TO:       Committee on Special Projects
FROM:    Specialization & Certification Committee
DATE:    December 12, 2012
RE:      CSP meeting – December 15, 2012; and Follow-up to September 8, 2012/Specialization Rules Discussion

The Committee will continue its discussion of the proposed Rules for certifying legal specialists in Michigan at the next CSP meeting.

This report and the discussion topics are divided into 4 parts: Overview, Office location - new applicants, Office Location - re-certification applicants, and Full-time (or equivalent) Requirements.

Part 1. Overview:

The Committee has again discussed the requirement that Board Certified specialists have a physical office location in Michigan (or within 25 miles of a Michigan border), and from which the Certified Specialist actually conducts business at least a minimum number of days per week. The Committee feels that this requirement provides better protection for the public, particularly from deceptive practices such as those which we are seeing in the marketing of estate planning legal services.

The Committee is aware that the State is in the process of removing the current reciprocity requirement of an intent to maintain an office in this state and activity practice “in this state.” See 2012 House Bill 6042: http://www.legislature.mi.gov/documents/2011-2012/billintroduced/House/pdf/2012-HIB-6042.pdf.

We do not feel that this change necessarily has any effect on what the requirements should be for Certified Specialists, because the Committee considers the program as a way to provide better protection for the public through better accountability. An attorney who is located in Michigan will be more accessible to the client when the client has questions and concerns. That attorney will also have more incentive to assure compliance with our rules and produce satisfied clients. An attorney located several states away can rely more on clever marketing than real results.

The second part of this Report (Part 2) reviews the requirements of several other states, including whether physical presence in the State appears to be a requirement.

However, even if a Michigan physical office, and physical presence in that office a certain amount of time, is to be required for new certification applicants, do we want to continue that requirement for re-certification applicants? Several states do, and others do not. Part 3 of this Report includes a discussion of that question. Also, we may want to consider including a definition of what qualifies as an “office” (see New Jersey’s definition reviewed in Part 2 below).
Next, under Part 4 of this Report, is the issue of the full-time practice requirement. Most states require full time practice before certification, but there are some variations on that concept.

**Part 2. Office Location Requirement for New Applicants.**

The current version of our proposed rules reads as follows:

**3.1.2 Michigan Office and Practice.**

A. **Certification Applicants.** Applicants must have maintained a physical office in Michigan, or within 25 miles of a Michigan border, from which the Applicant personally conducts business an average of at least three (3) days per week, for at least the three years immediately preceding application. Failure to meet this requirement will result in denial of application. [emphasis added]

This wording was substantially derived from the Texas rule:

**Texas Office and Practice.**

a. Certification Applicant. For the 3 years immediately preceding application, a certification applicant must have maintained a Texas office from which he or she personally conducts business an average of at least 3 days per week, until certification is achieved. Failure to meet this requirement will result in denial of application. TBLS may waive this requirement upon a showing of good cause. [Section II, A, 2, General Requirements, Standards for Attorney Certification of the Texas Board of Legal Specialization; emphasis added].

A review of the rules of several other states follows. You can see that some states require that the attorney have practiced from an office located in the state, and some do not.

Arizona requires that the attorney have practiced from an Arizona office for at least two years before applying for certification:

**A. Required Period of Law Practice.** Applicants must be admitted to the practice of law for a minimum of five years, of which a minimum of two years immediately preceding the application must have been in the practice of law within the State of Arizona and after such admission shall have engaged in legal service (as defined in Section 1 of the Rules and Regulations of the Arizona Board of Legal Specialization) equivalent to at least 50% of a full-time law practice.

[Part II, A, Arizona Standards for Certification of Lawyers Specializing in Estate and Trust Law; emphasis added]

California’s requirements include the following, but do not appear to require an actual California office:

**4.1 Have been engaged in the practice of law continuously during the five years immediately preceding the submission of his or her application for certification and, in each of those five years, have practiced law in the area in which certification is sought for at least 25% of the time** the applicant has spent in occupational
endeavors.

[Part 4.1, Rules Governing the State Bar of California Program for Certifying Legal Specialists; emphasis added].

As with Michigan’s proposed rules, California defines the term “Applicant” to include both the new applicant and re-certification applicants, so, presumably, this requirement applies to both.

Florida does not appear to have an office location requirement.

Louisiana does appear to require an office in that State. Louisiana’s rule reads as follows:

Each applicant must at the time of application for certification be an active member, in good standing, of the Louisiana State Bar Association, who has practiced law in the field of estate planning and administration for a continuous period of at least five (5) years immediately preceding the year of certification, at least three (3) of which years shall have been as an attorney practicing in the state of Louisiana, and who regularly devotes at least 35% of his or her practice to estate planning and administration, including substantial involvement in a significant portion of the tax and non-tax-related activities enumerated in Section I., B. Each applicant must certify under oath to having met these requirements.

[Section II, A, Louisiana Board of Legal Specialization Estate Planning and Administration Standards; emphasis added].

The Louisiana standards define the practice of law as follows:

The practice of law means full-time legal work performed for the purposes of rendering legal advice or legal representation to the general public, private employers or governmental agencies.

[Section I, A, Louisiana Board of Legal Specialization Estate Planning and Administration Standards; emphasis added].

However, the terms “applicant” and “full-time” are not defined in those Specialization Standards or the general Rules and Regulations of the Louisiana Board of Legal Specialization.

Minnesota does not seem to have general certification rules – just rules that apply to each speciality. Also, Minnesota does not have certification standards for Probate & Estate Planning, but does for Civil Trial Law, Real Property Law, Criminal Law, and Labor and Employment Law. For example, the Minnesota certification standards for Real Property Law include the following:

To become certified as a real property law specialist, a lawyer shall demonstrate substantial involvement in this specialty in Minnesota during the three (3)-year period immediately preceding application. Substantial involvement means at least twenty five (25%) of the attorney’s practice and not less than three hundred (300) hours per year is spent in the area of real property law. Teaching law school or continuing legal education courses in real property law may be included as a minor (i.e. no more than twenty (20)% part of the twenty-five (25)% or three hundred (300) hour requirement.
Notice that the requirements include “substantial involvement in this specialty area in Minnesota”. Although their standards do not refer specifically to having an office located in Minnesota, that seems to be implied. (However, I do not at present know how their standard is actually applied in practice.) The other matter of note is the reference to the **required percentage of the attorney’s practice and the total number of hours per year**. See below for additional discussion of that concept.

New Mexico’s rules do not appear to require physical presence in the state, but do contain a reference to full-time practice:

> “Substantial involvement in specialty. The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of **substantial involvement in the specialty during the three (3) years immediately preceding the application** according to objective and verifiable standards. Such substantial involvement shall be defined as to each specialty from a consideration of its nature, complexity and differences from other fields and from consideration of the kind and extent of effort and experience necessary to demonstrate competence in that specialty. It is a measurement of actual experience within the particular specialty according to any of several standards. It may be measured by the time spent on legal work within the area of the specialty, the number or type of matters handled within a certain period of time, or any combination of these or other appropriate factors. However, within each specialty, experience requirements should be measured by objective standards. In no event should they be either so restrictive as to unduly limit certification of lawyers as specialists or so lax as to make the requirement of substantial involvement meaningless as a criterion of competence. Substantial involvement may vary from specialty to specialty, but, if measured on a time-spent basis, **in no event shall the time spent in practice in the specialty be less than twenty-five percent (25%) of the total practice of a lawyer engaged in a normal full-time practice**. Reasonable and uniform practice equivalents may be established, including, but not limited to, teaching, judicial, government or corporate legal experience.”

**[Article II, Section 19-203 C, New Mexico Legal Specialization Rules, Minimum Standards; emphasis added]**

This requirement also applies to re-certification.

New Jersey does not at present have a certification category for probate and estate planning, but the general rules related to certification in New Jersey provide in part as follows:

**202:1 Minimum Plenary Admission.** Admission to the bar of the State of New Jersey for the purpose of meeting the requirements of this section commences from the date of an attorney's plenary admission. An applicant must have been in good standing in all jurisdictions in which the applicant holds a bar license for at least the five years immediately preceding the filing of the application, and must so certify.
202:3 Practice of Law. Applicants for certification must be (1) engaged in the private practice of law, wherein the applicant represents and gives legal advice to clients, maintains a bona fide office pursuant to Rule 1:21-1(a) and maintains the appropriate bank accounts pursuant to Rule 1:21-6; or (2) employed by State, county or municipal government representing and giving legal advice to clients. [Part Two, Regulation 202, Regulations of the New Jersey Board on Attorney Certification; emphasis added]

New Jersey Rule 1:21-1(a) reads in part as follows:

“...no person shall practice law in this State unless that person ... maintains a bona fide office for the practice of law. For the purpose of this section, a bona fide office is a place where clients are met, files are kept, the telephone is answered, mail is received and the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours to answer questions posed by the courts, clients or adversaries and to ensure that competent advice from the attorney can be obtained within a reasonable period of time. For the purpose of this section, a bona fide office may be located in this or any other state, territory of the United States, Puerto Rico, or the District of Columbia (hereinafter "a United States jurisdiction"). An attorney who practices law in this state and fails to maintain a bona fide office shall be deemed to be in violation of RPC 5.5(a). An attorney who is not domiciled in this State and does not have a bona fide office in this State, but who meets all the qualifications for the practice of law set forth herein must designate the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions, including disciplinary actions, that may arise out of the practice of law and activities related thereto, in the event that service cannot otherwise be effectuated pursuant to the appropriate Rules of Court. The designation of the Clerk as agent shall be made on a form approved by the Supreme Court.”

[Part I, 1:21-1(a), New Jersey Court Rules; emphasis added; this rule includes an exception for staff attorneys employed full time by agencies of the federal government that have an office in New Jersey]

So, New Jersey does not require that an office be maintained in that State, but in that case, it has a system for designating an agent located in that State for service of process. Michigan does not have any system like that, so at present, the presence of a physical office would be the way to help assure that service and other contacts can be made. Perhaps we should use an office definition such as that used in New Jersey to clear up the question of what constitutes an “office” that complies with the requirements of our rules.


The Committee discussed the question of whether the Michigan office location requirement should be modified for previously certified attorneys who are renewing their certification. We feel that it
may be reasonable, in the case of re-certification applicants, to relax the requirement of personally conducting business from a Michigan office at least 3 days per week. This would allow attorneys to spend part of the year in a warmer climate if desired, or to relocate their office altogether, but still serve their Michigan clients (if we chose to allow that option for re-certified attorneys). The Committee consensus was that established Michigan practitioner would be more likely to maintain his/her Michigan office, even if not there personally for the time periods required for new certification applicants. This would be similar to the New Jersey office location requirement. Under that concept, the accountability goal would still be satisfied. **However, the Committee did not arrive at a consensus as to whether the Michigan office requirement should be eliminated completely, and therefore, asks for additional input from CSP.**

The current version of our proposed rules for the general requirements for initial certification or recertification is the same and reads as follows:

3.1.2 **Michigan Office and Practice.**

A. **Certification Applicants.** Applicants must have maintained a physical office in Michigan, or within 25 miles of a Michigan border, from which the Applicant personally conducts business an average of at least three (3) days per week, for at least the three years immediately preceding application. Failure to meet this requirement will result in denial of application. [emphasis added]

B. **Board Certified Specialists and Recertification Applicants.** All board Board Certified Specialists and Recertification Applicants must continue to meet the substantial involvement requirements pertinent to each applicable specialty area. These are found in the Speciality Area Requirements.

The term “Applicant” is defined in our proposed rules to include re-certification applicants, so the physical presence requirement applies to both new and renewal certifications the same.

As mentioned above, this is substantially derived from the Texas rules:

Board Certified Attorney and Recertification Applicant. A board certified attorney and recertification applicant must continue to meet the substantial involvement requirements pertinent to the specialty area **whether or not an office is maintained in Texas.** For other recertification qualifications, refer to the applicable Specific Area Requirements.

[Part II, b, Standards for Certification of Lawyers Specializing in Estate and Trust Law; emphasis added]

However, under the Texas rules, it appears that after Certification is achieved, the physical location in Texas requirement no longer applies at all. There is also no mention of a practice location requirement in the Arizona rules for re-certification applicants.

Louisiana’s requirements for re-certification are the same as for original certification as stated in Section II of its rules (shown above), which appear to require physical presence in the state.

The Minnesota “substantial involvement” requirement for real property law re-certification, which
appears to require physical presence in the state, is the same as for initial certification. [Part III, A, Standards and Requirements for Certification and Recertification of Lawyers as Real Property Law Specialists].

As mentioned above, New Mexico’s requirements for re-certification are the same as for initial certification and do not appear to require an office in that State.

If our “office in the state” and personal presence requirement is to be modified for re-certification applicants, several questions, as yet unanswered, are presented: (1) should the personal presence requirement at the Michigan office be entirely eliminated? (2) if so, should a physical Michigan office still be required? (3) if a minimum personal presence is still to be required, should that personal presence be defined as a certain number of hours per year, rather than a stated number of days per week?

The Committee asks for additional input from the Committee on Special Projects in addressing this issue and answering these questions.

**Part 4. Full-time practice requirement.**

This issue was discussed at the September, and also at the October, 2012, CSP meetings. One concern was that requiring full-time practice for a specified time before applying for certification would effectively prevent those who practiced primarily part-time from ever applying for such certification. Some in attendance felt that something close to full-time practice is need to gain the necessary person to person experience. One possibility would be to require a longer time period for part-time practitioners, maybe 7 or 7½ years. Another approach that might go along with that, would be to state the number of hours per week that constitutes the minimum practice requirement, or the number of hours per year that need to be worked to be added up toward the total necessary before the person could apply. There is also the issue of the attorney possibly being full-time part of the year, and taking a leave of absence, such as maternity leave or something else, during part of the year, so maybe the concept of the number of working hours per year would be the way to handle that possibility, or the accumulated total over a number of years. However, the prior discussion at CSP also included the observation that “experience counts” and it is difficult to develop the problem-solving skills for our type of practice without “putting in the time”.

The Committee favors a minimum “hours per week” definition of “full time” and suggests that 35 hours per week be used (however, we are open to other ideas). A variation on this approach can be seen in the Minnesota rules.

As mentioned above, Minnesota does not have certification standards for Probate & Estate Planning, but does for Civil Trial Law, Real Property Law, Criminal Law, and Labor and Employment Law. The Minnesota certification standards include minimum time requirements. Those for Real Property Law include the following:

To become certified as a real property law specialist, a lawyer shall demonstrate **substantial involvement in this specialty in Minnesota** during the three (3)-year period immediately preceding application. Substantial involvement means at least twenty five (25%) of the attorney’s practice and not less than three hundred (300) **hours per year** is spent in the area of real property law. Teaching law school or
continuing legal education courses in real property law may be included as a minor (i.e. no more than twenty (20)% part of the twenty-five (25)% or three hundred (300) hour requirement.

[Part II, A, Standards and Requirements for Certification and Recertification of Lawyers as Real Property Law Specialists; emphasis added].

This type of reference to the **required percentage of the attorney’s practice and the total number of hours per year** may be a concept we should consider. The Minnesota minimum time spent working as an attorney would translate to a minimum total practice time requirement of 1200 hours per year, or 24 hours per week average for 50 weeks per year (or 25 hours per week average for 48 weeks, etc). This may be lower than we will want to go for the new applicant. The other State’s rules do not really give much guidance as to what is to be considered full time.

As stated above, this Committee feels that the full-time equivalent should be 35 hours per week, but we are open to other suggestions.

Jim Steward