the State Bar have even seriously considered jettisoning specialization? Well, for one, each specialty area's commission was composed of volunteer lawyers, and the State Bar's outlook had evolved to essentially embrace the idea that having lawyers regulate lawyers was too close to letting the fox guard the chicken coop. As a result, the advisory commissions, including ALAC were disbanded. Thus, in May of this year, the volunteer appellate specialists serving on ALAC were ignominiously "fired." The number of volunteer attorneys involved with the program has been dropped from over a hundred to seven. So who's drafting the exams? The bar is currently hiring paid-personnel to develop, write, pre-test and grade the exams. So if that floats your boat, call the Board of Legal Specialization and ask for an application.

Next, there was an argument that the program was not really successful enough, since only 3% of active California lawyers are certified legal specialists (i.e., a little over 5,500

out of 168,750 lawyers). Interestingly, this 3% figure mirrors the percentage of certified specialists nationwide. By the way, five other state bars offer appellate practice certification: Texas (civil appellate only), Florida, Louisiana, New Mexico and North Carolina (criminal appellate only). See Melissa M. Serfass, "Standards for Certification of Appellate Specialists," 1 J. App. Prac. & Process 381 (1999). If you're wondering, in 2005 (10 years after its creation), there were about 90 certified appellate specialists. Today there are currently about 315, most of whom took the civil exam.

If the State Bar had decided to discontinue the program, one suspects the California Lawyers Association -- formed in 2018 from the State Bar's ejected Sections and Committees, which focused primarily on serving the needs and interests of lawyers (*gasp!*) rather than the general public -- presumably would have been delighted to adopt the program. (Hell, I'd be happy to adopt an orphan netting a million dollars a year!)

But the State Bar did not kill the goose that lays the golden eggs. Instead, the bar modified the program. Those changes address how specialization is run internally. The only external change of note was removing the role of all those dastardly volunteer lawyers.

In retrospect, the existence of California's certified Appellate Law specialization appears to have been a good idea (or at least certainly not a bad or harmful one). Certified appellate specialization has fostered a broader appellate community, has given aspiring and practicing appellate lawyers annual CLE and practice targets, and has provided at least one objective data point for bewildered clients seeking appellate representation. Certification is a small point of pride and accomplishment -- albeit one that comes with an annual fee.

**Ben is a Proud Certified Specialist In Appellate Law*