

CX-84-1651

LEGAL CERTIFICATION

REVIEW TASK FORCE

FINAL REPORT

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OFFICE OF
APPELLATE COURTS

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Supreme Court Task Force on Legal Certification

Final Report

Creation of the Task Force

In 2005 the Board of Legal Certification on its 20th anniversary submitted to the Minnesota Supreme Court a retrospective self assessment. The Court wishing to be more fully informed about the specialist certification policy considerations in December 2005 appointed a task force to review the policy options in the area of legal specialist certification. The Court requested specialty certification policy options regarding the following subjects:

- A. The continuing value to the public of specialty certification;
- B. The continuing professional demand for certification based on the number of certified legal specialists and certifying agencies;
- C. The appropriateness of board initiated expansion of areas of certification and the methods of accomplishing expansion, if necessary;
- D. Consideration of effectiveness of the Minnesota model of certification in comparison to models ranging from direct certification to delegation to some other body as used in other states.

The Task Force membership is listed in Appendix A.

Methodology

The Task Force conducted interviews with and gathered information from a number of interested parties including: Margaret Corneille, Director of the Minnesota Legal Certification Program; Penelope Phillips, Chair of the Labor and Employment Law Section of the MSBA; Carolyn Agin-Schmitt; Chair of the Criminal Law Section of the MSBA; Meaghan Harper, Certification Manager, Minnesota State Bar Association; John Koneck, representing the Property Law Section of the MSBA; Mark Hadkinson representing the Civil Litigation Section of the MSBA; Roberta Hughes of the National Board of Trial Advocacy; Tori Wibble of the Certification Program Manager of the American Bar Association; Gary McNeil, Director of the Texas Certification program; Lisa Garcia, Public Relations Consultant for the Florida Certification Program; and Adam Brink, Program Manager for the Florida Certification Program.

Brief Summary of the Findings of the Legal Certification Review Task Force

Value of Specialty Certification

Based on a public opinion survey conducted by the University of Minnesota Center for Survey Research, the Task Force found that over 80% of those responding indicated that it was important to their hiring decision that an attorney who advertised as a specialist had in fact been certified as a specialist by an accredited organization that had been approved by the State of Minnesota or the State Bar Association.

The Task Force found that certification provided an objective method by which the public could verify the advertised credentials of attorneys in a readily identifiable Minnesota office.

The Task Force found that the existence of the certification process served as a deterrent to self-proclaimed advertised claims of specialization which could be misleading to the public.

Continuing Professional Demand for Certification

The Task Force found that approximately 2% of attorneys nationwide are certified. From 1994 to 2004 the number of certified attorneys nationwide grew by 70% when attorneys with multiple certifications are included. Since 1999 the annual growth rate in number of attorneys certified is approximately 1.8%.

In 2006, the number of specialists in Minnesota (877) was 3.78% of the resident registered attorneys in good standing with more than 3 years experience. By comparison in no state did certification exceed ten percent.

The Task Force found that in Minnesota and in other states major program growth occurred when a new area of specialty was accredited.

During the review period, the Task Force learned that an application to accredit a new specialty had been received and that two Minnesota State Bar Association Sections were actively considering applying for accreditation.

Appropriateness of Board Initiated Expansion of Areas of Specialty and Methods of Accomplishing Expansion

The Task Force, through interviews with other selected large certification programs, found those programs seeking to expand the number of certified attorneys by identifying and

appealing to the needs of their lawyer constituencies. These methods include bar leaders adopting certification as a goal, using Bar Association Web sites and directories of certified lawyers to advertise to the public the availability of the certified specialists; recognition events for certified lawyers as a means of encouraging peers to become certified; referring press questions about legal issues and events to certified lawyers and encouraging reference to the certification in news articles, exploring ways to provide education opportunities at reduced rates, exploring ways to reduce the accreditation and certification process by recognition of certification or accreditation work done by other jurisdictions.

The Task Force finds that both the Minnesota State Bar Association and the members of the Board of Legal Certification have an interest in and a responsibility for jointly exploring the means to expand the pool of accredited agencies and certified lawyers in the interest of public trust and confidence in the profession and affordability to Minnesota lawyers. The Task Force received information from the Board of Legal Certification, specialist certification programs such as the Minnesota State Bar Association Real Property and Civil Litigation sections, and American Board of Certification about fee amounts and budget constraints which restrict program effectiveness and growth. The Task Force, therefore, recommends that the court convene a joint committee of the Board of Legal Certification and the Minnesota State Bar Association to discuss and resolve funding issues.

Effectiveness of the Minnesota Model of Certification

The Task Force finds that the use of a neutral body to accredit the certifying agency provides a useful check on the testing and compliance process. While other models work effectively in other states, the separation of the accreditation of agencies and the certification of individual specialists provides an additional assurance of credential objectivity at a cost of less than \$50,000 per year.

Report of the Legal Certification Review Task Force

The Legal Certification Review Task Force met over the course of five (longer?) months and received information from program managers of the legal certification process in Minnesota and other states as well as the American Bar Association. In addition the Task Force received

information from Minnesota and national specialist certifying agencies. Based on that information the Task Force makes the following report.

Continuing Value to the Public of Specialty Certification

In Minnesota the Board of Legal Certification accredits the agencies which certify lawyer specialists and approves the standards by which the lawyers will be certified. Those accredited agencies are responsible for certification of the attorney specialists. The accreditation process includes review of the agency specialty definition, an assessment of subject matter experience of the staff involved with the certification process, the procedures and examination that will be used to determine lawyer certification, and ability of the organization to conduct an acceptable specialist certification program for an indefinite period of time.

Rule 114 of the Rules of the Minnesota State Board of Legal Certification, sets forth the minimum standards for use by accredited agencies for certifying lawyers in the State of Minnesota. Those standards are:

- A. The lawyer is licensed and on active status in Minnesota.
- B. The lawyer shows by independent evidence “substantial involvement” in the field of law during the three year period immediately preceding certification.
“Substantial involvement” means at least 25% of the lawyer’s practice is spent in the field of law of the certification.
- C. The accredited agency verifies at least three (3) written peer recommendations, in addition to references from lawyers or judges unrelated to and not in legal practice with the lawyer.
- D. The lawyer successfully completes a written examination of the lawyer’s knowledge of the substantive, procedural and related ethical law in the field of law; grading standards for the examination must be made available prior to test administration; model answers must be made available for inspection after the test results are determined.
- E. The lawyer provides evidence of having completed at least 20 hours every three years of approved CLE activity that is directly related to the certified specialist’s field of law, sufficiently rigorous and otherwise appropriate for a certified specialist.

- F. The lawyer provides evidence of being current with CLE credit requirements for every state of active licensure and having been current throughout the period of application or recertification.
- G. The lawyer signs a release to share information with the Board from the files of the accredited agency.

In summary the Board accreditation process is designed to assure the public that the agency administering the specialist certification process has involved persons knowledgeable in the specialty area in designing the process, has made the opportunity to be a certified specialist available to lawyers in a non-discriminatory manner, has designed and administered testing and credential review procedures which are defined and rigorous, and has agreed to reporting requirements and decertification procedures when a lawyer no longer qualifies for the specialist certification.

The minimum standards for specialist certification specified in Rule 114 provide the public with a verifiable, fact based understanding of what certified specialization means in Minnesota. In Peel vs. Attorney Registration and Disciplinary Commission of Illinois, 496 U.S. 91, 110 S. Ct. 281 (1990) the United States Supreme Court held that a lawyer has a constitutional right to advertise the lawyer's certification as a trial specialist by the National Board of Trial Advocacy, as such an advertisement was not actually or inherently misleading since the advertisement stated factually verifiable information, rather than unverifiable opinion of the lawyer's credentials. The Court found that the disclosure of specific certification criteria "both serves the public interest and encourages the development and utilization of meritorious certification programs for attorneys." Id. at 111, 110 S. Ct. at 294.

Specialist certification conducted along the lines indicated above provides the public with factually supported information about a specialist's current licensure and registration in good standing in the states in which certification is granted; the ability to pass an examination in the area of specialty; the favorable assessment of the specialist by legal peers; the currency of the specialist's knowledge by continued participation in relevant and appropriate continuing legal education programs. The certification process provides a high-quality reference check based on verifiable factual information for the lawyers who undergo the process. While much of this information would be available (licensed in good standing, compliance with continuing

education requirements generally, lack of disciplinary sanction) to a diligent member of the public researching an attorney's background and competency, the certification process combines the data available from several other attorney regulatory processes and adds to it the testing and focused continuing education review and assurances.

Public Perception and Attitudes Favor Certification

The Task Force reviewed the survey conducted by the University of Minnesota's Center for Survey Research commissioned by the Academy of Certified Trial Lawyers and the Minnesota State Bar Association Trial Certification Board in 2004. That survey posed the following questions to a general sampling of the public.

1. How important would it be to your choice of attorney if you know that an attorney who advertised as a specialist had in fact been certified as a specialist by an accredited organization that had been approved by the State of Minnesota?
81 % of the respondents indicated that it would be very important (36%) or somewhat important (45%) to their choice of an attorney.
2. How important would it be to your choice of attorney if you knew that an attorney who advertised as a specialist had in fact been certified as a specialist by the Minnesota State Bar Association?
81% of the respondents indicated that it would be very important (40%) or somewhat important (41%) to their choice of an attorney.
3. The survey queried the qualifications which the respondents presumed were involved in certification.
 - a. Had passed an exam in a specialty area: 80%
 - b. Was required to have experience in the specialty area: 85%
 - c. Was required to take continuing education courses in the specialty area: 82%
 - d. Had undergone a check of professional discipline or malpractice history: 73%
 - e. Was required to receive good references or reviews from other lawyers: 66%
 - f. Was required to keep qualifications current: 90%

If they were to hire an attorney who was a specialist, 96 % of those responding indicated that the qualifications they identified would be very important (64%) or somewhat important (32%) to their choice.

The survey responses indicate that the criteria established by Rule 114 as minimum standards for specialty certification are the same criteria that a significant number of the survey respondents identified as standards required by a specialist. Where the public is aware of the certification process and its criteria, the specialist certification provides relevant information that the public has indicated it wants and would use in the selection of attorneys.

By establishing a thorough credentialing process for certifying attorney specialties and making accessible information that allows the public to make a fact based judgment about the meaning of the specialist designation in lawyer advertising, the process provides valuable information to the public about the lawyers who obtain the certification.

The process also discourages or prevents lawyers who have not sought certification from making a comparable claim of certification, thereby allowing the public to make a valuable distinction. The University of Minnesota Center for Survey Research survey indicated that 60% of respondents would be very concerned and 34% of respondents would be somewhat concerned if they had an attorney who had advertised as a specialist and they subsequently discovered that the attorney had not been certified as a specialist by an accredited organization. Fully 94% indicate trust in the process. The certification process thus enhances the trust and confidence of the public in this aspect of the administration of the justice system.

The committee queried other jurisdictions about the availability of recent surveys of public awareness of and satisfaction with lawyer certification and specialization and was unable to identify more current survey information from any of the entities queried about the continuing value to the public of specialty certification.

Certification programs acknowledged concerns about the vehicles for and cost of educating the public about the existence and benefits to the public of certification and acknowledged that currently communication with the public about specialist certification processes and criteria was limited in scope, usually consisting of providing lists of certified specialists and a description of the criteria upon request.

Conclusion: A thorough, fact based certification program is of continuing value to the public in providing information about lawyers who meet the certification criteria and by preventing the use of the specialist credential based solely on self-assessed opinion or through “mail-order” or “fly-by-night” unsubstantiated or other advertised designations.

Continuing Professional Demand for Certification based on the Number of Certified Legal Specialists and Certifying Agencies

National Trends

According to ABA statistics there were 1,103,376 resident and active attorneys in the United States in 2005. Further, according to the ABA, the number of certified lawyers increased from 18,108 in 1994 to 25,198 in 2004, an increase of 29%. Including lawyers who have more than one certified specialty, there are currently 30,743 certified specialists nationwide, an increase of 70% since 1994. Based on these figures approximately two per cent of lawyers nationally have sought specialist certification. From 1999 through 2004 the average annual increase in number of attorneys certified was 1.8%. Twenty-nine states have some form of certification process, while twenty-one states as of 2004 had no specialization certification program.

The ABA has compiled information on specialty certification nationwide and has identified 44 specialty certification fields in state and private programs. Those specialty fields are accounting professional liability, administrative, admiralty and maritime, antitrust, aviation, bankruptcy, business bankruptcy, business litigation, child welfare, city/county/local government, civil appellate, civil trial advocacy, commercial real estate, construction law, consumer, consumer bankruptcy, creditors rights, criminal, criminal appellate, criminal trial advocacy, DUI defense, elder law, environmental law, estate planning, estates (wills and trusts), family law, family law trial advocacy, farm and ranch real estate, federal Indian law, health law, immigration, intellectual property, international law, juvenile law, labor, legal professional liability, medical professional liability, natural resources, oil, gas and minerals, personal injury trial, real estate, residential real estate, tax, workers compensation.

Nationwide, civil trial specialization accounted for 25% of the certified specialists in 2004; criminal and family each for 9%; personal injury, real estate, wills trusts and estates, each for 8%; bankruptcy, worker's compensation, and tax each for 6%, civil appellate and labor each for 3% and all other specialty areas each for 1% or less. In 2004 no specialty area other than civil trial had more than 3000 specialists nationwide.

As of 2004 the ABA had accredited certification programs in the following areas: Civil trial advocacy, criminal trial advocacy, business bankruptcy, consumer bankruptcy, creditors'

rights, accounting professional liability, legal professional liability, medical professional liability, elder law, estate planning law, family law trial advocacy, juvenile law-child welfare, DUI defense, social security disability law.

Even in states (Texas, California, and Florida) with the largest number of specialists, the percentage of the bar certified as specialists in those states did not exceed 10%. Program managers in those states report that the number of certified attorneys has generally reached a plateau in their states in recent years. While new specialist certification is sufficient to replace attorneys whose certification is not renewed, the major increase in the number of certified specialists occurs when new areas of certification are added. This is true even in states like the three mentioned above that have significant certification program staff and funding. For example, Florida where five per cent of attorneys are certified specialists indicated a budget of \$1,000,000 with staffing of 19 employees or contractors. Texas, where ten percent of registered attorneys are certified specialists, indicated program staff of 7 and a budget of approximately \$900,000.

These three states have a mandatory bar and the specialization program is under the direction of the Bar Association in each. Efforts to encourage specialization expansion are being considered in these states. Those methods included encouraging specialists to recruit other members of their Bar section to the specialization program, reduced CLE tuition for specialists to fulfill continuing education requirements, publication on court and bar websites of the purpose of specialization and the names of lawyers holding specialist certifications, distribution of hard copy lists of certified specialists to the public and to other lawyers, publication of ads in legal periodicals about specialization, reference to the fact of specialization certification when attorneys are named in news articles in major news markets, increasing the visibility at all Bar association meetings of the certification program, encouraging Bar Association Presidents to use certification as a program theme.

With funding from the certification program fees, Florida has contracted for public relations assistance in communicating the benefits of certification to the members of the Bar. In a survey of each certification program committee chair, the themes of professionalism and peer recognition were identified as key reasons for lawyers in that state to become certified.

Therefore, outreach efforts are focused on personal recruitment contacts by certified lawyers at Bar section meetings and Inns of Court.

In Ohio the court engaged for a limited period in public service television advertising to the public about specialization, but found the program too costly to continue.

Minnesota Trends

As of 2006 the Minnesota Board of Legal Certification has accredited four agencies which certify attorney specialists: the Minnesota State Bar Association; the American Board of Certification (Bankruptcy); National Board of Trial Advocacy; and the National Elder Law Foundation.

In 2006 of the number of specialists in Minnesota (877) equaled 3.78% of the resident registered attorneys in good standing with more than 3 years experience. Those attorneys were arrayed among the specialty fields as follows:

336 & 156: Civil Trial Advocacy (MSBA/NBTA)	58% of specialists
348 Real property (MSBA)	40% of specialists
15 Criminal Law (NBTA)	2% of specialists
7 Business Bankruptcy (ABC)	less than 1% of specialists
6 Consumer Bankruptcy (ABC)	less than 1% of specialists
4 Family Law Trial Advocacy (NBTA)	less than 1% of specialists
3 Creditors' Rights (ABC)	less than 1% of specialists
2 Elder Law (NELF)	less than 1% of specialists

At the time of this report the Task Force was informed that the MSBA Labor and Employment Law Section and Criminal Law Sections were considering establishing a specialist certification program and that the National Board of Trial Advocacy had applied to be a certifying agency in the field of Social Security Administration.

As with other states and the national accredited certification programs, the Task Force received information from the Minnesota program that the number of certified lawyers had plateaued in recent years and that certification growth occurred primarily through the addition of new specialty areas.

The Minnesota legal certification program is administered by a director and staff shared with the Boards of Law Examiners and Continuing Legal Education. Approximately five per

cent of the time of several administrative staff positions and the director are allocated to support the Legal Certification Board, the equivalent of .35 full time equivalent staff in 2006. From 2001 through 2005 the five-year average operating expense of the Board of Legal Certification was \$44,587, including staffing and overhead.

Conclusion: Specialization certification throughout the country appears to appeal to a limited number of attorneys. Even in the states having significant staff and funding, the number of certified specialists does not exceed 10% of the licensed bar. The Minnesota certification program participation of almost 4% of resident attorneys with more than three years of experience is like that of other states. Program growth usually occurs when new specialty areas are added. While Minnesota accredits 7 specialty areas, 98% of the specialty certifications are in the areas of real property and civil trial practice.

The appropriateness of board initiated expansion of areas of certification and the methods of accomplishing expansion, if necessary.

As described in the previous section, the Bar Association in many states with a mandatory bar is responsible program growth. Program growth is accomplished by expanding the areas of specialization and by reaching out to bar section members on the basis of professionalism, peer recognition, and opportunity for public recognition.

Minnesota does not have a mandatory bar. In Petition for Integration of Bar of Minnesota, 216 Minn. 195, 12 NW 2d 515 (1943), the court noted: The fundamental functions of the court are the administration of justice and the protection of the rights guaranteed by the constitution. To effectively perform such functions, as well as its other ordinary duties, it is essential that the court have the assistance and cooperation of an able, vigorous and honorable bar.” at 518. The court in 1948 denied the petition for an integrated bar on the basis that it was not supported by a clear majority of the lawyers in the state. The court has, however, routinely sought out the policy position of the Minnesota State Bar Association and the lawyers of the state on issues of importance to the practice of law.

The Task Force heard from Meaghan Harper that the Minnesota State Bar Association does not take a position on the necessity of certification, but rather leaves the determination to determine the need for and benefit of specialization to each MSBA section, which is then responsible for funding the staffing to support the development of the certification program, the

testing, and the continuing education program to support sustained professional growth. Section certification program funding comes from fees paid by individual specialists upon application, examination, annually after certification, and upon recertification every six years.

In the spring of 2006 the Labor and Employment law section and the Criminal Law section were considering developing a certification program. Both sections had conducted surveys and both reported interest on the part of a significant number of section members responding to the survey.

In addition to expansion of specialty program areas through bar sections, certification programs in other states have indicated that they use certified specialists to solicit other members of the bar to seek specialization certification, use the bar website to publicize the benefits of certification to the public, to provide reduced cost continuing legal education for certified specialists, as an inducement to increase the number of lawyers seeking to obtain certification, to provide peer recognition opportunities. These roles are appropriate to the Bar Association and should be encouraged wherever possible.

In the Minnesota certification structure, the Board has been established to perform a process oversight role. The duties of the Board are set forth in Rule 106 of the Rules of Minnesota State Board of Legal Certification. Those duties include, among others, “providing information about lawyer certification programs for the benefit of the profession and the public.”

The Task Force in considering the role of the Board in expanding the areas of specialization recognized several possible functions:

- Education of the Bar in the Benefits of Specialization
The members of the Board could advocate for increased specialization certification programs and/or lawyer participation in existing programs through communications with
 - a. Various bar sections
 - b. Individual lawyers and law firms
 - c. Advocacy articles in various legal publications
- Education of the Public in the Benefits of Specialization
The members of the Board could work to increase communication with the public about the nature and benefit of specialization by

- a. Writing public service pieces about legal specialty certification for various community publications
 - b. Web site development focusing on the process of certification and the lawyers who have obtained the certification
 - c. Publicly addressing civic groups about legal certification
- Encourage National Programs such as the NBTA to offer other area specialty area programs in Minnesota

The question arises then whether the oversight, monitoring function of the board is in any way compromised by the performance of these advocacy roles. In the opinion of the Task Force it is not as long as the focus is on the larger questions of benefit to the public and the profession.

The Board, however, should not become involved with financial negotiations for services beyond setting the fees directly related to the certification process as allowed in Rule 105, Rules of Minnesota State Board of Legal Certification. While certification programs in states with a mandatory bar have reduced continuing education fees for those with specialty certifications, the setting or negotiation of fees for support services would better be left to those providing the certification program to keep the accreditation and certification process separate.

Furthermore, if additional or ancillary funding sources become necessary to support the specialization certification process, the responsibility to identify those alternative funding sources should remain with the Bar Association or those lawyers directly benefiting from the specialty certification.

From its inception, the Board of Legal Certification has operated under the expectation that the certification program would be supported by the certification program fees rather than a share of attorney registration fees generally. As indicated above the average annual operating budget of the Board of Legal Certification from 2001-2005 was \$44,587. The average annual revenue for the same period was \$47,293, an average 6% in excess of costs.

The Task Force considered information from the Director of the Board of Legal Certification that the Board was able to reduce expenses in fiscal year 2006 and 2007 and would carry forward as an operating reserve an amount equal to the Board FY07 budget through 2010.

The Task Force recommends that the Supreme Court and the Board of Legal Certification use the window of time permitted by the increased revenue reserve to explore with certifying

entities and the Minnesota State Bar Association the means by which services can be increased and fees can be moderated to attract additional and retain existing certified specialists.

Conclusion: The Task Force recognizes a dual responsibility for the Bar Association and the Board of Legal Certification to encourage the growth of the specialty certification program for the benefit of the bar and the public within the current delineation of their functions. Other accredited certifying agencies may similarly have an interest and a role in expanding the certification program and services specialists and the public. Both the Board of Legal Certification and the Minnesota State Bar Association singly and jointly should encourage greater lawyer participation in the certification process and encourage additional specialty programs to maintain a viable specialization certification program. The development of these strategies should be accomplished within the resources generated by the specialization certification program.

Consideration of effectiveness of the Minnesota model of certification in comparison to models ranging from direct certification to delegation to some other body used in other states

Several certification models for accomplishing those tasks exist across the country. Those models include:

- **Bifurcated accreditation and certification agencies; a state accreditation entity**, establishing the certification standards, and approving the test while the **private certification agency** develops and administers the test and certifies the lawyers according to the established standards;
- **Direct certification** by a single entity establishing the certification standards, developing and administering the test, and certifying the individual lawyers according to the established standards;
- **National ABA accreditation** of a private national certifying agency which develops and administers the test and certifies the lawyers according to the established standards;
- **Disclaimer of state involvement** in accreditation or certification.

Twenty nine states have adopted one of the certification models or a permutation. Twenty one states have adopted no specialization certification program although they may allow advertising of specialties and/or private certifications with disclaimer of state involvement.

State Accreditation entity/private certification entities.

The Minnesota model and that used by several other states with voluntary bars has been designed to place standard setting and standard monitoring in the hands of a court appointed entity which administers the court's constitutional authority over the administration of the practice of law in the state.

The development and administration of the test and individual credential verification is accomplished by an interested, specialty entity typically the State Bar Association or other national lawyer associations. This model maximizes the state legitimate policy setting role, achieves a degree of consistency across specialty areas by involving a single body of legal and public experts with a variety of backgrounds in the accrediting and program monitoring role, and provides a cross check on the actual programs in their implementation of the program. This model leaves the administrative implementation detail to organizations with specialized expertise in the subject area and who have a special or vested interest in making the program a success to protect the value of the credential. Two separate organizations with independent appointing, funding, and administrative structures could be viewed as assuring more independent review within a system of checks and balances. Budgets, staffing, leadership and control would be separate at the policy setting level, and the implementation level. While the two have reciprocal responsibilities, the direction and control are separate and provide institutional balance.

This model has value for the public of creating the sense of confidence from state involvement that the credentials have objectivity, scrutiny, and are not controlled by a special interest group. A state accrediting board provides a local resource for the public for information about the standards, the accredited certifying organizations, and the certification of the individual lawyers. It also provides a local contact to explore and resolve conflicts or issues with accrediting agencies, with the certification process, or with particular certified individuals.

An additional layer of costs may be added to the process to ensure the independent review.

Direct Certification Process

In states with mandatory bars, the court typically exercises its administrative authority over the practice of law in the state within the bar association structure. In states with specialty certification programs and mandatory bars, the standard setting is often done by one committee of the bar with separate bar association implementation committees established for each specialty area. There is the same recognized need for establishing general accreditation standards, achieving consistency across specialty programs, while assigning the test development and administrative detail of implementation to separate specialty committees. In some instances the process allows for state bar recognition of outside certification by private entities. In this setting, policy setting, direction and control, and resources are exercised by the Board of Governors of the bar association with ultimate appeal to the Supreme Court.

While this model also has the value for the public of creating a sense of confidence in the objectivity of specialist credentials, the confidence level may be reduced in the absence of external oversight. The organization which benefits directly from the certification is establishing the credentials without external monitoring. A state directed certification process provides a local resource for the public to obtain information about the standards, the accredited certifying organizations, and the certification of the individual lawyers. It also provides a local contact to explore and resolve conflicts or issues with accrediting agencies, with the certification process, or with particular certified individuals.

National Accreditation

A third model is to recognize an entity outside the state, such as the American Bar Association, which essentially replicates the state approval model for national organizations. States essentially relinquish control of the certification process within their own state by delegation to the ABA of the accreditation process and approval of the credentialing process proposed by accredited agencies. In practice the agencies accredited by the ABA have been the same entities which have been accredited by the states individually, e.g. the National Board of Trial Advocacy, the National Board of Certification, etc.

The Task Force interviewed ABA staff about the standards, procedures and general administration of the accreditation process. While some differences exist between the Minnesota specialty standards, the accreditation process and general administration procedures are be

designed to achieve the same objective quality and result. Total reliance on a national accreditation process would potentially limit tailoring of specialization testing or accreditation to state specific needs in the absence of a state credentialing oversight body. Total reliance to a non-state credentialing body would remove from the court a vehicle for achieving timely information and resolution should accreditation, testing or certification issues arise.

This model lacks a local point of contact for the public to obtain information and to raise issues about the certification process.

Disclaimer Approach

Many voluntary bar states and several mandatory bar states, 21 in all, have drafted rules allowing the advertising of legal specialties and requiring the specification of the private certifying agency and/or the disclaimer of any state involvement in the certification process. While this approach may meet the Peel test of providing verifiable information to the public about the source of certification, the information to the public is less helpful for making any assessment about its objectivity. Persons unfamiliar with the legal system will have little basis for assessing the information and may have difficulty in locating the certifying entities to ascertain certification standards or to verify individual attorney credentials.

Conclusion: The bifurcated accreditation/certification model used in Minnesota provides a checks and balance framework by two independent organizations that maximizes the likelihood of objective information relevant to Minnesota legal practice being made available to the public about professional credentials. While professional associations, either the state or American Bar Association, may perform credible certification processes, that review does not carry the benefit the monitoring and review of a neutral entity.

Affordability of the Minnesota Legal Certification Program Model

While the Task Force spoke with many advocates of specialty certification, the Task Force received information from several sources expressing concern about the cost of the specialty certification process in Minnesota. Those concerns came from certified Minnesota lawyers who question the continuing value of certification at current and escalating costs and from certified programs concerned about the funding program services themselves with fees while paying significant fees as certified entities to the Board of Legal Certification.

The Real Property Section of the Minnesota State Bar Association, one of the accredited entities which certifies 40 percent of the Minnesota specialists, presented the Task Force actual financial information for the years 2002/3 through 2004/5 for the Real Property Certification Program. The revenue for the program comes largely from fees from new applications to take the examination (\$250 of which \$100 is paid to the Legal Certification Board), examination fees (\$100), an every sixth year recertification fee (\$75) and annual specialist renewal fees (\$145 of which \$45 is paid to the Legal Certification Board). Examinations are offered every other year with approximately 30 new applicants each examination.

Expenditures consist of approximately \$25,000 for salaries and benefits for a part time certification program manager, approximately \$16,000 in Board fees, a \$6-8,000 MSBA allocation of overhead expenses, and miscellaneous operating expenses of approximately \$5500. An additional \$3000 is spent on examinations in years in which examinations are offered. The total cost of the Real Property certification program in 2004-5 was \$53,552. Fee revenue in that year was \$33,027, resulting in a shortfall of \$20,524.

Expenditures in the Real Property Certification Program exceeded revenue in each of the three years from 2002/3 to 2004/5 in amounts ranging from \$5000-\$20,000 per year. As a result the Real Property Section transferred funds from reserves to address the shortfall. In an effort to make the program self sustaining the Section raised the renewal fee paid by already certified specialists in 2005. With the increased renewal fee, the program is still projecting a projected operating deficit from an estimated \$1500 to \$6500 in three of the four years between 2005/6 and 2008/9 ranging.

The Board also received a copy of an April 13, 2005 letter to the Board of Legal Certification from Richard Mahoney setting out the concerns of the Minnesota State Bar Association Civil Trial and Real Property specialist certification programs about the amount of the fees paid to the Board of Legal Certification. In that letter Mr. Mahoney indicated that the Civil Trial Section and the Real Property section certification programs had been forced to eliminate public education from their budgets to the anticipated detriment of attracting new specialists, were operating at a deficit, were using reserves to continue certification programming, and could not continue to rely on reserves beyond the 2007-09 timeframe.

The Task Force received a copy of a 1999 letter from the American Board of Certification to the Board of Legal Certification requesting a reconsideration of the program reaccreditation fee indicating that at that time the Minnesota fee was the highest charged by any state, both for the initial fee and the annual fee. The American Board of Certification at the time of the letter had eleven certified specialists. They were charged by the Legal Certification Board specialty program fees and individual attorney fees a total of \$1445, an average of \$131 per attorney certified. In addition the American Board of Certification had an annual fee of \$95 per attorney to cover its program costs.

The Task Force also received information from the Director of the Board of Legal Certification about the revenue from agency and lawyer fees and expenses of the Legal Certification Board. The revenue and expenditures of the Board of Legal Certification had remained relatively static from 2001-2005. The average annual operating budget of the Board of Legal Certification from 2001-2005 was \$44,587. Of those costs an average of \$33,058 was attributable to personnel costs and \$6061 to rent. The personnel costs are calculated at 5% of the personnel costs for the Director, a receptionist, an office assistant, an office administrator and 15% of the cost of the shared administrator of the Boards of Continuing Legal Education and Legal Certification. The remaining \$5000 was for general operating costs such as communications, travel, meeting expenses, equipment maintenance and repair, etc. The average annual revenue through that period was \$47,022, slightly in excess of the average annual expenses. However, the average annual revenue for the period 2002-2006 was \$45,182, more closely approximating the annual average expenditures. A mutual problem arises because the Legal Certification Board is dependent on maintaining the revenue stream generated by the level of fees about which the certifying agencies are expressing concern.

The Board has been able to reduce expenditures in fiscal years 2006 and plans to do so in 2007. In fiscal year 2006 because of staff vacancies, the annual operating cost of the Legal Certification Board was \$29, 133. The projected costs for fiscal year 2007 are \$39,800. With these expenditure reductions, the Board will be able to operate within the current revenue stream for several additional years.

The Board accumulates operating funds a year in advance of expenditure. Current year receipts are used to finance the operating costs of the following year. In each year from 2001

through 2005 the Board had cash on hand equal to more than 100% of the following years operating costs, although initial budget estimates for operating costs in fiscal year 2006 would have reduced the cash on hand to following year operating costs ratio to 96%.

Conclusion: The Legal Certification Board and the accredited certifying agencies are funded by fees paid by the certified lawyers. Some lawyers are expressing concern about the cost-benefit to their practice of increased fees for specialization; some of these agencies in turn are expressing concern about the cost-benefit of fees which must be paid to the Board. Both the Board and the Minnesota State Bar Association certification programs have little apparent elasticity in the fee structures to meet increased cost demand. The Legal Certification Board and specialist certifying agencies must seek methods to reduce costs and increase demand for specialist certification if the present certification model is to remain viable.

Summary

In Summary, the Task Force Found that:

- The public expects the court or the profession to determine the qualifications of specialists and that the public generally agrees with the criteria currently in use.
- The public benefits from having a specialist program where credentials can be determined and monitored by a local, independent board and specialist claims can be verified.
- The Minnesota model of accrediting agencies to certify specialists provides a beneficial double level of check and balance on the integrity of the certification process.
- The fees collected from the current specialists are significant and may be reaching a level where further increases could be a deterrent to program maintenance and growth for both the Board of Legal Certification and the Minnesota State Bar Association sections which certify 78% of the specialists
- Fee revenue available to sustain certification program services at the Minnesota State Bar Association has been inadequate for several years and section reserves will not be available beyond 2007-2009 to underwrite the program.

- The Minnesota State Bar Association and the Board of Legal Certification each has a responsibility to explore ways in which to support legal specialization for the benefit of the public.

Therefore, the Task Force recommends that the Supreme Court convene a joint committee of the Minnesota State Bar Association specialty programs and the Board of Legal Certification to explore methods to increase the visibility of the specialty certification program to the public and the members of the bar association and the affordability of the program to members of the bar participate in the program.

Appendix A

The following members served on the 2005 – 2006 Supreme Court Task Force on Legal Certification Review:

Hon. Robert Awsumb	Second Judicial District
Stephanie A. Ball	Fryberger, Buchanan, Smith & Frederick, P.A.
Martin A. Cole	Lawyers Professional Responsibility Board
Barbara Jean D'Aquila	Flynn, Gaskins & Bennett, LLP
Candace L. Dale	Schwebel, Goetz & Sieben, P.A.
Terry A. Karkela	Svingen, Hagstrom, Karkela, et al
Robert J. King, Jr.	Lommen, Abdo, Cole, King & Stageberg, P.A.
John M. Koneck	Fredrikson & Byron, P.A.
Elizabeth D. Moran	UnitedHealthcare Corporation
Lewis A. Remele, Jr.	Bassford Remele
Caren L. Schurhammer	Schurhammer & Johnson, P.A.
Marshall H. Tanick	Mansfield, Tanick & Cohen, P.A.