

# **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 pre-determined 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 not 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

# ANTITRUST

- 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

# ANTITRUST

- 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

# ANTITRUST

- 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



# DUE PROCESS

- 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

# DUE PROCESS

- 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

# DUE PROCESS

- 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

# DUE PROCESS

- 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

# DUE PROCESS

- 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

# DUE PROCESS

- 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

# DUE PROCESS

- 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 - King and Meneely - standards setting and failure to fix deficiencies



# INTELLECTUAL PROPERTY

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

# COPYRIGHT



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

# COPYRIGHT

- 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

# COPYRIGHT

- 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

# COPYRIGHT

- 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**

# COPYRIGHT

- 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**

# COPYRIGHT

- 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

# COPYRIGHT

- 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



# COPYRIGHT

- 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



TM

# CERTIFICATION MARKS

- Designate person or product recognized as meeting specified standards and criteria
- Key difference: certification mark can only 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

# CONTRACTS

Basic areas to consider when reviewing a contract:

**W**arranty

**I**ntellectual Property

**P**ayment

**I**ndemnification

**T**ermination

# CONTRACTS

- 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



# CONTRACTS

- 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 (i.e., permission) or assignment (i.e., transfer) if not work-for-hire

# CONTRACTS

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

# CONTRACTS

- 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

# CONTRACTS

- 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

# INSURANCE

- 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

# INSURANCE

- 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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