

Report of the First Study Commission on Judicial Specialization

For purposes of our report, we consider specialization to be a somewhat narrow concept. It refers to knowledge of and experience in an area of particular substantive law dealing with more technical issues such as intellectual property or bankruptcy/insolvency law or particular areas of commercial practice. In this report, the term specialization does not mean the more general distinctions that are drawn between, for example, criminal law and civil law.

There are reasons that favor specialization. Among them are the increasing complexity of legislation in various areas. This is leading to more specialization among the attorneys who practice in these areas before the court. As a result, judges dealing with cases in these more specialized areas themselves need to become more expert in these areas. In addition, economic circumstances may drive the judiciary to become more efficient in handling their cases, because a decline in resources available to support the judiciaries does not correspond to a decline in caseloads, particularly in complex areas of the law. Specialization should also lead to a more stable development of case law in the technical areas that are covered.

There are arguments against specialization. Specialization of the judiciary can create the appearance that the process is unfair when one of the parties who is not expert feels that the more expert party and the specialized judge are working together at a more refined level than the less expert party. There is a danger that the specialized judges become separated from the judges who are generalists or from the judges who are specialized in different substantive areas. Judges who become specialized may also suffer from limited mobility within the judiciary.

While there are some concerns about the effects of specialization on the independence of the judiciary, the trend toward moderate specialization to this point has not had an appreciable impact on the independence of the judiciary.

Conclusions:

Specialized judges should remain part of a single judiciary, subject to the same general procedural rules and ethical standards applicable to all judges. The trend toward specialized judges should proceed carefully so that specialization does not inhibit the independence of the judiciary.

Specialized judges should be paid at the same rate as their counterparts.

In areas such as intellectual property, it will regularly be necessary that there be experts or witnesses participating as experts in the cases. These persons can be those brought in by the parties. They can also be those appointed by the judge handling the case. There are differing views as to whether the expert judge should be allowed to use her expertise to fill in facts that are not present in the case or whether the expertise merely guides the judge as the judge considers the evidence that has been presented. We also recognize the problems that may occur if an expert or witness participating as an expert is allowed to dictate the outcome of a case as opposed to merely conveying facts and opinions that the judge may consider.

Care must be taken that the development of specialized courts and judges with specializations is not used by the legislative bodies to limit resources or as a point of criticism for overall problems that must be addressed with adequate resources.

Care must also be taken that when judges become specialized, the fact that they work in a specialized area is not used as a mechanism to limit the judge's career possibilities.

Finally, while the topic is too broad to yield any present recommendations, particularly in the area of intellectual property, the members of the Commission note that the increasingly global nature of intellectual property issues may benefit from a more global judicial approach, including perhaps, a specialized international court with jurisdiction in this area. This, of course, would be subject to various treaty relations and development of applicable procedures, concerning which we make no specific recommendations. The idea is worthy of further consideration and development, however.