Certification Programs: Understanding Legal Risks

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CREDENTIALING

 Process by which an agent qualified to do so grants formal recognition to and records such status of entities (individuals, organizations, processes, services, or products) meeting predetermined and standardized criteria.

 Can include certification, accreditation, recognition, certificate programs, etc

LEGAL ISSUES

Corporate Structure Tax Exemption Antitrust Due Process **Tort Liability Intellectual Property** Contracts Americans with Disabilities Act Confidentiality Insurance

CORPORATE STRUCTURE

- Need for autonomy and independence to prevent undue influence and bias, but no legal requirements
- National Commission for Certifying Agencies
 - Standard 2-Autonomy over "Essential Certification Activities" – eligibility, development/scoring exams, personnel, operational policies, incorporation sufficient
- American National Standards Institute
 - ISO 17024 structure that "Safe Guards Impartiality" must be a "Legal Entity or Part of Legal Entity"
- Incorporation or operation as autonomous unit should suffice; more insulation from liability for separate corporation (though more risk of 'run-a-way')
- Include autonomy provisions in bylaws or policies

TAX EXEMPTION

- Professional certification and non-academic accreditation generally are tax-exempt activities for Section 501(c)(6) associations
- IRS position that professional certification is <u>not</u> Section 501(c)(3) activity (except limited public purpose certification) academic accreditation is 501(c)(3)
- Likely that certificates for education courses are permissible for 501(c)(3)
- Certification and accreditation fees exempt from tax

<u>ANTITRUST</u>

- Sherman Act, Section 1, prohibits price-fixing, boycotts, market allocation, tie-ins
- Boycotts are concerted refusals to deal, or only deal on specified terms
- Professional certification and accreditation programs risk claims
- Per Se violations NSPE case re Code of Ethics
- Rule of Reason is likely analysis for certification and accreditation programs

<u>ANTITRUST</u>

- Hydrolevel v. Am. Soc. Mechanical Engineers (1982)
 - Association responsible for acts of volunteers
- Marjorie Webster College v. Middle States (D.C. Cir. 1970) Held courts would not review as antitrust violation, unless "virtual pre-requisite"
 - Standards must be "Reasonable," "Even Hand"
 - Judicial deference to professional judgment
- Consolidated Products v. API (5th Cir. 1988)
 - Product Certification not Per Se violation

<u>ANTITRUST</u>

- Ezekwo v. Am. Bd. Internal Medicine (N.Y. 1998)
 - Failure to certify when candidate fails exam is not illegal boycott
- Foundation Interior Design Education Research v.
 Savannah College (6th Cir. 2001)
 - Accreditation decision held not to violate the antitrust laws

- Not Constitutional Due Process
- Common Law Fairness
- Substantive and Procedural Due Process
- Much more of concern than Antitrust
- Substantive standards and criteria must be applied reasonably, with an even hand
 - Open process leads to fairness
- Procedural Due Process
 - Notice of actions or requirements
 - Opportunity to be heard
 - Fair and impartial decision-maker

- For certification, due process generally requires:
 - Open process for standards and criteria
 - Accurate job analysis
 - Fair assessments
 - Psychometrically sound
- ANSI 17024 requires due process
- NCCA Standards also requires due process
- NCCA Standards for "Responsibilities to Stakeholders" (6-9)
 - Establish, publish, apply and review policies and procedures for eligibility criteria, exams, etc.
 - Publish description of assessments and research methods demonstrating validity
 - Publish lists of certificants

- NCCA Standards for "Assessment Instruments" (10-18)
 - Publish job analysis
 - Psychometrically sound
 - Cut score consistent with established level of competence
 - Document procedures
 - Ensure reliable scores
 - Different forms equivalent
 - Ensure security
 - Score retention
- NCCA Standards for "Recertification" (19-20)
 - Periodic Recertification
 - Review to ensure measurement accurate

- Important Area: Appeals and Discipline
 - NCCA Standard 6
 - ANSI Standard 4.2.7
- May refer to different stages
 - Eligibility review denied candidate limited
 - Examination appeal candidates may request hand scoring, further review - typically more limited
 - Determination review appeal of decision to deny certification
 - Disciplinary process to handle complaints or denial of re-certification
- Key to have procedures in place

- In disciplinary process, basic due process principles are:
 - Fair and reasonable
 - Notice
 - Opportunity to respond
 - Fair and impartial decision-maker
- Procedures should set out basic scope and grounds for discipline; violation of code of ethics, or
 - Felony or crime of moral turpitude in profession
 - Gross negligence or professional misconduct
 - Fraud or misrepresentation in application or other submissions

- Initial receipt of complaints
 - Unreliable, unsupported, or frivolous are rejected
- If actionable complaint, notice to certificant, and process begins
- Review Committee established to investigate and recommend disciplinary action to the Board, which administers discipline

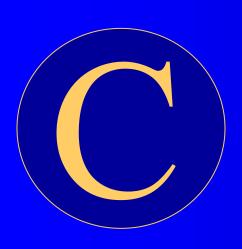
- If appealed, separate panel appointed
- Should not include those who have already participated in investigation or on Board
- Limited basis for appeal
- Don't need trial-type proceeding, witnesses, formal rules of evidence, legal counsel
- State scope of what panel can do in policy

TORT LIABILITY

- Injury to Third Parties
- Negligence requires
 - Duty
 - Reliance
 - Negligence
 - Resulting Injury
- Restatement of Torts, § 324A
- No cases holding certification or accreditation body liable that we know of
- NSPI Cases <u>King</u> and <u>Meneely</u> standards setting and failure to fix deficiencies

INTELLECTUAL PROPERTY

- Copyrights
- Trademarks
- Patents
- Member/Certificant Lists
- Also -
 - Right of Privacy
 - Right of Publicity



- Federal Copyright Act
- Authorship
- Rights
- Work-for-Hire
- Fair Use
- Notice
- Registration
- Assignment/License
- Infringement

- Copyright protection "subsists in original works of authorship fixed in any tangible medium of expression..." Section 102 of Copyright Act
- Rights accrue upon creation; no notice or registration is required
- Ideas and facts are not covered
- Electronic expressions are covered

<u>COPYRIGHT</u>

- Proper Notice under Section 401 of Copyright Act is:
 - Symbol © or "Copyright" or "Copr."
 - Year of first publication of work
 - Name of copyright
- Notice is NOT required for ownership, but use of notice prohibits innocent infringement defense

- Works may be registered with U.S. Copyright
 Office, Library of Congress with deposit of work
- Registration is NOT necessary to own copyright, but required for suit
- If work is registered prior to infringement or within three months of publication, copyright owner can sue for copyright infringement and claim statutory damages of up to \$150,000, for each willful infringement under Section 504
- Can register tests with exception for deposits

<u>COPYRIGHT</u>

- Literary works
- Musical works
- Dramatic works
- Pictorial, Graphic, and Sculptural works (includes graphics, charts, and figures)
- Motion pictures and other audio-visual works
- Sound recordings
- Tests and Websites are covered

- Section 101 of Copyright Act defines as
 - "Work prepared by an employee within the scope of his or her employment" or
 - Specifically ordered or commissioned as a contribution to collective work, part of audiovisual work, translation, supplementary work, compilation, instructional text, test, answers to test, or atlas, IF expressly agreed in a written instrument signed by the parties.
- Under Work-for-Hire, employer is author and owner under the law for all purposes

- The infamous "Fair Use" Doctrine under Section 106 of Copyright Act:
 - Defense to copyright infringement
 - Allows use of a copyrighted work without permission of author
 - BUT-
 - Vague and subjective
 - Lots of litigation

- Copyrights can be assigned (i.e., transferred) only upon signed written instrument under Section 204 of Copyright Act
- Permission (i.e., license) to use copyrighted works can be granted, and can be expansive (exclusive) or limited (only certain rights); can be written or implied

TRADEMARKS

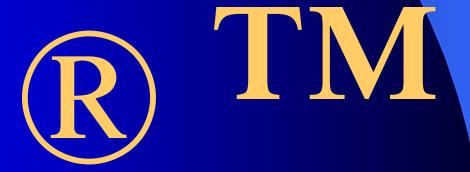
- Trademarks and Service Marks essentially the same from legal perspective
- Certification Marks are different
- Signify source and origin of product or service
- Can be name, design logo, or acronym of Association or Certification Board
- If another uses a mark that is "confusingly similar," constitutes trademark infringement

TRADEMARKS

- Rights accrue upon first use in interstate commerce
- Owner of marks would be the Association or Certification Board
- Registration with Patent and Trademark Office provides procedural advantages (presumptive first use and ownership; prevents defense of innocent infringement)

TRADEMARKS

- Can always use TM or SM if claim trademark rights
- Can only use R in a circle if federally registered



CERTIFICATION MARKS

- Designate person or product recognized as meeting specified standards and criteria
- Key difference: certification mark can <u>only</u> be used by the one certified - NOT by the Association or Certification Board
- But Board can license/allow use of trademarks or service marks, acronym to/by certificants to achieve same result
- Key: adopt clear use policy

CERTIFICATION MARKS

- PTO has limited view of Certification Marks; not easy to register unless unique, such as design logo
- Crowded field, lots of C-somethings
- CERTIFIED CERTIFICATION PROFESSIONAL; CCP
- Generally not recommended to attempt to register

Basic areas to consider when reviewing a contract:

Warranty

I ntellectual Property

Payment

I ndemnification

Termination

- Warranty
- A statement by the provider of the product or service representing that it will meet certain criteria or standards of performance
- Specify exactly what must be done; with schedule, due dates for deliverables, and acceptance

- Intellectual Property
- Provisions relating to the use or creation of intellectual property by either side (e.g. copyrights, trademarks, mailing lists, etc.)
- Crucial to have certainty regarding copyrights; must have license (<u>i.e.</u>, permission) or assignment (<u>i.e.</u>, transfer) if not work-for-hire

- Payment
- A clear statement of payment terms, including payment schedule and maximum amount of payment according to budget

- Indemnification
- An agreement, mutual or reciprocal, to stand behind obligations and limit liability under a contract
- If indemnification not available, recognize risk factors
- Vendors often try to limit to fees paid

- Termination
- A clear statement regarding the term or duration of the contract and the means for terminating
- Should have an "out" clause
- Make sure that all materials are returned, regardless of any dispute; good idea to request copies periodically

AMERICANS WITH DISABILITIES ACT

- Prohibits discrimination on basis of disability
- Requires "reasonable accommodations"
- Section 309 for "examinations and courses"
 - Applies to certification exams
 - Requires assessment of aptitude or achievement on same basis
 - Must be accessible
 - May require extra time, reader, tape, braille, etc.
 - Applicant must request, with documentation;
 organization can assess independently

CONFIDENTIALITY

- Certification and accreditation bodies possess confidential information
- Policies generally prohibit disclosure without permission or unless required by law
- Boards often receive subpoena for records
- Must be jurisdiction by court
- Should only comply if required by court
- Can move to quash or obtain protective order

<u>INSURANCE</u>

- Legal actions are a real risk
- Advisable to have insurance
- Comprehensive General Liability
- Directors and Officers
- Errors and Omissions ("Malpractice")
- Association Professional Liability Insurance
- Specialty Insurance for Standards, Certification, and Accreditation

<u>INSURANCE</u>

- APLI usually protects against wrongful acts, negligence, infringement, employee claims, but not breach of contract
- Usually "duty to defend" and covers attorneys fees
- Should cover certification and accreditation if disclosed and not excluded
- Insurers may require specialty policy

THE END

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