

# SMITH LAW FIRM

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To whom it may concern:

I have been retained by Stewart Davidson, ACSFP Advisory Board President, on behalf of the ACSFP—Association of Chartered Senior Financial Planners, Inc. It is my opinion, based on my research, that a governmental agency, including a State Department of Insurance or other regulatory board, could not prohibit a person under the agency's jurisdiction (hereinafter collectively "agent" or "agents") from advertising that they had completed a continuing education ("CE") course provided by the ACSFP, as long as the course had previously been submitted to and approved by their resident State's Department of Insurance or other regulatory body charged with approving CE courses (hereinafter "department of insurance"). The advertiser could include the dates of attendance, course number, and number of hours approved. This prohibition does not extend to private insurance companies, brokers dealers, agency, or any other private entity (hereinafter "agencies"), who can limit their agents' advertisement at will subject only to the terms of the contract between the agent and the agency. The reasoning for my opinion is as follows:

Advertising is protected by the first amendment, though it is not afforded the same level of protection as non-commercial speech. *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 100 (1990). Thus, if a state law prohibits the use of true information that does not have a tendency to mislead consumers in advertising, it is likely unconstitutional.

*Peel* is a U.S. Supreme Court case that lists the relevant constitutional standards with regards to professional advertisements. 496 U.S. 91. In *Peel*, an attorney's letterhead contained the line "Certificate in Trial Advocacy" from the National Board of Trial Advocacy (NBTA). The NBTA is a well established, well respected organization that certifies lawyers in trial advocacy and operates nationally. Membership is open to all attorneys, and

NBTA has developed a set of standards and procedures for periodic certification of lawyers with experience and competence in trial work. Those standards, which have been approved by a board of judges, scholars, and practitioners, are objective and demanding. They require specified experience as lead counsel in both jury and non jury trials, participation in approved programs of continuing legal education, a demonstration of writing skills, and the successful completion of a day-long examination. Certification expires in five years unless the lawyer again demonstrates his or her continuing qualification.

The lawyer in question in peel was disciplined by the state Attorney Registration and Disciplinary Commission of Illinois, a division of the state bar association of Illinois supervised by the state supreme court (a state organization, not a private organization exempt from the requirements of the First Amendment) for violating a rule against using any certification in advertising that has not been approved by the state.

The U.S. Supreme Court ruled that the “blanket prohibition” against certification was an unconstitutional restriction on commercial speech in advertising. The court noted that the certification was not deceptive and would not tend to mislead prospective clients because the certification would not tend to carry more weight than a simple factual recitation of the requirements to get the certification, which did tend to indicate a higher level of expertise than those not certified. Even if someone could be misled, a state ban on commercial speech that may, but is not inherently misleading is unconstitutional.

The Court summed up authority to regulate commercial speech as follows:

Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content of method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice. If the information also may be presented in a way that is not deceptive....

Even when a communication is not misleading, the State retains some authority to regulate. But the State must assert a substantial interest and the interference with speech must be in proportion to the interest served.

*Peel*, 496 U.S. at 100 (quoting *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)). In the context of certifications, the Court clarified:

We do not ignore the possibility that some unscrupulous attorneys may hold themselves out as certified specialists when there is no qualified organization to stand behind that certification. A lawyer's truthful statement that “XYZ Board” has “certified” him as a “specialist in admiralty law” would not necessarily be entitled to First Amendment protection if the certification was a sham. States can require an attorney who advertises “XYZ certification” to demonstrate that such certification is available to all lawyers who meet objective and consistently applied standards relevant to practice in a particular area of the law.

*Id.* at 109.

So, by careful analysis of *Peel*, whether the state can regulate use of a “certification” or, by logical extension, membership in an organization that purports to provide specialized knowledge or education, is entirely dependent on the organization providing the certification or membership. The state certainly may regulate such advertisement if the certification or membership is pro forma, and does not actually depend on meeting objective, consistent standards that actually indicate that the person does have a greater degree of knowledge or experience, because such a claim would tend to make an individual believe the person claiming the membership or certification actually does possess training and experience which they might not, and would thus be inherently misleading. On the other hand, if the membership or certification is no more persuasive than the requirements necessary to obtain that certification, then the State may not regulate it; the advertisement would be truthful, not misleading, and thus present no compelling justification that would allow state regulation.

Thus, the State or the Department of Insurance may not prohibit an agent from advertising that they had completed the ACSFP course because that advertisement is not inherently deceptive and would not have a tendency to deceive. Saying that the agent

attended a particular Department of Insurance approved CE course on such and such dates and obtained so many hours of CE credit is a mere recitation of facts, and as long as the advertisement is not worded in such a way as to make the agent appear to have greater expertise than the course actually provides, it is perfectly acceptable and not subject to state regulation. For example, an agent could, without fear of reprisal, advertise that they completed the approved CE course offered by the ACSFP, the dates of attendance, the CE hours achieved, and even indicate the areas of training offered in the course. Advertising that they are a “member of ACSFP” is likely not deceptive or likely to mislead, so long as the course is approved by the State Department of Insurance and the course does, in fact, provide additional expertise above and beyond another agent who has not taken the course and is not an active ACSFP member.

This prohibition does not apply to private agencies. Simply put, the First Amendment does not apply, in any way, to private, non-state actors. *United States v. Stanley*, 109 U.S. 3 (1883). A private agency may prevent its agents, as employees or contractors, from advertising in any way it sees fit. The only potential limits to this ability of the agencies would be in the contract between the agency and the agent or the laws of the state in which the agent is situation. Thus, a determination of whether an agency can limit the agent’s advertising consistent with state law and the contract must be made on a case by case basis and is beyond the scope of a general opinion letter. For example, if a contract an agent has with an insurance company or broker dealer, or other private entity states; the agent must be duly licensed and/or must abide by applicable laws; and if the agent’s home State Department of Insurance, Broker Dealer, SEC (securities and exchange commission), or other regulatory board requires the agent to complete a certain number of hours of “CE” Continuing Education Credits to maintain that license, then the agent could advertise that he completed such course(s), as long as the course(s) had previously been submitted to and approved by their resident State Department of Insurance or other regulatory body charged with approving CE courses. The advertiser could include the name of the course, dates of attendance, course number, and number of CE hours approved.

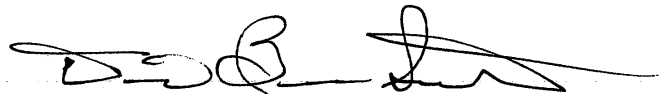
In summary: An agent may advertise that they completed the ACSFP course (including the course number and dates of attendance), or may hold themselves out as a **member of the ACSFP**. As long as the advertisement is not inherently misleading and

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does not have a tendency to mislead those who may view it who do not have expertise in the industry, the State may not prohibit that advertisement. However, this rule does not apply to a private insurance company or agency, and whether the private company can limit the advertisement of an agent in a particular way must be determined on a case by case basis; and would depend upon the contractual terms of the contract the agent has with that private company.

If you have any questions or concerns, please don't hesitation to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'David Burnell Smith', with a long horizontal flourish extending to the right.

David Burnell Smith

DBS/ea