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BOARD CERTIFICATION: A Judge's Perspective

By Justice Robert H. Edmunds Jr.

Almost every lawyer completes the last question on the bar exam swearing never to take another test. Nevertheless, every year in many states attorneys willingly sit for demanding specialization examinations to earn board certification in a particular area of practice. In this article, I will discuss first the advantages to the bench, bar, and public of specialization programs in general, and second how I, as a member of the bench, have worked with the North Carolina State Bar to reinvigorate a specialty in appellate practice. I hope that North Carolina's experience may be useful to judges who are considering various methods for improving the quality not only of appellate advocacy but also of professionalism in all aspects of the practice of law.

North Carolina, one of at least 23 states with a board certification program, currently recognizes 10 areas of certification, such as criminal law, family law, immigration law, and workers' compensation law. The primary purpose of certification is to serve the public by identifying those lawyers who have demonstrated special knowledge, skill, and proficiency in certain areas of law. A secondary benefit is that board-certified attorneys have a credible and objective basis for holding themselves out as being particularly well qualified.

The certification is administered by the North Carolina State Bar (the mandatory bar). Attorneys apply for certification by establishing their pertinent experience and their continuing substantial involvement in the field. After meeting the initial requirements, successfully undergoing confidential peer review, and passing an examination, they receive the certification. Certified attorneys who maintain their skills may be recertified after five years without having to take another examination.

When first proposed in North Carolina in the 1980s, specialization was controversial, even though Chief Justice Warren Burger called for the creation of certification programs for trial advocates as early as 1973 in the Fourth Annual John F. Sonnett Memorial Lecture at Fordham Law School. Opponents argued that the program would be elitist and would favor lawyers practicing in big cities or with large firms. However, experience has shown that those attaining board certification have come from across the spectrum of practitioners. Approximately 3 percent of North Carolina's 24,000 active attorneys are board certified in one or two fields, and certification is recognized throughout the state as a mark of excellence.

Judges have good reason to support board certification programs. In law as in medicine, certification benefits the entire profession. As the number of lawyers grows, the maintenance of the highest levels of professionalism is as important for judges as well as for the ABA. Recognition of a cadre of experienced and skilled practitioners promotes professionalism, and board certification

is a valid method of identifying such a cadre. Those specialists then provide mentors and examples for young lawyers striving to become the leaders in their own cohort.

Judges see the full spectrum of legal skills. We all experience the internal pain that comes from watching a lawyer lose a winnable case. We have all seen cases where a lawyer missed good issues. We know that clients can suffer because of their lawyer's errors. These mistakes can result from any number of reasons, such as failing to research the latest law in a field, practicing (or dabbling) in an unfamiliar but complex area of law, or not knowing the applicable rules of procedure and practice. Certification programs, setting a high standard to which all can aspire, help alleviate such problems. Open judicial support of these programs, helping to assure their endurance and their success, thus promotes professionalism.

Certification programs can also improve the bench. Many, if not most, judges come from the ranks of practitioners. The question of how best to pick judges continues to be debated in the states and in the ABA. Whatever the process, if an attorney aspiring to the bench can point out that she or he has been board certified in a field of practice, that aspirant gives those who must choose among judicial candidates an objective measure of their expertise. Not only will those picking or electing the judge have assurance that they are choosing someone who knows what they are doing, someone who has earned the approval of their peers and has shown high competence in the practice of law, they will have the added satisfaction of knowing that the strength of the bench will be preserved by selecting the board-certified candidate. A board-certified attorney seeking a judicial position may not necessarily be the best candidate (to the best of my knowledge, neither Holmes nor Brandeis were board certified), but he or she will certainly be a good one. For instance, in North Carolina, where judges are elected but vacancies are filled by gubernatorial appointment, several attorneys who were board certified in family law as practitioners have gone on to the District Court bench, where domestic matters are routinely heard. The state bar, recognizing the value to bench, bar, and the public of their expertise, allows such board-certified practitioners who become judges to maintain and renew their certifications.

Let me now discuss how North Carolina has set about creating such a specialty, a process in which I have been privileged to participate. As an appellate judge, I have observed a wide range of skill among appellate practitioners. Appellate courts are reactive, and judges on those courts cannot reach out for issues that have not been properly presented, no matter how tantalizing. Because an appellate court is only as good as the issues brought before it, my colleagues and I have suffered the frustrations of seeing cases containing important issues that were inadequately identified, sketchily briefed, and indifferently argued. The bench and bar of North Carolina work together to improve trial and appellate practice, and it struck me that another tool in that process could be for the state bar to create a board certification field of appellate practice.

In fact, a North Carolina certification already existed in the field of "Criminal Appellate Practice" but it was moribund. It was created in 1994 but as of 2011, only seven attorneys have the specialization and two of them have gone on the bench. The main obstacle to the success of this particular specialization has been the requirement that each applicant demonstrate "substantial involvement" in the field. The application to take the examination required the applicant to provide information about a daunting number of recent arguments, with accompanying briefs. In effect, the application weeded out nearly everyone except those such as appellate defenders whose full-time job was appellate practice, and they had little incentive to apply.

Accordingly, my first task was to work with the state bar both to open the specialization to civil practitioners and to ameliorate the brutal "substantial involvement" requirement. Although the requirement of substantial involvement is inviolate under the governing state bar rules, the bar is eager for the specialization program to flourish and was willing to apply an expansive definition to the term. Working within the bar rules, we were able to broaden "substantial involvement" to include such activities as adjunct teaching in appellate advocacy, presentation at pertinent continuing legal education CLE courses, time on the bench for judicial applicants, second-chair experience, and drafting of an appellate brief by those such as associates who did not themselves argue a case.

As required by the bar rules, we also enlisted a group of practitioners to serve on an Appellate Law Committee for the Bar's Board of Legal Specialization. The Committee members were given the responsibility of participating in the process of creating the specialization, including garnering signatures of support from members of the bar, defining the qualifications for taking the examination, and drafting and grading the examination. Rounding up Committee members was easy because no one wants to say no to a judge. More seriously, an extraordinarily capable group of civil and criminal practitioners recognized the need for and usefulness of the specialization and readily agreed to join. Although one of the incentives the state bar provides such volunteers is the assurance that they will receive the certification without having to take the examination, they are earning the perk through their hard work.

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At the same time, I recruited all the living former chief justices of the Supreme Court of North Carolina to be an auxiliary committee to review and evaluate the exam before it is administered, and to help with the grading afterwards. The participation of these respected former chiefs has been a significant factor both in securing the approval of the state bar and in generating enthusiasm among appellate practitioners.

The application to take the examination also requires that the applicant establish that they have attended CLE courses in the field. To ensure that no one is excluded for lack of CLE credits, the North Carolina Bar Association (the voluntary bar) has agreed to sponsor a CLE program to be administered shortly before the exam. We have entitled the CLE "Gateway to Specialization" and are setting the CLE topics with an eye toward the areas to be covered in the examination. The CLE program is intended to be broad enough to assuage the concerns of practitioners who ask if they can hope to pass the exam when their practice is limited to, say, federal civil appeals and they never have occasion to deal with the North Carolina Rules of Appellate Procedure.

The Committee is now involved in drafting the examination. We have consulted with the bars of Texas and Ohio, both of which have existing specializations in appellate practice. Their help and advice allowed us to avoid several pitfalls as we draft the exam.

Particularly useful to the Committee has been the participation of a psychometrician. Dr. Terry Ackerman, a professor at the University of North Carolina at Greensboro, works with the state bar to help create the examinations in all the areas of specialization. Since everyone on the Committee is considerably more experienced at taking tests than at writing them, his expertise has proven invaluable. He warned us of the dangers of writing an exam that tests only appellate trivia. Instead, we have been encouraged to identify the skills needed to be an effective appellate advocate and to design an exam that will identify those skills. He has given us valuable guidance on the merits and drawbacks of different forms of questions, the language used in the question itself, and on different examination formats.

No less important, Dr. Ackerman has reminded us that the examination will be given every year and should be of consistent difficulty over time. Accordingly, to assure continuity, the Committee is drafting a technical manual that documents the steps taken and the decisions made in setting up the specialization and drafting the exam, along with the reasons behind the decisions. The technical manual not only helps assure continuity from year to year, it will serve as a form of "preventative medicine" if and when (we are lawyers, after all) a disappointed applicant who has failed the examination challenges the fairness of the testing process. In response to Dr. Ackerman's observation that some qualified practitioners will decline to take the test because of "exam anxiety," a syndrome familiar to almost all lawyers, the Committee has discussed in an article in *North Carolina Lawyers Weekly* newspaper the format of the examination and the steps being taken to accommodate practitioners whose appellate practice is in a subspecialty area.

The primary purpose of certification is to serve the public by identifying those lawyers who have demonstrated special knowledge, skill, and proficiency in certain areas of law.

Based upon this advice, we are planning a two-part examination. The first part will consist of a closed-book three-hour session of short-answer questions. Because some appellate practitioners limit their practice to subspecialties in the field, those taking the test will be allowed to skip some of the questions so long as they answer a minimum number. In other words, while there are fundamental aspects of appellate practice that all who purport to be specialists should know and expect to be tested on, those who never venture into federal court will be able to find and answer questions dealing with more familiar state-law issues, and vice versa.

The second part of the examination will be a take-home essay question. The Committee is aware that some of those taking it may be senior partners who rely on associates for most of their research. Accordingly, the Committee has concluded that the fairest approach is to present an issue that has been fully researched but appallingly briefed. Those taking the test will be asked to identify rules violations in the brief and, using only the research already provided, redraft the argument portion of the brief. The issue to be rewritten will involve appellate practice or procedure, so that applicants must deal simultaneously with form and substance. In this way, we hope to assess the ability of each participant to write a persuasive argument that meets the requirements of the Rules of Appellate Procedure. No North Carolina specialization exam has included a take-home portion, so we are embarking on uncharted waters.

In conclusion, board certification is an established route toward improvement of our profession. Judicial support of certification can be a significant factor in the acceptance, vitality, and continuing growth of such programs. Judges have authority, and practitioners are mindful of what judges do and what judges like. When judges support specialization, attorney participation follows. Both as a practitioner and later as a judge I have found involvement in specialization to be a worthy endeavor. ■