

By STEPHEN W. SATHER

The Benefits of Board Certification

I became board certified in business bankruptcy law in 1992 by the Texas Board of Legal Specialization, and certified in 1994 by the American Board of Specialization (ABC). As a younger attorney, it was a way to stand out from my peers. Congress recognized the benefit of board certification when it stated that courts should consider “with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field.”¹

In conducting the lodestar analysis, board certification is a way to establish that the attorney has “demonstrated skill and experience in the bankruptcy field.” This was spelled out in a recent decision from the U.S. Bankruptcy Court for the District of Nevada:

The considerations reflected in Sections 330(a)(3)(A, B, D and E) are consistent with the “lodestar” method utilized in determining other attorney’s fee awards in both bankruptcy and non-bankruptcy cases. That method typically bases an award on a reasonable number of hours charged at a reasonable hourly rate. (citation omitted).... Sections 330(a)(3)(B and E) focus on the hourly rate charged by the professional, taking into account the professional’s qualifications, skills and experience....

Thus, in Section 330, Congress provided specific guidance for the reasonableness of compensation awarded to professionals who provide services to a bankruptcy estate. Although much discretion is still afforded to bankruptcy courts in awarding fees under Section 330, the task is not relegated simply to the gut instinct of the bankruptcy judge.²

The ABC is the only national certification program for bankruptcy attorneys. Founded in 1992, it is sponsored by ABI and the Commercial Law League of America.³ Thirty-four sitting judges were certified by the ABC before taking the bench.⁴

In order to be certified, a person must have been licensed for at least five years, presently be licensed in at least one state, demonstrate good character, demonstrate substantial involvement in the field,

have completed at least 60 hours of continuing legal education (CLE) in the field in the prior 36 months, submit nine recommendations and pass an exam.⁵ To meet the substantial-involvement standard, an applicant must have devoted 30 percent of his/her time and at least 400 hours during each of the three previous years. He/she must also demonstrate participation in at least 30 adversary proceedings or contested matters, no more than five of which can be in the same area.⁶

Benefits of Certification

Several judges have recognized the benefits of the ABC program. One judge said, “The ABC examinations are comprehensive and well regarded in the bankruptcy legal community and are recognized by the Florida Bar.”⁷ At the suggestion of attorneys who had failed to perform well, he allowed them to file cases again once they had passed the ABC exam. Another judge stated:

The Court fully recognizes that the process of obtaining certification is quite extensive and that maintaining certification requires significant continuing education.... The Court agrees with those who have suggested that attorneys who are certified are entitled to a higher rate when they use those skills.⁸

Similarly, in a chapter 11 case, the court justified a higher rate than other attorneys based on board certification:

The highest rate was charged by Lawrence R. Ahern, III, whose effective hourly rate is \$336.46 an hour. His actual hourly rate is \$475 an hour. Mr. Ahern is a certified bankruptcy specialist with [more than] 40 years of bankruptcy experience. His effective rate is higher than that of other professionals retained in this case but the court may take this certification into consideration in determining the appropriateness of his rate.⁹

There are a few courts that have quantified what board certification is worth. Unfortunately, these are mostly consumer cases, where the rates are low to begin with. In the U.S. Bankruptcy



Stephen W. Sather
Barron & Newburger,
PC; Austin, Texas

Stephen Sather is the head of the Bankruptcy Section of Barron & Newburger, PC in Austin, Texas. He is board certified in business bankruptcy law by the Texas Board of Legal Specialization and ABC.

1 11 U.S.C. § 330(a)(3)(E).

2 *In re Hartland MMI LLC*, 2018 Bankr. LEXIS 3866 (Bankr. D. Nev. 2018).

3 “History,” ABC, available at abcworld.org/history (unless otherwise specified, all links in this article were last visited on Sept. 1, 2020).

4 “Certified Judges,” ABC, available at abcworld.org/certified-judges.

5 “Rules and Regulations,” ABC (last amended Dec. 8, 2018), available at abcworld.org/rules.

6 *Id.*

7 *In re Moon Thai & Japanese Inc.*, 448 B.R. 576, 590 (Bankr. S.D. Fla. 2011).

8 *In re Sharp*, 367 B.R. 582, 585 (Bankr. E.D. Mich. 2007), *aff’d*, 2007 U.S. Dist. LEXIS 80468 (E.D. Mich. 2007).

9 *In re McKenzie*, 494 B.R. 329, 332 (Bankr. E.D. Tenn. 2013). Please note that Mr. Ahern, a partner with Brown & Ahern in Nashville, Tenn., has been an ABI member since 1987.

Court for the Western District of Michigan, the chief judge keeps a list of attorneys certified by the ABC.¹⁰ There are three tiers of “no look”¹¹ fees allowed in chapter 13 cases. The lowest tier is for attorneys who are not certified and have not completed recent CLE. The middle tier is for attorneys who have completed CLE but are not board certified. The highest tier is for attorneys who are board certified. The no-look fee for a board-certified chapter 13 lawyer was \$900 above the lowest rate, a premium of 37.5 percent. For attorneys billing hourly, the premium was \$45 per hour, an increase of 25 percent.¹²

In another chapter 13 case, the board-certified attorney was given a boost of \$25 per hour in his rate, an increase of about 10 percent.¹³ However, the court granted the attorney just \$265 per hour and refused his requested rate of \$320 per hour, a decision that was affirmed by the district court.

In a third chapter 13 case, the court refused to give a board-certified attorney his usual rate for a chapter 11 case in a simple chapter 13 proceeding.¹⁴ The court’s reasoning was that simple cases merited a lower rate than harder cases. While the difference in the case was between \$250 per hour and \$200 per hour (either of which is quite low), it reflected a discount of 25 percent for handling a simple case.

Board certification is also a factor that courts have discussed in describing the qualifications of an expert witness.¹⁵ Sometimes, board certification can have negative impacts on non-certified attorneys. In one complex chapter 11 case, the highly experienced board-certified local counsel billed at \$370 per hour and \$430 per hour, respectively. The lead counsel was billing its 0-6-year associates at a rate of \$355 to \$655 per hour.¹⁶ The lead counsel was assigning teams of associates to projects that could have been accomplished by one of the local counsel at the same or a lower rate. The clearly offended judge reduced the lead firm’s fees by 75 percent.¹⁷

In a less dramatic example, both a board-certified attorney and his associates charged \$225 per hour. The court rejected the argument that the work performed by the associates should be compensated at a lower rate than the board-certified attorney.¹⁸

High Expectations

Board certification does carry with it higher expectations. As retired Judge Jeff Bohm of the U.S. Bankruptcy

Court for the Southern District of Texas stated, “because he is board certified he is to be held to a higher standard.”¹⁹ In the specific case, a trustee employed his own firm as counsel, then billed the estate for tasks that constituted trustee functions, resulting in significant cuts to both the legal fees and trustee’s commissions charged, as well as an admonition in a separate opinion that the court would only approve a trustee hiring his own firm if he could demonstrate that no other firm could do the work.²⁰

In another case, a debtor attempted to blame his board-certified attorney for deficiencies that led to a denial of his discharge.²¹ The attorney testified to his own sloppiness in what he described as the most difficult case that he had ever handled. However, the court stated that “he cannot now avoid the consequences of the acts or omissions of his freely selected attorney.”²² The attorney’s name was mentioned 258 times in the 81-page opinion.

Is It Worth It?

Given the unfortunate attention paid to board-certified attorneys who did not perform well, is it still worth it to earn the distinction? My personal answer is “yes.” Poor performance will be critiqued regardless of whether an attorney is board certified. However, certification will help an attorney acquire the expertise and experience needed to practice at a high level.

While some of the hourly rates discussed in this article seem comically low, there are some very high rates being charged in complex chapter 11 cases. At some point, judges may ask for justification of sky-high rates, and board certification is an objective credential that can justify a premium rate.

Board certification is also valuable for attorneys who practice in markets where more modest rates apply. It also helps a young lawyer seeking to take his/her career to the next level, as it is an investment in one’s career, as well as a credential. In my experience, certification can be particularly valuable for an attorney who has been licensed five to 15 years, since that is the point in an attorney’s career when it is important to stand out.

In addition, the ABC and ABI have created a special course to prepare applicants who are planning to become board certified. The full ABC Prep Course also provides six hours of CLE credit (where permitted for online learning), including one hour of ethics. The course is \$295 for ABI members and \$395 for non-members (includes one year of ABI membership, a \$395 value). For more information, visit abcworld.org and abi.org/abcprep. **abi**

10 *In re Rogers*, 500 B.R. 537 (Bankr. W.D. Mich. 2013).

11 This is a fee that is presumed to be reasonable without the need to file a formal fee application.

12 *In re Rogers*, *supra* at 543. In a different case, the court raised the district’s no-look fee at the request of a board-certified attorney. *In re Fox*, 2016 Bankr. LEXIS 4260 (Bankr. E.D. Okla. 2016).

13 *In re Sharp*, *supra*.

14 *In re Romero*, 2010 Bankr. LEXIS 790 (Bankr. D.N.M. 2010).

15 *In re Tapang*, 540 B.R. 701 (Bankr. N.D. Cal. 2015).

16 *In re Latshaw Drilling LLC*, 481 B.R. 765 (Bankr. N.D. Okla. 2012).

17 *Id.* This case was in 2012, so the rates for both the local counsel and the young associates are likely higher today. In one case in which the author is involved, a firm is charging \$500 an hour for first-year associates.

18 *In re Garcia*, 2020 Bankr. LEXIS 1270 (Bankr. D.P.R. 2020).

19 *In re King*, 559 B.R. 158, 172 (Bankr. S.D. Tex. 2016).

20 *In re King*, 546 B.R. 682 (Bankr. S.D. Tex. 2016).

21 *Abbey v. Retz (In re Retz)*, 438 B.R. 237 (Bankr. D. Mont. 2007).

22 *Id.* at 302.

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