

BY MICHAEL D. FIELDING

Board Certification Reduces Risk of Attorney Grievances

Over the past few years, complaints to state bar entities against attorneys have nearly doubled. In 2015, approximately one out of every 10 attorneys could expect to have a complaint made against them to their state bar agency. In addition, approximately one out of every 200 practicing attorneys could expect to receive some sort of private or public discipline. In an era with more than 1.4 million practicing attorneys, is there a way for clients to quickly identify lawyers who are significantly less likely to be the subject of an attorney grievance or disciplinary action?

Yes, there is, if the attorney practices in bankruptcy or creditors' rights law. The American Board of Certification (ABC) is a nonprofit entity that objectively certifies attorneys who meet its rigorous standards. These attorneys are substantially less likely to have grievances lodged to state bars or have disciplinary actions taken against them. This article considers why board certification creates such a strikingly significant statistical difference.



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The ABA Study

Each year, the Standing Committee on Professional Discipline of the American Bar Association's (ABA) Center for Professional Responsibility releases the results of its Survey on Lawyer Discipline Systems (the "SOLD survey") questionnaire, which is sent to 56 lawyer disciplinary agencies throughout the U.S. The survey reveals significant data regarding attorney disciplinary actions on a state-by-state basis. Let's take a look at the SOLD survey results for 2013-15.

The 2013 SOLD survey found that there were nearly 1.19 million active lawyers in the U.S.¹ During that time, there were a total of 43,535 complaints received by attorney disciplinary agencies.² Plus, there were an additional 24,133 complaints pending as of the beginning of the year.³ Of the total pending and new complaints received that year, 41,167 were summarily dismissed or screened out by the disciplinary agency.⁴ There were 55,078 complaints that were investigated,⁵ and 23,402 of the complaints were subsequently closed or dis-

missed.⁶ Ultimately, 4,150 attorneys received some form of private discipline,⁷ while 2,600 lawyers were publicly disciplined.⁸

The SOLD survey for 2014 found that there were 1.235 million active lawyers in the U.S.⁹ That year, there were a total of 88,930 complaints received by attorney disciplinary agencies.¹⁰ There were an additional 27,340 complaints pending as of the beginning of 2014.¹¹ Of those pending and new complaints, 43,998 were summarily dismissed or screened out by the disciplinary agency.¹² There were 63,257 complaints that were investigated,¹³ and 34,317 of the complaints were subsequently closed or dismissed.¹⁴ Ultimately, 4,884 attorneys received some form of private discipline,¹⁵ and 4,566 lawyers were publicly disciplined.¹⁶

In April 2017, the SOLD survey for the 2015 calendar year was released.¹⁷ It found that there were just over 1.4 million active lawyers in the U.S.¹⁸ During that time, there were a total of 116,175 complaints received by attorney disciplinary agencies.¹⁹ Plus, there were an additional 28,498 complaints pending as of the beginning of the year.²⁰ Of the total pending and new complaints received that year, 40,856 were summarily dismissed or screened out by the disciplinary agency.²¹ There were 67,895 complaints that were investigated,²² and 34,381 of the complaints were subsequently closed or dismissed.²³ Ultimately, there were 4,747 attorneys who received some

6 2013 SOLD Survey, Total for Item 5.

7 2013 SOLD Survey, Totals for Items 8-8c. The private discipline consisted of the following: 2,034 (private/nonpublic disciplinary sanctions); 900 (admonition); 319 (reprimand); and 897 (letter of warning/caution). *Id.*

8 2013 SOLD Survey, Total for Item 9.

9 2014 SOLD Survey, Total for Item 1, *available at* americanbar.org/groups/professional_responsibility/resources/historicalabasoldsurveys.html.

10 2014 SOLD Survey, Total for Item 2.

11 2014 SOLD Survey, Total for Item 3.

12 2014 SOLD Survey, Total for Item 4.

13 2014 SOLD Survey, Total for Item 5.

14 2014 SOLD Survey, Total for Item 6.

15 2014 SOLD Survey, Totals for Items 10-10c. The private discipline consisted of the following: 2,077 (private/nonpublic disciplinary sanctions); 1,022 (admonition); 258 (reprimand); and 1,527 (letter of warning/caution). *Id.*

16 2014 SOLD Survey, Total for Item 11.

17 The 2015 SOLD Survey (*available at* americanbar.org/content/dam/aba/administrative/professional_responsibility/2015_sold_results.authcheckdam.pdf) indicates that Connecticut, Nevada and South Dakota did not provide responses by the deadline. 2015 SOLD Survey, Introduction. Given various issues with the reporting, the SOLD Survey estimates various total figures.

18 2015 SOLD Survey, Total for Item 1, p. 3.

19 2015 SOLD Survey, Total for Item 2, p. 3.

20 2015 SOLD Survey, Total for Item 3, p. 7.

21 2015 SOLD Survey, Total for Item 4, p. 7.

22 2015 SOLD Survey, Total for Item 5, p. 7.

23 2015 SOLD Survey, Total for Item 6, p. 7.

1 2013 SOLD Survey, Total for Item 1, *available at* americanbar.org/groups/professional_responsibility/resources/historicalabasoldsurveys.html.

2 2013 SOLD Survey, Total for Item 2.

3 2013 SOLD Survey, Total for Item 3.

4 2013 SOLD Survey, Total for Item 4.

5 2013 SOLD Survey, Total for Item 5.

form of private discipline²⁴ and 3,146 lawyers who were publicly disciplined.²⁵

What are the practical takeaways from these figures? In 2015, as a practicing attorney, there was a 10.3 percent chance that you had a pending or new complaint made against you. If a complaint was made, you had a 28.2 percent probability of having the complaint summarily dismissed. If it was investigated, you had a 23.8 percent chance of then having it dismissed following the investigation. In other words, more than half of all disciplinary complaints resulted in no adverse outcome for the attorney. Please note that not all complaints received in 2015 would have been resolved by the year's end but would carry into 2016. As such, it is not possible to accurately determine from a year-to-year survey how many complaints ultimately result in some sort of public or private disciplinary action being taken. However, given the 4,747 attorneys who were privately disciplined and the 3,146 attorneys who were publicly disciplined, one can conclude that there is at least a 0.56 percent chance that an attorney would receive some sort of public or private disciplinary action. In other words, in 2015, approximately one in 10 practicing attorneys could expect to have some sort of bar complaint made against them, and roughly one out of every 200 attorneys could expect to receive some sort of disciplinary action.

When the SOLD survey results are compared on a year-to-year basis, it becomes clear that there is a marked increase in complaints about attorney performance. The table summarizes SOLD survey results for 2013-15.²⁶

Strikingly, in the past few years, the percentage of complaints against lawyers has nearly doubled. While the cause of the growing client dissatisfaction is beyond the scope of this article, these numbers are cause for concern. With the large number of practicing attorneys today, how can clients quickly discern which attorneys are highly immune from client complaints or disciplinary actions?

The American Board of Certification

Statistically speaking, attorneys who are certified by the ABC are far less likely to have a complaint filed against them or be the subject of a state bar disciplinary action. Founded in 1992 as a nonprofit organization, the ABC seeks to improve the quality of representation in bankruptcy and creditors' rights law. According to its website, "ABC offers separate certification programs in business bankruptcy, consumer bankruptcy and creditors' rights law. The ABC is sponsored

24 2015 SOLD Survey, Total for Items 10-10c, p. 15. The private discipline consisted of the following: 1,824 (private/nonpublic disciplinary sanctions); 1,088 (admonition); 257 (reprimand); and 1,578 (letter of warning/caution). *Id.*

25 2015 SOLD Survey, Total for Item 11, p. 20.

26 The ABA released the 2013 SOLD Survey in October 2014, and the 2014 SOLD Survey was released in January 2016.

SOLD Survey Results, 2013-15				
Year	Active Lawyers	New Complaints	Pending Complaints	Percentage
2013	1,187,777	43,535	24,133	5.7%
2014	1,235,298	88,930	27,340	9.4%
2015	1,403,258	116,175	28,498	10.3%

by [ABI] and the Commercial Law League of America. All three ABC programs are accredited by the [ABA] and several states have accredited the ABC programs.²⁷

Becoming board certified is not for the faint of heart. An attorney applicant must pass a rigorous day-long exam. In addition, the applicant must show that he/she has (1) devoted a minimum of 400 hours and 30 percent of their practice for the last three years to the specific area for which they seek to become board certified, (2) had substantial and wide experience in matters unique to their desired certification, (3) attended a minimum of 60 hours of continuing legal education during the past three years in bankruptcy law, (4) submitted a grievance history for all jurisdictions in which they are admitted (including the resolution of any grievances that may have been submitted) and (5) provided references from nine attorneys (four of whom must be familiar with the applicant's practice and the other five of whom have served as opposing counsel to the applicant).²⁸ Once an attorney becomes board certified, he/she must renew that certification every five years by showing that he/she continues to meet the five foregoing requirements.

With respect to grievance matters, attorneys who are seeking certification or recertification as ABC members must detail whether they have been "disbarred, suspended, reprimanded or otherwise disciplined by the state bar of any state, by a state or federal court, or by any other entity that has authority over attorney discipline."²⁹ The attorneys must also disclose whether they have been the subject of "(1) a disciplinary lawsuit or action; (2) a complaint or inquiry with a grievance committee of any bar association or with the designated disciplinary entity of any state; (3) a finding or admission of legal malpractice; [or] (4) a criminal indictment or information for a felony crime."³⁰ Finally, attorneys must detail any conviction, probation or fine for a felony crime.³¹

The initial and ongoing certification standards are an objective "weeding-out" process designed to identify exceptional lawyers in the bankruptcy and creditors' rights bars. This commitment to excellence has tangible results.

As of Dec. 31, 2013, there were 916 total certifications. None of the attorneys holding a certification reported any grievances against them that year. As of Dec. 31, 2014, there were a total of 895 certifications. Only two grievances were reported that year, with the two grievances being associated with the same attorney. Finally, as of Dec. 31, 2015, there were 788 attorneys who held 885 certifications (approximately 100 attorneys hold two or even all three types of certifications). Of those 788 attorneys, none of them reported any state grievances in 2015.³² Succinctly stated, in the course of a three-year period, only one board-certified attorney reported any state bar grievances being reported.

27 "About the American Board of Certification," available at abcworld.org/about.

28 The specific requirements for becoming board certified can be found at abcworld.org/downloads.

29 ABC Application for Certification in Bankruptcy Law, Item VI.A; ABC Application for Recertification in Bankruptcy Law, Item VI.A.

30 ABC Application for Certification in Bankruptcy Law, Item VI.B; ABC Application for Recertification in Bankruptcy Law, Item VI.B.

31 ABC Application for Certification in Bankruptcy Law, Item VI.C; ABC Application for Recertification in Bankruptcy Law, Item VI.C.

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ABC Insights: Reduced Risk of Grievances and State Bar Disciplinary Actions

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Why Such a Stark Contrast?

The survey results for attorneys generally stand in stark contrast to the results reported by ABC attorneys. Why is this?

Aspiring and existing ABC members are held to higher standards than most attorneys. They are required to demonstrate significant and substantive experience in their field(s) of expertise. They must pass a rigorous exam to ensure that they meet objective levels of competence. Each year, they must take a sizeable number of continuing legal hours that are specifically focused on their area(s) of practice. An attorney who meets the criteria is clearly someone who is concerned about the quality of his/her practice. Is it any wonder that these conscientious, focused attorneys are significantly less likely to have a grievance filed or disciplinary action taken against them?

How Do Clients Benefit?

Clients receive several benefits by engaging a board-certified attorney. Board certification is a simple way to objectively verify that an attorney has met objective certification criteria

in a very specialized area of law. In other words, the certification designation enables a client to know that they are engaging someone who is in the cream of the crop. This helps a prospective client quickly narrow the search for legal counsel.

Anecdotally, it is the author's experience that the practices of board-certified attorneys are focused on their area of certification. For example, someone who is certified as a business bankruptcy specialist would likely be found to be spending at least 1,200-1,500 hours each year on business bankruptcy-related matters. Similarly, one who is certified as a consumer bankruptcy specialist in all likelihood would be found to spend at least 60-80 percent of their practice on consumer bankruptcy-related matters. The benefits that clients receive from such extensive, focused practice cannot be overstated.

Conclusion

According to its website, "ABC certification serves the public by allowing potential clients to make an informed decision in choosing bankruptcy and creditors' rights counsel. In addition, ABC certification encourages attorneys to strive toward excellence and recognizes those attorneys who have met the rigorous ABC standards."³³ To be certain, engaging a board-certified attorney on a bankruptcy or creditors' rights matter does not guarantee that the engagement is risk-free, but clients who engage an ABC attorney know that they are getting someone who meets exacting standards and focuses a substantial amount of their practice in that area of law. **abi**

³² To be clear, the figures the from 2015 SOLD survey are based on slightly different criteria than what the ABC requires its prospective and existing members to report. The 2015 SOLD survey lists the specific definitions and questions that were provided to the various state bar entities. For example, a "complaint" is defined as "[a]ny information received by the disciplinary agency regarding lawyer conduct that requires a determination as to whether the disciplinary agency has jurisdiction over the lawyer or matters(s) complained of, or whether sufficient facts are alleged that would, if true, constitute misconduct." 2015 SOLD Survey, "Terms and Phrases." The SOLD survey takes a very expansive definition of a "complaint." In contrast, various state bar entities do not consider a "complaint" or grievance to have been made against an attorney unless the allegations are such that some sort of response by the attorney is required. In other words, a disgruntled and angry client could make a "complaint" (as defined by the SOLD survey) to a state bar, but if on the face of the "complaint" itself the state bar determines that nothing wrong occurred, then there would be no "complaint" from the state bar's perspective, which, in turn, would not trigger any reporting requirement to the ABC.

³³ See *supra*, fn.27.

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