

THE SPECIALIST

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Did you know?

- North Carolina began certifying Specialists in 1987
- Committees of volunteer Specialists oversee the exam preparation and grading each year
- The State Bar is looking into a specialty in Social Security Law
- The State Bar annually distributes directories of Certified Specialists to libraries, Clerks of Courts and military resource centers throughout the state



HIGHER STANDARD OF CARE?

By Paul B. Geilich,

Looper, Reed & McGraw, P.C. Dallas, TX

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

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

It is true that the standard of care applied in legal malpractice cases, as traditionally has been the case in medical malpractice cases, is higher for specialists

than non-specialists. Such cases are founded on common law principles of negligence, which require a finding that the defendant violated a duty owed to the plaintiff. In legal malpractice cases, this duty will vary depending on defendant attorney's level of experience and skill.

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

Upon recognizing a difference in treatment of specialists versus non-specialists in malpractice cases, the question arises:



where is the line? At what point does a general practitioner concentrate so much in a particular area of law that he becomes a speContinued p. 3

YELLOW PAGES LISTINGS

Are you listed in your local yellow pages as a certified specialist?

As you may know, the yellow pages industry has really grown in the past few years and the producers are not always consistent about listing certified specialists separately. One of the goals of the Board of Legal Specialization this year is to work with advertisers to help them understand legal specialization and how it should be reflected in yellow pages listings throughout the state.

Please notify Denise Mullen at 919-828-4620 x255 or dmullen@ncbar.com if you have any difficulty in working with your local listing. She would be happy to assist you with gaining recognition of your credential.

"Certification gives my clients a measure of confidence that I have tried to keep abreast of developments in my practice area."

Valerie Johnson, Certified Specialist in Workers' Compensation Law



Criminal Law Specialists~ Fair Trial Initiative Fellow Khary Johnson, J.D. recently spoke at the North Carolina Association of Black Lawyers business meeting in RTP. The Fair Trial Initiative is a new non-profit, based in Durham, NC whose mission is to ensure fairness by providing adequate and competent legal representation to indigent defendants facing death penalty trials. Khary, a Santa Barbara, CA native is finishing his fellowship at FTI next year. He spoke about the bar's social responsibility in the capital trial process and the need for more lawyers and financial assistance to improve the serious crisis in capital representation. For more information about the Fair Trial Initiative and how you can get involved, please contact Michael Paredes, J.D., Development Director at (919) 680-2986 or e-mail him at michael@fairtrial.org

MEDIA OUTREACH

In a continuing effort to educate the public about selecting an attorney who has experience in a specific practice area, the State Bar is distributing a resource packet to various media outlets throughout the state. The packet includes a list of certified specialists who have agreed to serve as media contacts. Media contacts make themselves available for comment or interview in pertinent news stories.

We hope that this contact list, coming from the State Bar, will attract attention and be well used. We plan to update the list on a regular basis. If you would like to be a part of this exciting project, please let us know.

The first list of certified specialists has

already been mailed to newspapers, television and radio stations, law schools and professional organizations. Join today and help improve the public's understanding of the important role certification plays in the law.

Are you willing to serve as a media contact for topics in your specialty?
Email dmullen@ncbar.com or call 919-828-4620 x255

TAKING ON "WE THE PEOPLE"

Bill Janvier, a certified specialist in business and consumer bankruptcy law, is leading the effort to seek sanctions against "We The People" for failing to follow regulations instituted to protect bankruptcy consumers.

"We The People", (WTP) a Colorado based company with offices in Raleigh and Greenville, has advertised aggressively over the past few years, offering assistance to people who want to represent themselves in legal matters including bankruptcy, wills, divorces, incorporations and trusts.

As a Chapter 7 bankruptcy trustee, Mr. Janvier administers many bankruptcy cases. Over the last year, he noticed a significant increase in the number of bankruptcy filings completed with the assistance of WTP. As he looked more closely, he learned that quite a few of these cases were filed without following the proper procedures. In addition, Mr. Janvier viewed the fees charged for preparing bankruptcy documents as excessive.

Deciding to bring these matters to the attention of the court, Mr. Janvier filed a motion for sanctions in the Eastern District and the Honorable J. Rich Leonard was assigned to the case. The NC Attorney General's office soon joined in, agreeing with Bill's complaint and adding to it. There is a similar action pending in the Middle District.

On September 10, 2002 Roy Cooper, Attorney General, Harriet Worley, Assistant Attorney General and Leonard Green, Assistant Attorney General, filed a brief outlining the issues involved. The brief contends that WTP has engaged in the Unauthorized Practice of Law, and includes as evidence a copy of WTP's "Bankruptcy Overview—Chapter 7 North Caro-

Bill Janvier, certified specialist in business and consumer bankruptcy law and Partner at Everett Gaskins Hancock and Stevens, LLP in Raleigh

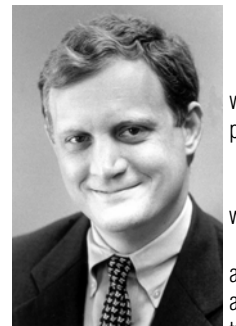
is inaccurate and essentially the ten manifestation of the in-son legal advice that a debtor would receive from an attorney.

Also included in the brief questions involving the value of WTP's typing service. WTP argued that the fees are reasonable and presented an affidavit from a typing service showing that it took three hours to test-type the documents on an electric typewriter. The brief countered that the use of computer word processing and software readily available today is much more efficient. Mr. Janvier further argued that there is no value to the typing service as these documents may be handwritten.

Judge Leonard is expected to rule in this matter within the next few weeks.

The North Carolina State Bar has also issued a Letter of Caution relative to an investigation of We The People for the unauthorized practice of law. That investigation continues.

As this issue went to press, Mr. Janvier expected a ruling similar to the one handed down in Raleigh by Judge A. Thomas Small. The ruling directed WTP to show cause why it should not be sanctioned, why its activities should not be enjoined as unfair and deceptive, and why they should not be required to refund moneys to affected parties. That hearing will take place in late November.



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lina". The Attorney General's office argued that the Overview

STANDARD OF CARE, CONTINUED

cialist? In the courtroom, the answer can be supplied by objective evidence of the defendant's years of experience, education, the number and types of cases accepted and litigated, etc. If the defendant is board certified, that fact likely will be offered as further evidence of a legal specialty. This is simply because the typical qualifications for certification as a legal specialist are the same as those reviewed by courts in establishing whether a malpractice defendant is a specialist.

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

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

Admittedly, it would be difficult for a certified attorney to deny his special skills in the area in which he was certified. But the mere fact of his certification is not the issue; it is the standard of competence he or she was required to show in order to become certified in which the court is most interested. Could an attorney credibly deny that he is a specialist when, in fact, he is? Could the fact that he is *not* certified as a specialist persuade a judge or jury in a malpractice case to apply a lower standard of care, whereas the same lawyer bearing a certification would

be subjected to a higher standard? No, it is submitted that this is not the case. A specialist in bankruptcy law or any other practice area will be held to a higher standard of care, whether certified or not.

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

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

There is little doubt that the benefits of board certification outweigh the risk that an attorney's certification may be cited as evidence of a legal specialty in a malpractice case. For instance, certified attorneys may enjoy higher hourly rates of compensation for their services. The twelve factors enumerated by the 5th Circuit in the *Johnson v. Georgia Highway Express, Inc.* case, commonly employed by bankruptcy courts nationwide in judging fee applications, place great emphasis on the skill and expertise of the attorney applicant, and certification is an objective indicator of such skill. Soon to come may be new legislation expressly recognizing the

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STANDARD OF CARE CONTINUED

value of board certification as a tool in determining the value of a bankruptcy attorney's services. Prospective clients may be attracted by an attorney's certification, and anecdotal evidence indicates that malpractice insurance companies are beginning to offer discounts on premium rates for certified lawyers. Not to be forgotten is the intangible but undeniable benefit of professional pride enjoyed by certified lawyers who have achieved a skill level worthy of recognition by their peers.

The conclusion to be drawn is that certified attorneys *will* be held to a higher standard of care for their clients, but because of their certification. There is no "super-standard" of care for certified specialists. Board certification does not make a specialist, it merely recognizes one. Certification is an acknowledgment of specialization that already exists, and it is that specialization that will cause courts to impose a greater duty. *Reprinted from the ABA Certification Link, June 2002*

BOB SUMNER—APPRECIATED

Bob Sumner recently stepped down as Chair of the Board of Legal Specialization. Following is an excerpt from his resolution of appreciation: *WHEREAS, the North Carolina State Bar Board of Legal Specialization desires to recognize the services of Robert W. Sumner and his contribution to the specialization program of the North Carolina State Bar; and WHEREAS, as a member of the Board of Legal Specialization from 1996 to 2002, Bob gave unselfishly of his time and talent, chaired numerous committees and review panels, provided thoughtful and compassionate opinions in difficult certification and re-certification appeals, and advocated tirelessly and on many occasions during the ultimately successful campaign to establish a specialty in Workers' Compensation Law; and WHEREAS, as chair of the board from 2001 to 2002, Bob utilized his motivational skills and his*

enthusiasm for specialization, together with gentle persuasion, personal integrity, and an open mind, to guide the board and the staff toward visionary but pragmatic decisions for the specialization program; and WHEREAS, Bob has been the best possible ambassador for legal specialization because, having nothing at stake personally, he has nevertheless given his impassioned support to the program because of its value to the public and to the profession; NOW, THEREFORE, BE IT RESOLVED BY THE NORTH CAROLINA BOARD OF LEGAL SPECIALIZATION: That the members of the Board of Legal Specialization hereby express their appreciation and gratitude to Robert W. Sumner for his outstanding devotion to and service on the North Carolina State Bar Board of Legal Specialization.