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## Your Doctor Is Board Certified. Is Your Lawyer?

Thomas P. Sartwelle

**I**t is estimated that 80%–90% of physicians practicing in the United States are board certified. On the other hand, less than 3% of private practice lawyers are board certified by a state or national certifying body. Why the stark contrast between the two professions?

This article explores the reasons that so few lawyers seek peer review certification and recognition as certified specialists while physicians continually expand the specialties and sub-specialties available for certification and re-certification.

This article also looks at the history and future of lawyer certification, compares it to medical board certification, and discusses the issue of standard of care when certified lawyers are sued. Finally, it looks at the competition to legal board certification and probably the primary reason lawyer certification lags so far behind the medical profession, that is Super Lawyers–Best Lawyers. Analyzing how Super Lawyers–Best Lawyers impact the profession's most recent sea change—advertising—reveals why true peer reviewed specialization certification will probably never be popular under the current professionalism paradigm. Finally, a paradigm shift is suggested in lawyers' path to professionalism, a model based primarily on medicine's familiar board certification strategy.

### Introduction

It is late at night. You are alone at the office. You experience sudden chest pain radiating into your arm and shoulder. You manage to drive yourself to a local emergency room. The ER doctor agrees with your heart attack self-diagnosis. He tells you he is calling in a general practitioner to assess your situation and initiate treatment. What? A general practitioner? No, of course not. The likelihood is you will be seen by a specialist, a cardiologist, assuming you are in even a modest size urban area.

Now, suppose there are two cardiologists available to treat you. Each has equal years in practice.

One is board certified in cardiology and interventional cardiology, and one has no board certification. Which one would you choose? The one board certified, of course. Why? Because, sight unseen, we presume the board certified cardiologist has superior skill, knowledge and experience than the other. At the very least, we know one made the effort to go beyond minimum practice requirements. That effort suggests, does not prove but does suggest, a more serious dedication to superior medical practice.

Now suppose the same scenario, but you are a layperson, not a lawyer. Many lay people are familiar with physician board certification and at least vaguely know what it implies. So as a layperson assume you choose the board certified cardiologist but during catheterization he pokes a hole in your heart. You look for a lawyer to file a medical malpractice claim. Do you, as a layperson, know that lawyers, like doctors, can be board certified?

Same scenario. This time you as the layperson look for a lawyer to file a legal malpractice case against your medical malpractice lawyer who missed the statute of limitations. Same question. Do you know that lawyers can be board certified in legal malpractice law?

Unfortunately, for the vast majority of Americans the answer is no to both questions. While many Americans are familiar with medical specialization and medical board certification, they are equally ignorant of any formal lawyer effort to specialize and certify. In fact, judging from the number of nationwide specialty certifications, lawyers themselves are unfamiliar and apathetic about legal board certification.

One reason for the public's lawyer certification ignorance is a complete lack of publicity by state or national entities promoting lawyer certification as the gold standard of legal practice. The reasons for lawyer unfamiliarity and apathy are less clear. Several objections are heard. The most frequent is the vow that virtually every lawyer took about thirty seconds

## Your Doctor Is Board Certified. Is Your Lawyer?

(Continued from page 1)

after finishing the bar examination and just after murmuring the please let me pass prayer: "I swear, if I pass this thing, I'll never take another test as long as I live." A second objection, much less frequent than the first but one that has at least an objective premise, is the fear that being certified raises the lawyer's standard of care if sued for malpractice. Is this true?

### Board Certification and the Medical Profession

National medical board certification formally began in 1933 with the establishment of the American Board of Medical Specialties (ABMS).<sup>1</sup> ABMS was the culmination of the medical specialty board movement that began in the early 1900's with the establishment of the first specialty board, The American Board for Ophthalmic Examinations.<sup>2</sup> By contrast, local state sponsored legal board certification barely sputtered into existence in the 1970's in a small handful of states. National attention to lawyer certification was scant to nonexistent until the mid-1990's, almost a century behind the medical profession.<sup>3</sup>

ABMS is the national entity overseeing 24 medical specialty boards now certifying physicians in 149 specialties and sub-specialties.<sup>4</sup> ABMS assists its member boards to develop and implement not only the professional standards to evaluate and certify specialists but also the underlying educational qualifications (Residency and Fellowships) required as the initial step in certification.<sup>5</sup> ABMS advertises and promotes board certification to the public, to health care organizations, to insurance companies, and to other institutions as the gold standard for choosing a physician. ABMS maintains a national registry for documenting individual physician board certification. And ABMS aggressively promotes the benefits of certification through advertising, public service videos, its website, and other promotional activities.<sup>6</sup>

### A Short History of Lawyer Specialization in the United States

Until the 1970's, ABA and virtually all state disciplinary rules prohibited lawyers from proclaiming that they specialized. The only exceptions were for patent and trademark lawyers and admiralty lawyers.<sup>7</sup>

The ABA promoted the prohibition through its Model Code of Professional Responsibility and Model Rules of Professional Conduct.<sup>8</sup> In the 1950's, the ABA considered whether to recognize and regulate legal specialists on a national basis but rejected the idea. In the 1970's the ABA relented somewhat but decided to leave specialization and certification up to the states. It was not until 1992 that the ABA Model Rules of Professional Conduct finally allowed lawyers to proclaim themselves as specialists in areas of law.<sup>9</sup>

Although the ABA rejected national specialty certification before 1992 it did approve state pilot certification programs. California was the first, adopting a pilot specialization program in 1971, then Texas (1974) and Florida (1983). A

few other states followed.<sup>10</sup> Whether these local efforts would have eventually resulted in national certification programs is problematic. The event that elevated specialization to a national issue was the 1977 United States Supreme Court opinion in *Bates v. State Bar of Arizona*.<sup>11</sup> *Bates* dramatically altered the lawyer advertising landscape and coincidentally accelerated national lawyer specialty certification. But by the time the ABA recognized specialization the legal profession was seven decades behind medical board certification, which by then had achieved wide-spread recognition not only among physicians but among the lay public as well.

### The Beginning: *Bates vs. State Bar of Arizona*

Lawyers John Bates and Van O'Steen graduated law school in 1972. They formed a cut-rate legal clinic. Their aim was providing legal services at modest fees. They only accepted simple cases, relying on paralegals and other cost cutters to keep fees low. Obviously, their business depended on volume. To generate clients, they began advertising in newspapers. They advertised not only their services but their fees as well.

In the 1970's the Arizona Bar, along with virtually every other state bar, categorically prohibited lawyers from advertising their services, much less their fees, or the fact of specialization. Lawyer advertising was not only unsavory, it was undignified.<sup>12</sup> However, the 1970's had already seen attacks on the organized bar's traditions, including the minimum fee schedule.<sup>13</sup> Bates and O'Steen were attacking the lawyer advertising ban as a violation of free speech.

For many decades purely commercial advertising was not thought to have First Amendment protection.<sup>14</sup> In 1976, however, the Supreme Court for the first time held that the First Amendment protected truthful, non-misleading, commercial advertising by pharmacists.<sup>15</sup> Consequently, the *Bates* court held attorney advertising was also not subject to blanket suppression. Any regulations on attorney advertising had to be reasonable in terms of restrictions on time, place, and manner.<sup>16</sup>

*Bates* and several subsequent decisions on commercial speech regulations<sup>17</sup> opened the doors to a torrent of lawyer advertising. And of course a fair number of lawyers were willing to advertise that they were specialists in certain areas of law, implying special competence resulting from this specialization. Much of this advertising was specious. One New York lawyer touted himself as "the meanest, nastiest S.O.B. in town" and "The Hammer", claiming extensive courtroom prowess. In a subsequent legal malpractice case against the lawyer, he testified he had never tried a lawsuit.<sup>18</sup>

The states reacted. Some sought to deal with specialization claims by adopting formal certification bodies to establish minimum requirements for certification in specialty areas. The vast majority, however, simply continued disciplinary rules prohibiting advertising specialization. The ABA, although finally assisting the states by creating an

exception for state specialization programs, still did not advocate national certification organizations. Some lawyers felt that the minimal advertising regulations and lack of enforcement were allowing other lawyers to mislead the public by implying superior qualifications and specialization without a formal process to sort out those truly qualified. The trial bar was particularly concerned. This concern was channeled into the creation of national certifying organizations.

Two early national certification organizations were the American Board of Professional Liability Lawyers,<sup>19</sup> organized 1972, and the National Board of Trial Advocacy (“NBTA”), organized in 1977 (now known as the National Board of Legal Specialty Certification).<sup>20</sup> The organizers were seeking to certify lawyers through a process of verify-

**Certification is a red herring.  
Specialization is the issue.**

ing actual experience and substantial practice involvement, peer assessment, and written testing. Despite the success of these national efforts, the ABA and most states continued to resist recognition of national specialization in favor of the small number of states with certifying plans.

The ABA’s reluctance to endorse national certifying bodies was especially curious in view of the support given to national trial lawyer certification by then Chief Justice Burger who, in 1973, called for some system of certification for trial advocates, characterizing the national certification process as “imperative and a long overdue step.”<sup>21</sup>

Finally, the Supreme Court again entered the fray and again dramatically altered the advertising and specialization landscape with its 1990 opinion in *Peel v. Attorney Disciplinary Commission*.<sup>22</sup>

Peel, certified as a Civil Trial Advocate by the NBTA, advertised his certification on his letterhead. The Illinois Bar complained because the Illinois Code (like most states at the time) prohibited a lawyer from holding himself/herself out as a specialist. The Illinois Supreme Court upheld censure, holding that the First Amendment did not protect a claim of superior quality. The U.S. Supreme Court ruled that states could not impose a blanket prohibition on a truthful statement by a lawyer certified by a bona fide organization as a specialist.<sup>23</sup>

The *Peel* decision invalidated the relevant disciplinary rules of most of the states.<sup>24</sup>

### **National Legal Boards of Certification Today**

*Peel* not only legitimized existing national specialty groups, it gave birth to others as well. In 1993 ABA adopted “*Standards for Accreditation of Specialty Certification Programs*

for Lawyers”, delegating to the Standing Committee on Specialization the task of developing and conducting a process to accredit programs sponsored by private national legal organizations.<sup>25</sup> In most states these private organizations must be accredited by the ABA, approved by state regulatory authorities, or both before lawyers may publicize their certification.

Of course, certification programs are voluntary. No lawyer is prohibited from practicing in a specialty field, and certified lawyers can practice outside their field of certification.

The majority of certified lawyers in the United States have earned their credentials from traditional state-sponsored programs administered by state supreme courts and state bar associations on the courts’ behalf.<sup>26</sup> Even today, however, only fifteen states offer state-sponsored certification plans for certifying specialists in various fields of law for lawyers licensed in the state: Arizona, California, Connecticut, Florida, Idaho, Indiana, Louisiana, Minnesota, New Jersey, New Mexico, North Carolina, Ohio, South Carolina, Tennessee, and Texas.<sup>27</sup> There are also state-sponsored plans to accredit private certifiers in these states: Alabama, Idaho, Indiana, Maine, Minnesota, Ohio, Pennsylvania and Tennessee.<sup>28</sup>

Statistics presented to the 2010 National Roundtable on Lawyer Specialty Certification sponsored by the ABA Standing Committee on Specialization revealed that there were 35,453 certified specialists in 49 specialty fields in state and private programs including all national organizations.<sup>29</sup> There were 13 ABA accredited national certification programs including Civil and Criminal Trial Advocacy, Legal and Medical Professional Liability, Elder Law, Business and Consumer Bankruptcy, Creditors’ Rights, Estate Planning Law, Family Law Trial Advocacy, Juvenile Law-Child Welfare, DUI Defense Law, and Social Security Disability Law.<sup>30</sup>

Twenty years after *Peel*, national board certification is still in its infancy. The number of licensed lawyers in the United States in 2008 was 1,180,386.<sup>31</sup> Of this number approximately three-quarters were in private practice. With approximately 35,000 lawyers certified by state and national programs, it seems that less than three percent of potentially eligible private practice lawyers are certified.

### **Board Certification and the Standard of Care**

Does a lawyer’s certification, for example, by The American Board of Professional Liability Attorneys as a medical malpractice specialist, cause courts to impose a higher standard of care on that lawyer when the lawyer is sued by a disgruntled medical malpractice client who has lost a jury verdict?

This seemingly simple question has a complex answer that is, in some states, still somewhat fluid since the phrase “standard of care” has a multi-part definition that differs from state to state. The term has been influenced not only by the history of lawyer specialization but by medical malpractice standard of care concepts as well.

The short answer to the question, does certification impose a higher standard of care on a lawyer, is no. Certification is a red herring. Specialization is the issue. And specialization has been a reality in United States law practice for decades, if not a century or more. Specialization occurred long before certification was even a concept.

A certified lawyer is *a priori* a specialist. Otherwise, the lawyer could never meet board certifying criteria, which includes providing evidence of substantial involvement in a specialty area (usually 25% or more of one's practice) for a minimum number of years and minimum CLE in the specialty area preceding the application to take the written test.<sup>32</sup> But even requirements for board certification do not create a legal specialty, they merely set standards for formally recognizing an area of law practice that has by informal tradition become a legal specialty. Board certification does not make a specialist, it merely recognizes one. Certification acknowledges a specialization that already exists.<sup>33</sup>

In the legal malpractice world as administered by fifty different state court systems, the above answer may have its detractors.<sup>34</sup> Those detractors ignore, however, the growing trend in legal malpractice opinions recognizing specialization whether or not formally endorsed through board certification.<sup>35</sup> Thus, an attorney handling a case in a specialized legal area must exercise the degree of skill and knowledge possessed by attorneys who routinely practice in that specialty.<sup>36</sup> Specialization is simply concentration of a lawyer's practice to one or at most a few fields of law. Self selection of fields of concentration—*de facto* specialization—has been around as long as has the practice of law.<sup>37</sup> Courts are beginning to acknowledge that reality as well as the special knowledge and skill exhibited by the lawyers who devote significant time to one or a few fields of law.

The advent of the large law firm contributed greatly to specialization. Large law firm practice areas channeled lawyers into narrow specialty practices. Large law firm specialization has increased with the passage of time. Today, specialization in law practice generally is the rule. In the 60s and 70s, commentators debated formal recognition of legal specialties, some contending that the lawyer generalist was the favored model of law practice.<sup>38</sup> That debate is certainly dead today, if in fact it ever existed. Specialization was always a real world fact.

### The Ordinary Lawyer and Specialization

In truth, the question whether the standard of care is elevated for a board certified lawyer is backward. The real question is what is specialization's impact on the standard of care for the non-specialist "ordinary lawyer" who ventures into a specialized area of law and makes an error?

The term "standard of care" is a euphemism for the question of whether a lawyer was negligent.<sup>39</sup> Of course, the starting point for any negligence case is the Platonic ideal of the "reasonable person". A lawyer is a reasonable person who has gone to law school, passed a professional qualifying examination, and hopefully gained wisdom from actual practice. So the reasonable person is transferred into the "reasonable attorney" for purposes of determining negligence.<sup>40</sup>

The first understanding of standard of care is that it is

not perfection. Neither a lawyer nor a doctor, without a specific promise, warrants success or the soundness of legal or medical opinions or guarantees or insures a particular result. A bad result, death following surgery, an adverse jury verdict, in and of itself is not evidence of negligence. Neither medicine nor law is an exact science. It is doubtful that differences of opinion in either endeavor will ever be resolved. Thus, errors in judgment will occur in a profession where judgment is its hallmark.<sup>41</sup> The issue of whether an attorney erred is distinct from the issue of the attorney's negligence. An error may well not be negligence even if that error causes injury to a client. The issue becomes whether the attorney's conduct comported with the known principles of reasonable, competent law practice—not perfect law practice—known to the field of law in which the attorney was practicing.<sup>42</sup>

The factors to be possessed by the reasonable attorney, however, differ from court to court, with some courts emphasizing competence, others emphasizing skill and knowledge, and others various combinations of similar descriptive terminology. In general, however, courts seem to have settled on a negligence definition [standard of care] that says attorneys should exercise the skill and knowledge usually possessed by attorneys under the same or similar circumstances. The same or similar circumstances phrase has come to include locality differences, customs and practices, and, since the 1970's, specialization.<sup>43</sup>

Until the 1970s, there were few legal malpractice decisions discussing specialization or suggesting a standard of care predicated on a comparison to anything other than an "ordinary attorney" or "reasonable attorney."<sup>44</sup> On the other hand, medical malpractice decisions well prior to the 1970's recognized the reality of medical specialization. In medical malpractice cases, establishing negligence required that experts testifying against the defendant be specialists in the area of their testimony and required the non-specialist practitioner to exercise the same degree of skill and knowledge as that possessed by physicians practicing in a particular specialty.<sup>45</sup> If a family physician or non-surgeon attempted a heart transplant, the standard of care by which that physician is measured is that of a transplant surgeon. There is no lower standard for less skillful or unqualified physicians. And medical standards of care have become almost uniformly national in scope.<sup>46</sup>

Many courts have begun to follow the medical negligence paradigm as regards legal specialization. Thus, while in some states there still exists an open question as to what the standard of care may be with legal specialists, the definite trend is that attorneys undertaking a task in a specialized area of law must exercise the degree of skill and knowledge possessed by attorneys who regularly practice in the specialty.<sup>47</sup>

With some states and the ABA recognizing specialty certification through either state sponsored or national organizations, and most states allowing some designation of practice in particular fields of law,<sup>48</sup> the essential questions to ask and answer in any legal malpractice case are, is the attorney engaged in a recognized legal specialty, is that attorney a specialist or non specialist, should the attorney be held to a

more demanding standard of a specialist, and what qualifications will the plaintiff's expert need in order to establish the standard of care against the lawyer defendant.<sup>49</sup> The task of determining what is a specialty will undoubtedly be done case by case based on evidence concerning recognition of certification by a combination of the state bar, the ABA, national professional organizations, the local legal community, and the defendant lawyer's own practice. Importantly, the ordinary lawyer without a specialty or a specialist engaging in an unfamiliar legal field will undoubtedly raise an issue of whether the lawyer had a duty to refer the client to a specialist.<sup>50</sup> The same duty exists in medicine.<sup>51</sup>

Certain legal specialties have been recognized as having a national standard of practice similar to the now widely recognized national standard of care for various medical specialists,<sup>52</sup> for example, Federal Tax Law, Securities Law, Patent Law, and Bankruptcy. As law schools continue to trend toward national legal training, states expand reciprocity licensing, and bar exams take on more of an interstate nature, a national standard of care is probably not far behind.

### What is the Future of Specialization?

There are arguments pro and con about specialization and certification.<sup>53</sup> General practitioners, rural practitioners, and geographically isolated practitioners, especially, feel that formal specialization detracts from a presumption that any licensed lawyer is competent to handle any legal problem.<sup>54</sup> Similar arguments were made by general medical practitioners in the past, but today there are 24 medical specialty boards certifying physicians in 149 specialties and subspecialties.<sup>55</sup> Legal specialization is here to stay.

One reason certification will continue to expand is that certification is crucial to the public's ability to access legal services. According to a study by the ABA Section of Litigation, consumers find legal services among the most difficult to buy. The primary difficulty being the uncertainty about how to tell a good lawyer from a bad one.<sup>56</sup> Certification, of course, is no competency warranty, but it is certainly a more reliable indicator than trying to judge competency by choosing between competing TV and phone book ads. Thus, the ABA and some courts recognize a genuine need to provide the public with reliable information on lawyers' qualifications and capabilities.<sup>57</sup>

Former Chief Justice Burger, more than three decades ago lamented the absence of certification programs as a key reason for the "low state of American trial advocacy and a consequent diminution in the quality of our entire system of justice."<sup>58</sup> It is probable that many judges today would echo Justice Burger's observations.

The age of lawyer advertising has done little to instill public trust in the profession. A 2009 Gallup Poll found that the public mistrusted lawyers as much as ever. Only thirteen percent of those surveyed rated honesty and ethical standards of lawyers as "high" or "very high." These qualities were ranked lower for lawyers than for nurses (83%), medical doctors (65%), bankers (19%), and, believe it or not, state governors (15%).<sup>59</sup> Fortunately, lawyers remain well ahead

of Senators, members of Congress, and car salespeople. A 2001 ABA Section of Litigation Survey found that 69% of those polled agreed lawyers are more interested in making money than in serving clients. Fifty-seven percent believed that most lawyers are more concerned with their own self-promotion than their clients' best interest.<sup>60</sup>

While there are many solutions offered to improve lawyer professionalism and thus the image of lawyers,<sup>61</sup> perhaps the most direct is certification of specialist with a concomitant promotion of specialty certification to the public as the gold standard for choosing a lawyer in that particular field. In order to aggressively promote certification benefits, there should be one umbrella organization—like ABMS—advertising to the public and lawyers alike, the elite professional standing of board certified attorneys. This could be accomplished through the already existing ABA Standing Committee on Specialization. As it is now, promotion is left to each certifying body. The lawyer board certification story is still a century behind medical board certification and falling further behind each day.

Of course, the argument against an ABA-sponsored organization promoting certified lawyers over non-certified lawyers will be one of discrimination against general practice, non-board-certified lawyers. But the same arguments were used in medicine. Some day the ABA will follow medicine's lead and in so doing will make Chief Justice Burger's dream for litigation lawyers a reality for all board certified legal specialists: "some system of certification for trial advocates is an imperative and long overdue step."<sup>62</sup>

### Board Certification Competition

Lawyer board certification will never equal the esteem, eminence, and achievement of physician board certification as long as legal board certification has as its main competitors Super Lawyers,<sup>63</sup> Best Lawyers,<sup>64</sup> and to a lesser extent Martindale Hubbell rankings.<sup>65</sup> Legal board certification requires proof of years of devotion and dedication to a specialty, proof of competence within that specialty, and test taking to prove the purported competence. Super Lawyers, Best Lawyers, and Martindale-Hubbell require nothing. All three, despite claims of objectivity and rigorous selection process, are essentially marketing schemes with maximum advertising revenue as the end game. Selected lawyers are popular with their peers, but may not necessarily be the most skillful. Contrary to claims that the publications assist consumers in selecting lawyers, these publications even more loudly proclaim readership numbers as the tried and true method of driving up the price of the full page ads that permeate Super Lawyers-Best Lawyer publications. All in all, the emphasis on advertising and the obvious profits generated by these publications make the peer review claims dubious.<sup>66</sup>

Dubious or not, bar associations, ethics committees, and courts around the country are giving their approval to, or acknowledging their inability under the law to preclude this form of attorney advertising and in the process are blessing the single most important deterrent to more lawyers seeking

board certification. The fact that lawyers and the public equate Super Lawyers-Best Lawyers designations as an endorsement of the lawyers' supposed superior credentials, whether intended or not, makes an easy choice for a lawyer facing a true objective, rigorous testing by board certification examination. Why would a "Super Lawyer" ever risk subjecting his/her credentials to board certification peer review, or risk failing a board certification test when selection as a "Super Lawyer" requires no effort at all?

### Compare the Effort

Comparing the selection criteria of Super Lawyers-Best Lawyers to board certification leaves little doubt that lawyer board certification will never achieve the numbers achieved in medicine as long as Super Lawyers-Best Lawyers is perceived as an endorsement of supposedly superior credentials.

To be board certified, a lawyer must demonstrate a dedication to a particular specialty, and prove that dedication by documenting cases, trials, hearings, briefs, and other endeavors reflecting his/her actual work. CLE in the specialty

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enthusiastic support?

area must be documented. Importantly, written references by other lawyers and judges who have observed the lawyer's work in the specialty must be provided. Lastly, the board certified lawyer must submit to an actual knowledge examination testing whether the lawyer can indeed demonstrate the intimate knowledge that should be associated with an advocate skilled in that specialty.<sup>67</sup>

Super Lawyers-Best Lawyers, on the other hand, require nothing. Best Lawyers selection is dependant on a mysterious, but highly touted, "exhaustive and rigorous peer review survey comprising more than 3.1 million confidential evaluations by the top attorneys in the country."<sup>68</sup> Notice the subjective nature of the adjectives: exhaustive, rigorous, top attorneys. Exactly who are these "top attorneys?" And, who selected them? What was the motivation of these "top attorneys" in filling out those confidential surveys? And of course no objective measure is used to actually test the selected attorneys' legal skills and knowledge. Selection is purely subjective.

Super Lawyers' selection is no more objective, although again, the selection process is touted as comprehensive and detailed. Super Lawyers creates its pool of potential selectees from peer nominations with "safeguards" to prevent gaming the system.<sup>69</sup> However, a "Star Search" process also takes place to locate lawyers with "Star Search Credentials,"<sup>70</sup> essentially defined as lawyers who have garnered a lot of publicity. Potential selectees then undergo a Super Lawyer

research department evaluation to find out what the selectee has done in law practice. Note that this "research" is again essentially publicity driven. The final step is "blue ribbon review",<sup>71</sup> a "review" by the selectees with the highest point totals from the previous steps. These blue ribbon selectees rate all of the other selectees on a 1 to 10 scale.

### Medical Versus Legal Board Certification

Medical Board Certification became the pinnacle of medical practice achievement long before the ad people ever came up with Top Doctors,<sup>72</sup> or Super Doctors.<sup>73</sup> There was no alternative for physicians to distinguish themselves from colleagues. Thus, Board Certification is even today the medical profession's gold standard. This gold standard status is reinforced by insurance carriers, hospitals, and HMO's, some of whom require board certification as a prerequisite to credentialing. Lawyers, on the other hand, had barely been allowed to advertise, much less designate a specialty in 1991 when the first edition of Super Lawyers was published in Minnesota by an enterprising magazine publisher.<sup>74</sup> However, a perfect advertising storm was forming: Super Lawyers, Best Lawyers, the internet, law firm websites, blogs, and Google. Is it any wonder then that lawyer board certification with its requirements for actually proving accomplishments and testing competence like physicians require lacks enthusiastic support?

### Super Lawyers Et Al. and Advertising

*"The louder he talked of his honor, the faster we counted our spoons."*

—Ralph Waldo Emerson

Several states have confronted the issue of whether publicizing attorneys as Super Lawyers-Best Lawyers violates ethics rules, especially those related to advertising. Virtually all states considering the issue have allowed such advertising as consistent with the state's ethics rules.<sup>75</sup> The reasoning behind these decisions is murky at best considering that the titles are purely manufactured aggrandizements promoted by non-lawyer commercial enterprises implementing a self-described peer selection process that in reality is both subjective and arbitrary. These ethics decisions are perhaps best understood by looking at New Jersey's three-year scuffle between the ethics committee and Supreme Court leading to the Court's 2009 advertising rule amendment allowing lawyers to advertise their status as Super Lawyers-Best Lawyers.<sup>76</sup>

The background to New Jersey's dilemma is the United State Supreme Court's various decisions regulating commercial speech and in particular lawyer's commercial speech.<sup>77</sup> Essentially, a state may regulate lawyers' commercial speech by following a four-pronged test: if the commercial speech (1) involves a lawful activity and is not fraudulent or misleading, the state statute must (2) serve a substantial government interest; (3) directly advance the substantial

government interest; and (4) be narrowly tailored to serve the substantial government interest.<sup>78</sup>

New Jersey's odyssey began when lawyer Lloyd Levenson, selected as a New Jersey Super Lawyer in 2005, complained to the ethics committee that he had been selected and that the company told him he could buy a full-page ad for \$15,000.<sup>79</sup> Levenson's complaint was rooted in his belief that the general public presumed that money purchased the title. Levenson also thought the public would believe that lawyers with full-page ads were somehow better than those named in the small print in the back pages and certainly better than those who didn't even make the small print.<sup>80</sup>

The ethics committee agreed with Levenson. The ethics committee said Super Lawyers' Best Lawyers' ads violated the misleading advertising rule because the superlative language—Super-Best—was inherently comparative of one lawyer's service with that of other lawyers and would mislead the public into believing that Super-Best lawyers could achieve results superior to colleagues unrecognized as Super Lawyers.<sup>81</sup>

The New Jersey Supreme Court stayed the ethics committee decision to study the issues. The court subsequently released a 300-page Special Master's Report discussing factual and legal issues.<sup>82</sup> In December 2008, the Supreme Court vacated the committee's opinion, calling for adoption of an amended advertising rule. The court found that Super Lawyers' selection process was "sophisticated, comprehensive and complex" and "a good-faith...effort to...produce a list of lawyers that have attained high peer recognition, meet ethical standards, and have demonstrated some degree of achievement in their field."<sup>83</sup>

A year later New Jersey had a new advertising rule. Super Lawyers-Best Lawyers, as well as other comparative ads, were approved as long as the organization name was stated, the comparative basis could be substantiated, and the ad was accompanied by the disclaimer that the advertisement was not approved by the Supreme Court.<sup>84</sup>

### What is Professionalism?

Current lawyer advertising has done little to elevate lawyers' public perception, which has been in free fall for decades. As Professor Michael Asimow points out, in the 1830's Alexis de Tocqueville wrote that lawyers were the only enlightened class not mistrusted by the public and therefore were called upon to fill the public offices. "No one would dream of writing that today. In the last 25-years, the public's opinion of lawyers has turned sharply negative. Nowadays, American lawyers are distrusted and despised."<sup>85</sup>

Of course, advertising alone does not explain the legal profession's decline. It is virtually impossible to truly know the answer. In reality, it is a combination of many things, including Watergate, Enron, tort reform, movies, the D.C. judge suing a family dry cleaners for \$67 million for losing his grey pants, and countless other uncontrollable cultural influences.<sup>86</sup> There are as many suggested solutions as there are perceived causes.<sup>87</sup> More professionalism is one oft-repeated answer. But what is professionalism? And in reality these suggestions offered as cures do not fundamentally

change the status quo. They are more like fingers in a dike. If the profession does not change fundamentally will the public ever change its perception?

### Changing the Paradigm

To law Professors Adrian Evans and Clark Cunningham, professionalism is a fusion of technical expertise with demonstrated excellence in client service, public service, and ethical practice.<sup>88</sup> Stated otherwise, the professors say professionalism can be thought of as a process in which knowledge develops into wisdom, skill becomes art, and values rise to the level of virtue.<sup>89</sup> Contrary to most other plans to increase professionalism, however, these professors suggest that specialty certification should offer a path to professionalism far different than the traditional path followed in the United States today. Their model is based on medical board certification as well as the legal profession in Australia.

The paradox professionalism improvement the U.S. legal profession faces is that training and assessment ends when lawyers pass the bar examination. The only post-bar examination requirements are mandatory CLE, the mere presence in the audience being sufficient, and good behavior. Proposals for more professionalism, therefore, are purely voluntary affairs without clearly defined achievement incentives or measures ensuring ethical growth.<sup>90</sup>

The medical profession and Australian specialty certification offer what current U.S. specialty legal certification does not—progressive development of competency, excellence in client service and ethical excellence after the licensing

**The legal certifying bodies have no provision for supervision.**

examination. This is accomplished through supervised work experience, specialty study, positive work references, and finally a written examination. The culmination of the entire process is practice as a certified specialist.<sup>91</sup> The current U.S. legal specialty certifying process, the professors point out, has similar requirements with one significant and potentially fatal flaw. U.S. legal certification requires a minimum number of completed activities, like 20 jury trials to verdict, 15 of which are felony trials for criminal certification in Florida.<sup>92</sup> Unlike residency and fellowship where young doctors perform operations and other medical activities under supervision, the legal certifying bodies have no provision for supervision. Young lawyers working their way up to the required certifying number of trials are expected to do so without concern for how that experience is achieved. Thus, the American legal certifying system only works if large numbers of clients have been represented by uncertified lawyers engaged in specialized legal endeavors that

“clients should demand be done only by certified specialists. This paradox arises out of the origin of American specialty certification as an issue of truth-in-advertising rather than as a method of professional development.”<sup>93</sup>

Therein lies the demise of at least the trial-related specialties—requiring substantial trials to verdict at a time in the United States when tort reform, plea bargains, and other pervasive influences have substantially reduced civil and criminal trial verdicts to the point that young lawyers have considerable difficulties meeting minimum certification requirements. Before long, certification will simply be a very old lawyer’s distant recollection.

## Conclusion

Changing the legal profession’s paradigm and thus its public perception will not be accomplished soon or easily. Entrenched forces are difficult to dislodge. A beginning, however, would be to recognize Super Lawyers-Best Lawyers for what they really are and displace those superficial designations with truly significant specialist proficiency tested and approved by real peer review.<sup>94</sup> The medical profession has such a system today—a voluntary but vigorous process of post-licensing professional development leading to a highly trained, dedicated specialist. Of course, the legal protection afforded to the marketing gimmicks of Super Lawyers-Best Lawyers makes the paradigm revisions difficult. However, in a profession of supposed innovators and thinkers someone could surely find a solution if the bar associations find the political will to change the paradigm. ■

## Endnotes

1. ABMS, [http://www.abms.org/about\\_abms/who\\_we\\_are.aspx](http://www.abms.org/about_abms/who_we_are.aspx) (last visited Nov. 16, 2010).

2. *Id.*

3. For a history of legal specialization, see, e.g., A. Mikell, *The Case For Attorney Specialization*, VERMONT BAR JOURNAL (Spring 2007), available at <http://www.vtbar.org/images/journalarticles/spring%202007/toc.html>; Buddy O. Herring, *Liability of Board Certified Specialists In A Legal Malpractice Action: Is There A Higher Standard?*, 12 GEO. J. LEGAL ETHICS 67 (1998); Johannes P. Burlin, *Lawyer Certification and Model Rule 7.4: Why We Should Permit Advertising of Specialty Certifications*, 5 GEO. J. LEGAL ETHICS 939 (1992).

4. ABMS website, *supra* note 1; ABMS, [http://www.abms.org/News\\_and\\_Events/Media\\_Newsroom/Release/release\\_TwoNewSubspecialties\\_11042010.aspx](http://www.abms.org/News_and_Events/Media_Newsroom/Release/release_TwoNewSubspecialties_11042010.aspx) (last visited Nov. 16, 2010).

5. *Id.*

6. *Id.*

7. Mikell, *supra* note 3, at 1.

8. *Id.*

9. ABA Standing Committee on Specialization, *A Concise Guide to Lawyer Specialty Certification*, at 1 (2007) [hereinafter *ABA Specialty Certification Guide*]. For a more detailed history of certification, see Buddy O. Herring, *supra* note 3, at 69-74. See also A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005 766 (2006).

10. Mikell, *supra* note 3, at 1.

11. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

12. For a contemporary look at attorney advertising as viewed in the mid-twentieth century and before, see Robert F. Boden, *Five Years After Bates: Lawyer Advertising In Legal and Ethical Perspective*, 65 MARQUETTE L. REV. 547 (1982). For other contemporary views of attorney advertising and *Bates*, see, e.g., Roger P. Brosnahan and Lori B. Andrews, *Regulation of Lawyer Advertising: In The Public Interest?*, 46 BROOK. L. REV. 423 (1979); Harold G. Christensen, *Advertising By Lawyers*, 1978 UTAH L. REV. 619 (1978); Charles A. Hobbs, *Lawyer Advertising: A Good Beginning But Not Enough*, 62 A.B.A.J. 735 (1976).

13. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

14. *United States v. Edge Broadcasting*, 509 U.S. 418 (1993).

15. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

16. *Bates*, *supra* note 11, at 384.

17. See Brian A. Benko and Corrine Morrissey, *Is It Ethical to be a Super Lawyer?*, 20 THE PROF. LAW. 1, at 25 (2009); Conner Mullin, *Regulating Legal Advertising on the Internet: Blogs, Google and Super Lawyers*, 20 GEO. J. LEGAL ETHICS 835 (2007); Joshua A. Derothy, *Impervious to Kryptonite: Why Minnesota’s “Super Lawyer” Can Continue Advertising*, 30 HAMLINE L. REV. 685 (2007); New Hampshire Bar Association Ethics Committee, *Lawyer Advertising: Million Dollar Advocate*, (November 1997), available at <http://www.nhbar.org/legal-links/ethics-opinions-practical-ethics-articles.asp> (last visited May 6, 2010).

18. *Buyer Beware: What You Need To Know About Lawyer Advertising*, available at [http://www.articlealley.com/article\\_203595\\_18.html](http://www.articlealley.com/article_203595_18.html) (last visited May 1, 2010). For an analysis of advertising today and how the lack of enforcement of advertising rules leads to multiple violations of the rules, see Fred C. Zacharias, *What Lawyers Do When Nobody’s Watching: Legal Advertising as A Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971 (2002).

19. ABPLA, <http://www.abpla.org/about.php> (last visited Nov. 13, 2010).

20. NBLSC, [http://www.nblsc.us/about\\_nblsc/](http://www.nblsc.us/about_nblsc/) (last visited Nov. 13, 2010).

21. Burger, *The Special Skills Of Advocacy: Are Specialized Training And Certification Of Advocates Essential To Our System Of Justice?*, 42 FORDHAM L. REV. 227 (1973); See also The Task Force on Lawyer Competence of The Conference of Chief Justices, Report With Findings And Recommendations to The Conference of Chief Justices, May 26, 1982 (publication number NCSC-021) (recognizing NBTA as an exemplary certifying organization with an arduous selection process culminating in recognition of superior achievement in trial advocacy).

22. *Peel v. Attorney Registration and Disciplinary Comm’n of Illinois*, 496 U.S. 91 (1990).

23. *Id.*; For a detailed, comprehensive look at lawyer advertising from the nineteenth century through the 1990s see J. GORDON HYLTON, PROFESSIONAL VALUES AND INDIVIDUAL AUTONOMY, THE UNITED STATES SUPREME COURT AND LAWYER ADVERTISING (1998). Professor Hylton, a law professor at Marquette University Law School, has written perhaps the most readable and detailed lawyer advertising history yet published. Professor Hylton has written the