COMMENTS OF THE NEW YORK STATE BAR ASSOCIATION COMMITTEE ON STANDARDS OF ATTORNEY CONDUCT

on

PROPOSED AMENDMENT TO RULE 7.4 OF THE RULES OF PROFESSIONAL CONDUCT RELATING TO THE REQUIREMENT THAT SPECIALIZATION DISCLAIMERS BE "PROMINENTLY MADE"

The Committee on Standards of Attorney Conduct ("COSAC") of the New York State Bar Association (the "NYSBA") hereby submits its Comments on the proposed amendments to Rule 7.4 of the New York Rules of Professional Conduct set forth in the May 31, 2013 Memorandum of the Unified Court System's Counsel seeking public comment (the "Proposal"). These Comments are COSAC's alone. They have not been reviewed or approved by the NYSBA House of Delegates.

Rule 7.4 regulates when a lawyer may publicly identify himself or herself as a "specialist" or a "certified specialist" and requires that certain accompanying disclaimers be "prominently made." The Proposal would add a new subparagraph (c)(3) to Rule 7.4 that would provide more specific directions as to the legibility and audibility of those disclaimers.

SUMMARY OF COMMENTS

COSAC recognizes that a lawyer's claim of specialty certification has the potential to mislead the public, particularly when the certification is given by a private organization. Nevertheless, COSAC also recognizes that obtaining a specialty certification covered by Rule 7.4(c)(1) or (c)(2) is both difficult and commendable. In our view, lawyers wishing to advertise their accomplishment should not face an undue regulatory burden.

COSAC therefore recommends that the requirement of legibility and audibility be confined to requiring that the disclaimers be in the same font size as the statement of certification itself or, if spoken, the same cadence and volume. In addition, COSAC recommends that the disclaimers be shortened and that the disclaimer used in the case of out-of-state governmental certifications be revised simply to make clear that the disclaimer is not granted by any governmental authority in New York. The existing disclaimer that the certification is not "recognized" by any New York governmental authority is not entirely accurate and creates a misleading impression that some certifications are recognized by such an authority.

Thus, COSAC recommends that Rule 7.4(c) be revised as indicated below:

(c) A lawyer may state that the lawyer has been recognized or certified as a specialist only as follows:

(1) A lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: "~~The [name of the private~~

~~certifying organization~~] This certification is not ~~affiliated with~~ granted by any governmental authority."

(2) A lawyer who is certified as a specialist in a particular area of law or law practice by the authority having jurisdiction over specialization under the laws of another state or territory may state the fact of certification if, in conjunction therewith, the certifying state or territory is identified and the following statement is prominently made: "This ~~C~~certification is not granted by ~~the [identify state or territory] is not recognized by~~ any governmental authority within the State of New York."

(3) A statement is prominently made if, when written, it is legible and capable of being read by the average person and is in a font size at least as large as the largest text used to state the fact of certification, and when spoken, it is intelligible to the average person, and is in a cadence no faster, and volume no lower, than the cadence and volume used to state the fact of certification.

If COSAC must choose between the two options proposed by the Unified Court System for written claims of certification, we would prefer the second option (making the font size two points larger but not requiring bold or upper case letters).

BACKGROUND

Fundamental to our recommendations on the prominence and disclaimer requirements of Rule 7.4 is our view that (a) the certification requirements of the various certifying organizations referred to in Rule 7.4 are generally rigorous, (b) relatively few lawyers obtain them, and (c) there is relatively little danger of misleading the public from truthful disclosure of such certifications. In 2008 the NYSBA Special Committee on Legal Specialization in New York undertook a study of the possibility of reviving proposals that the NYSBA accredit specialty certification programs. The NYSBA House of Delegates had rejected such a proposal in 1986, based in part on concerns that non-rigorous certification programs would proliferate, confusing or misleading the public, and that general practitioners would be harmed as the public would flock to certified lawyers to handle increasingly specialized legal needs. The Special Committee concluded that, after more than two decades of experience, these concerns – and indeed the overall fear that the public will prefer lawyers who are certified – had proven not to be well founded.

The ABA has played a prominent role in establishing standards for accreditation of specialty certification programs since 1993. It currently has in place a Standing Committee on Specialization, whose members are appointed by the ABA President and which, under the auspices of the ABA's Center for Professional Responsibility, continues to evaluate the accreditation standards and determine whether specific applicant organizations should be accredited or retain an existing accreditation. The ABA Standards for Accreditation of Specialty

Certification Programs for Lawyers (the "ABA Standards") require organizations seeking accreditation to meet rigorous requirements, including, among many others: (a) that the accrediting organization "is dedicated to the identification of lawyers who possess an enhanced level of skill and expertise"; (b) that "it possess[es] the organizational and financial resources to carry out its certification program on a continuing basis"; and (c) that those who evaluate applicants for certification are "lawyers who have substantial involvement in the specialty area." ABA Standards, §§ 4.01-4.03. More specifically, the certifying organization must require that lawyers seeking certification, *at a minimum:*

- Devote no less than 25% of their total practice to the area in which they are seeking certification;
- Obtain a minimum of five detailed references, a majority of which are from judges or lawyers familiar with the lawyer's competence in the practice area, and "none of which are from persons related to or engaged in legal practice with the lawyer";
- Pass a written examination "of suitable length and complexity";
- Devote a minimum of 36 hours to "participation in continuing legal education in the specialty area in the three-year period preceding the lawyer's application for certification;" and
- Be of good standing in their jurisdiction.

ABA Standards, § 4.06.

The accrediting organizations often exceed these ABA minimums in setting standards for certifying attorneys. The National Board of Legal Specialty Certification (formerly the NBTA), for example, requires that an applicant for certification as a civil or criminal trial advocate demonstrate that he or she: (a) has devoted more than 30% of their time to civil or criminal trial practice within the past three years; (b) has conducted at least 45 days of trial in his or her career; (c) has served as lead counsel in at least five jury cases; (d) has conducted direct and cross-examination of 25 lay witnesses; (e) has conducted direct and cross-examination of at least 15 expert witnesses; (f) has participated in at least 100 additional contested matters involving the taking of testimony (including depositions); and much more. The NBTA also requires CLE participation, peer review, a written examination, and a legal writing sample. *See* www.nblsc.us/certification_standards_civil.

Equally onerous are the requirements of the American Board of Certification (the "ABC"), the ABA-accredited organization that certifies attorneys as specialists in business bankruptcy, consumer bankruptcy, and creditors rights law. As with the NBTA, the ABC has detailed practice requirements, including that a minimum of 30% of the lawyer's practice be devoted to bankruptcy law; that the lawyer have devoted a minimum of 400 hours to the practice of bankruptcy law in each of the past three years; that the lawyer have "substantially participated" in a minimum of 30 relevant "adversary proceedings or contested matters," either by trying cases, drafting motions or otherwise; and that the lawyer meet extensive CLE

requirements, undergo peer review, and pass a written examination. *See* www.abcworld.org/rules.

In our experience, relatively few New York lawyers seek certification from ABA-sponsored organizations (or from other states). The 2008 NYSBA Special Committee Report estimated (at p. 21) that only 3-5% of New York attorneys would seek NYSBA-sponsored certification if it were made available. We believe that those who ultimately obtain such a certification should not face undue barriers in making their achievement known. Moreover, while we understand the concerns expressed by the Court of Appeals in *Hayes v. Grievance Committee of the Eighth Judicial District*, 672 F.3d 158, 167 (2d Cir. 2012), about the risk that members of the public would be misled into thinking that the ABA-sponsored certification process is actually sponsored by the State, the rigor involved in obtaining certification indicates that the actual danger to the public from *truthful* disclosure of certification by a private organization is minimal.

Similarly, because the number of lawyers obtaining certification is relatively small, the predictions that the public would jettison general practitioners in favor of certified lawyers, and that certification by private organizations would become *de rigeur* among attorneys, simply has not come to pass. Moreover, in our experience, general practitioners often recognize that, on certain matters, either working together with or referring a matter to a certified specialist is in the client's best interest. As the *Hayes* court recognized, there are situations that a certified lawyer may be more qualified to handle than a general practitioner – and it is appropriate for the public to know which lawyers have obtained a specialty certification. *See Hayes,* 672 F.3d at 168.

Finally, any concern that private certifying organizations would rapidly proliferate and become difficult to police has not come to pass. Since it began accrediting certifying organizations in 1993, the ABA has accredited only seven different organizations, which offer a total of only fourteen specialty certifications. Indeed, the ABA has not accredited any new private certifying organization since 2004, and no new applications are currently pending at the ABA.[1]

With these general considerations in mind, we turn to our recommendations concerning the Proposal.

RECOMMENDATIONS

The Prominence Requirement

The Proposal seeks to amend Rule 7.4(c) (3) by supplementing the prominence requirement with either of two alternate additional paragraphs as follows:

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[1] For further background, see the website of the ABA Standing Committee on Specialization http://www.americanbar.org/groups/professional_responsibility/committees_commissions/specialization.html.

Alternative 1: "(c)(3) A statement is prominently made if when written it is legible and capable of being read by the average person, and is in bold type face and upper case letters in a font size at least as large as the largest text used to state the fact of certification, and when spoken aloud, it is intelligible to the average person, and is a cadence no faster, and a level of audibility no lower, than the cadence and level of audibility used to state the fact of certification."; and

Alternative 2: "(c)(3) A statement is prominently made if when written it is legible and capable of being read by the average person, and is at least two font sizes larger than the largest text used to state the fact of certification, and when spoken aloud, it is intelligible to the average person, and is a cadence no faster, and a level of audibility no lower, than the cadence and level of audibility used to state the fact of certification."

The only difference between the two alternatives is that the first requires the disclaimer to be (a) in *bold type face*, and (b) in *upper case letters*, and (c) in a *font size at least as large* as the largest text used to state the fact of certification, while the second requires only that the *font size used must be at least two font sizes larger than* the size of the font size used for the statement of certification, but does not require bold face or upper case letters.

Thus, under Alternative 1, if the statement of certification is stated in 12 point type as "John Jones is certified by the National Board of Legal Specialty Certification as a Certified Civil Trial Specialist" the disclaimer under Alternative 1 would read **"THE NATIONAL BOARD OF LEGAL SPECIALTY CERTIFICATION IS NOT AFFILIATED WITH ANY GOVERNMENTAL AUTHORITY."** However, the same disclaimer under Alternative 2 would read "The National Board of Legal Specialty Certification is not affiliated with any governmental authority." Both are awkward and suggest that certification should be looked on with suspicion because it lacks government affiliation.

Significantly, the Proposal treats disclaimers regarding certification differently from other disclaimers required by the advertising rules. For example, the disclaimer required by Rule 7.1(e)(3) for attorneys advertising their past successes – "Prior results do not guarantee a similar outcome" – need not be in any particular font size, bolded, or underlined, nor must the words "attorney advertising," which Rule 7.1(f) requires be included on any print advertisement. This is so despite the fact that both involve content much more likely to mislead the public than a truthful claim of ABA-sponsored certification. To be consistent with the treatment for the "attorney advertising" and "prior results" disclaimers, it should be enough that the claim of certification not be false, deceptive, or misleading – the overarching requirement found in Rule 7.1(a) – and that the disclaimer be readable by the average person. A more demanding requirement unfairly diminishes the substantial and meaningful accomplishment of obtaining a specialty certification.

Under the Proposal, if the fact of certification is spoken aloud, the statement of disclaimer is considered "prominently made" as long as it is not at a faster cadence or lower audibility than the statement of certification. There is no requirement that the spoken disclaimer be announced in a form asserting more or different prominence than the spoken form of certification. COSAC

believes that it would be sufficient to state the disclaimer in the same font size as the statement of certification, and we urge the Court to adopt that standard of prominence.

Nevertheless, should the Courts not adopt our suggestion, COSAC prefers Alternative 2, as the requirement in Alternative 1 for bold type face and all capital letters seems an unnecessarily harsh requirement with no additional benefit.

Proposed Changes to Language of Disclaimers

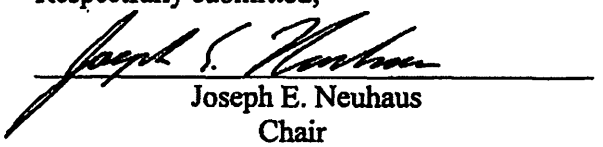
COSAC also recommends changes to the language of the required disclaimers. First, it is unnecessary to state the name of the certifying organization twice (once in stating the fact of certification and again in the disclaimer). The names of some of the certifying organizations are lengthy, and more importantly, there is a virtue in as much brevity as possible where text is to be used in settings in which space is at a premium, such as letterheads, business cards, and advertisements. More substantively, the required disclaimer for certifications by out-of-state governmental authorities – that the certification is not "recognized" by any governmental authority in New York – is, strictly speaking, inaccurate and is itself misleading and unduly negative. The disclaimer is inaccurate because the Rule allows mention of the out-of-state governmental certification, which is not true of all such purported certifications, and that is a form of "recognition." The disclaimer is misleading because it carries the implication that some certifications are "recognized" by a New York governmental authority.

CONCLUSION

The proposal to require that the disclaimer that is to accompany statements of certification as a specialist be of significantly greater prominence than the statement of certification itself goes beyond what is needed to protect the public and unnecessarily denigrates the certification. It should be sufficient that the disclaimer be the same size and prominence as the statement of certification. In addition, the disclaimers themselves should be shorter and more neutrally stated. These suggestions will cure the constitutional infirmities cited in *Hayes* without discouraging lawyers from advertising their hard-earned certifications. It will also make Rule 7.4 simpler to follow while addressing the concerns about the potentially misleading nature of those certifications.

July 29, 2013

Respectfully submitted,



Joseph E. Neuhaus
Chair
Committee on Standards of Attorney Conduct
of the New York State Bar Association

OCARule7-4 - DISCLAIMER

From: Mike Hayes <jmh@jmichaelhayes.com>
To: "OCARule7-4@nycourts.gov" <OCARule7-4@nycourts.gov>
Date: 6/3/2013 8:30 AM
Subject: DISCLAIMER
Attachments: Letterhead _new_.pdf; Letterhead.pdf

Mr. McConnell,

I sent you a copy of my letterhead last week. "Word" sometimes does not show the entire document. I am attaching pdf's of the same documents. That way there can be no misunderstanding.

As to the ultimate question you pose, the answer would seem to have been supplied by the Second Circuit: Permit a practitioner who may be concerned that his advertisement is not "prominently made" to request an advisory opinion from the Grievance Committee. In a like manner, when the Grievance Committee perceives a potential violation, let them call the practitioner first.

I appreciate that the Courts are loathe to provide advisory opinions. However, devising a single rule to cover all forms of advertising is nearly impossible. This is a workable solution.

J. Michael Hayes

J. MICHAEL HAYES

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Very truly yours,

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OCARule7-4 - DISCLAIMER

From: Mike Hayes <jmh@jmichaelhayes.com>
To: "OCARule7-4@nycourts.gov" <OCARule7-4@nycourts.gov>
Date: 5/31/2013 3:04 PM
Subject: DISCLAIMER
Attachments: Letterhead.doc; Letterhead (new).doc

Mr. McConnell,
I was just provided a copy of the proposed new "Rule 7-4".
Attached is my present letterhead and one "compliant" with the new Rule.
The first question should be whether there has there been much abuse of the Certification authority by the 50 lawyers who are so certified in NY?
If the Bar wants to target a particular group, why doesn't it go after the advertisers who may not even know where the Court House is located?
Respectfully, this all strikes me a a bit onerous.

J. MICHAEL HAYES

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