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## ABC Update

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### Legal Underpinnings of Certification

Change happens slowly in the legal profession, especially with regard to specialty certification. While specialty certification in the medical and dental professions is well established and accepted by the general public because “board certification ... has ‘come to be regarded as evidence of the skill and proficiency of those to whom they [have] been issued,’”<sup>2</sup> board certification is a relative newcomer for the legal practice areas of bankruptcy and creditors’ rights. Last year, the American Board of Certification (ABC) celebrated its twentieth year of certifying lawyers in business bankruptcy, consumer bankruptcy and creditors’ rights.<sup>3</sup> ABC, the nation’s premier legal specialty certification organization, is sponsored by ABI and the Commercial Law League of America (CLLA), and all three ABC certification programs are accredited by the American Bar Association (ABA) and many states. ABC certification is available to all qualified attorneys without regard to membership in ABI or CLLA.

ABC’s certification program represents the culmination of a long and hard-fought battle that the U.S. Supreme Court has traced to then-Chief Justice Warren E. Burger’s 1973 claim that “specialized training and certification of trial advocates is essential to the American system of justice.”<sup>4</sup> The legal certification movement was born with the Supreme Court’s 1977 decision in *Bates v. State Bar of Arizona*,<sup>5</sup> wherein the Court (in a plurality opinion) held that commercial speech, in the form of attorney advertising that is not misleading, was protected by the First Amendment to the U.S. Constitution.

In *Peel v. Attorney Disciplinary Comm’n of Ill.*, the Supreme Court addressed the issue of whether

a lawyer’s advertising of certification by a third party was protected by the First Amendment under *Bates*. In *Peel*, a lawyer had been censured by the Illinois Supreme Court because his letterhead stated that he was certified as a civil trial specialist by the National Board of Trial Advocacy (NBTA) in violation of a disciplinary rule that forbade lawyers from claiming that they were “certified” or a “specialist.”<sup>6</sup> The Illinois Supreme Court found this statement “misleading” because it “had never recognized or approved any certification process.”<sup>7</sup>

Reversing the Illinois Supreme Court, the Supreme Court held that *Peel*’s statement of the fact of his certification “was neither actually nor inherently misleading,” and that there was “no dispute about the bona fides and the relevance of NBTA certification” so that “[d]isclosure of information such as that on petitioner’s letterhead both serves the public interest and encourages the development and utilization of meritorious certification programs for attorneys.”<sup>8</sup> Four years later, the Supreme Court re-emphasized *Peel* in *Ibanez v. Florida Dep’t of Business and Prof’l Regulation, Bd. of Accountancy*,<sup>9</sup> holding that a lawyer who was both a certified public accountant and certified financial planner could include the designations CPA and CFP next to her name in her *Yellow Pages* advertisement without being subject to discipline.<sup>10</sup> In response to *Peel* and *Ibanez*, the ABA revised Rule 7.4, Communication of Fields of Practice, of its Model Rules of Professional Conduct to provide that “(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless: (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and (2) the



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2 *Peel v. Attorney Disciplinary Comm’n of Ill.*, 496 U.S. 91, 102 n.11 (1990) (citations omitted).

3 For more information on ABC certification, visit [www.abcworld.org](http://www.abcworld.org).

4 *Peel, supra*, 496 U.S. at 94 n.2, citing Warren E. Burger, “The Specialized Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?,” 42 *Ford. L. Rev.* 227 (1973); see also Burger, “Some Further Reflections on the Problem of Adequacy of Trial Counsel,” 49 *Ford. L. Rev.* 1 (1980).

5 433 U.S. 350 (1977).

6 *Peel, supra*, 496 U.S. at 94-98.

7 *Id.*, 496 U.S. at 98.

8 *Id.*, 496 U.S. at 110-11.

9 512 U.S. 136 (1994).

name of the certifying organization is clearly identified in the communication.”<sup>11</sup>

Following the lead of *Peel, Ibanez* and the ABA, 24 states currently recognize ABA accreditation as the sole or partial criteria for approving certifying organizations in such states,<sup>12</sup> and the important role that peer review plays in the legal board-certification process (such as is employed as part of the ABC initial certification and recertification processes) recently was recognized, defended and upheld by the U.S. Court of Appeals for the Eleventh Circuit in *Zisser v. The Florida Bar*.<sup>13</sup> Moreover, as a result of the 2005 amendments to the U.S. Bankruptcy Code, 11 U.S.C. § 330(a)(3)(E) recognizes board certification in bankruptcy as a factor that the court can consider in awarding compensation.

Today, thanks to *Peel, Ibanez* and decades of hard work by the founders, officers, directors and members of what is today the ABC, certification is here to stay, and more than 900 lawyers are certified by the ABC in business bankruptcy, consumer bankruptcy and creditors’ rights. Isn’t it time you joined their ranks? **abi**

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10 The Court added that “[w]e express no opinion whether, in other situations or on a different record, the Board’s insistence on a disclaimer might serve as an appropriately tailored check against deception or confusion, rather than one imposing ‘unduly burdensome disclosure requirements [that] offend the First Amendment.’” *Id.*, 512 U.S. at 146 (citations omitted). Many states impose such disclaimer requirements for lawyers seeking to mention their certification. See, e.g., Rule 7.4(c) of the Illinois Rules of Professional Conduct (“(c) Except when identifying certificates, awards or recognitions issued to him or her by an agency or organization, a lawyer may not use the terms ‘certified,’ ‘specialist,’ ‘expert,’ or any other, similar terms to describe his qualifications as a lawyer or his qualifications in any subspecialty of the law. If such terms are used to identify any certificates, awards or recognitions issued by any agency, governmental or private, or by any group, organization or association, the reference must meet the following requirements: (1) the reference must be truthful and verifiable and may not be misleading in violation of Rule 7.1; [and] (2) the reference must state that the Supreme Court of Illinois does not recognize certifications of specialties in the practice of law and that the certificate, award or recognition is not a requirement to practice law in Illinois”), [www.state.il.us/court/supremecourt/rules/art\\_viii/artviii\\_new.htm](http://www.state.il.us/court/supremecourt/rules/art_viii/artviii_new.htm). However, the U.S. Court of Appeals for the Second Circuit recently partially invalidated a similar disclaimer under Rule 7.4 of the New York Rules of Professional Conduct in *Hayes v. State of N.Y. Att’y Grievance Comm. of the Eighth Jud. Dist.*, 672 F.3d 158 (2nd Cir. 2012). See Martha R. Lehman, “Second Circuit Weighs in on Advertising by Certified Attorneys,” *ABI Journal*, Vol. XXXI, No. 4, May 2012, and Bryan J. Hall, “Warning: Required Disclosures for Attorney Specialists May Violate First Amendment,” *ABI Ethics and Professional Compensation Committee Newsletter*, Vol. 10, No. 1, January 2013, [www.abiworld.org/committees/newsletters/ethics-and-professional-compensation/vol10num1/warning.html](http://www.abiworld.org/committees/newsletters/ethics-and-professional-compensation/vol10num1/warning.html).

11 See Rule 7.4 Communication of Fields of Practice and Specialization, [www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_7\\_4\\_communication\\_of\\_fields\\_of\\_practice\\_specialization.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_4_communication_of_fields_of_practice_specialization.html); see also Oklahoma Bar Association, Ethics Opinion No. 315 (Dec. 15, 2000), [www.okbar.org/ethics/315.htm](http://www.okbar.org/ethics/315.htm).

12 ABC, [www.abcworld.org/state/](http://www.abcworld.org/state/).

13 630 F.3d 1336 (11th Cir. 2011). The *Zisser* court famously noted, in upholding the importance of the peer-review component of Florida’s marital and family law board certification program, that “[t]o ensure that certification achieves its purpose, the Bar has established a body of rules and procedures, including a confidential peer review process, so that an attorney certified in an area of practice truly is ‘somebody’ in that field; without such rules and procedures, the process, the decisions it produces, and the resulting recognition would not amount to much.” *Id.* at 1338.