



How Your Nonprofit Can Operate a Legally Sound Certification or Accreditation Program

Thursday, October 13, 2016, 12:30 pm – 2:00 pm ET

Venable LLP, Washington, DC

Moderator

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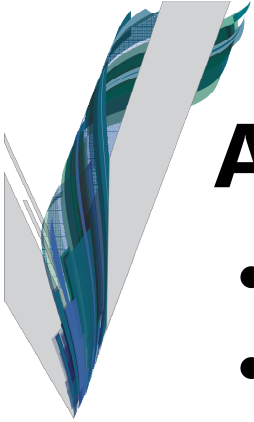
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Upcoming Venable Nonprofit Events

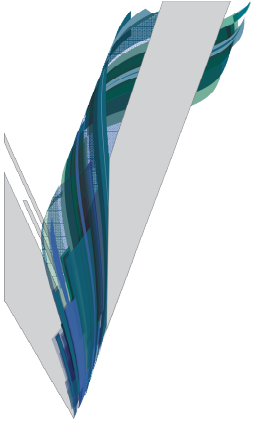
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- **November 10, 2016:** [Federal and State Regulators and Watchdog Groups Are Bearing Down on Charities and Their Professional Fundraisers: How to Prepare for the Regulatory Storm](#)
- **December 12, 2016:** [Top Ten Risks Facing Nonprofits Operating Internationally, Co-Sponsored by Venable LLP and BDO](#)



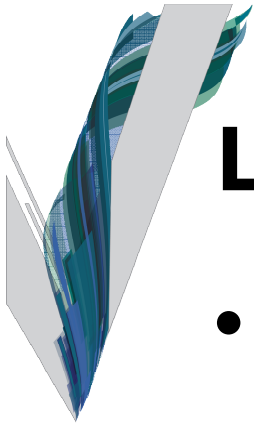
Agenda

- Introductions
- Legal Background
 - Due Process
 - Antitrust
 - ADA
 - Intellectual Property
 - Tax
 - Tort Liability
- Case Studies and Lessons Learned
 - PMI
 - AAM
- Conclusion/Questions



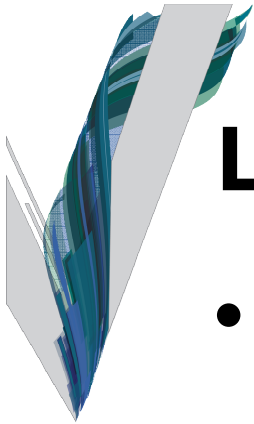
Accreditation and Certification

Legal Background



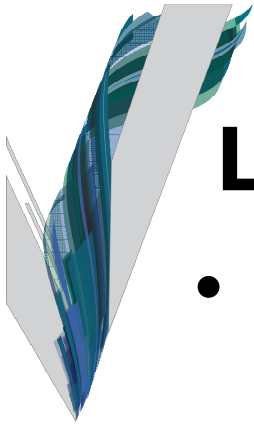
Legal Background

- Common activity of nonprofit organizations:
 - Certification of individuals – measuring competency, ability
 - Certification of products – measuring product performance, safety
 - Accreditation of entities
- Two key aspects:
 - Setting or agreeing upon standard to use
 - Applying standard through procedures
 - E.g., testing, field auditing



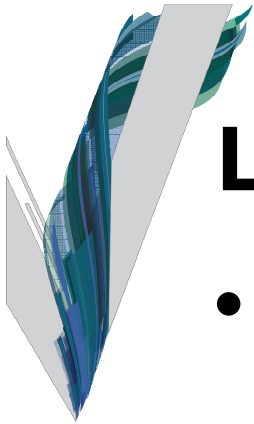
Legal Background

- What are the legal risks to organizations that engage in certification and accreditation?
 - Due process – Is the organization being fair in making decisions regarding certification?
 - Antitrust – Is the program anticompetitive?
 - E.g., designed to keep out price cutters?
 - ADA Compliance
 - Intellectual Property
 - Tax-Exempt Status
 - Tort Liability



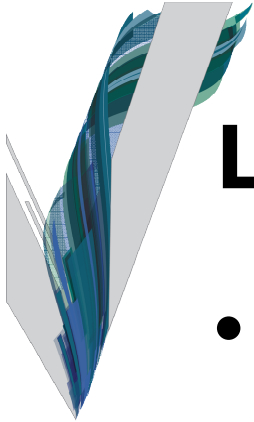
Legal Background

- Due Process and Antitrust:
 - Standards must be reasonable and fairly arrived at, and the certification/accreditation program must have pro-competitive results
 - SDOAA 2004 allows some protection from antitrust liability
 - Procedures for applying certification and accreditation decisions also must be fair – aggrieved parties should have some right to contest decisions; similarly situated people/entities should be treated similarly
 - Independence important for bodies that accredit certification organizations



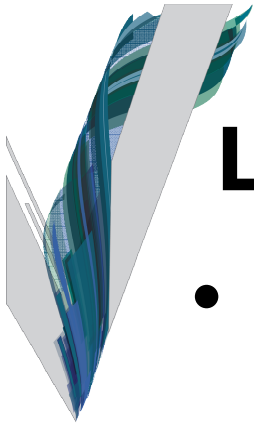
Legal Background

- ADA Compliance:
 - Issue arises most frequently in certification programs that involve certification of individuals
 - Must offer examinations and courses in a place and manner accessible to persons with disabilities
 - May involve extensions of time, etc.
 - Cannot force individual with a disability to bear the cost of an accommodation



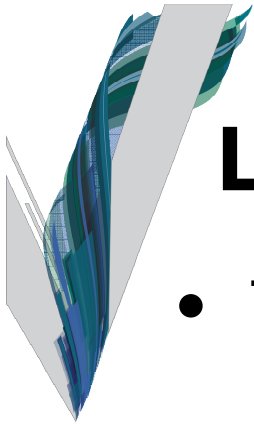
Legal Background

- Intellectual Property:
 - Copyright protection for standards, examination questions, other items
 - Trademark or certification mark registration to protect use of certification name



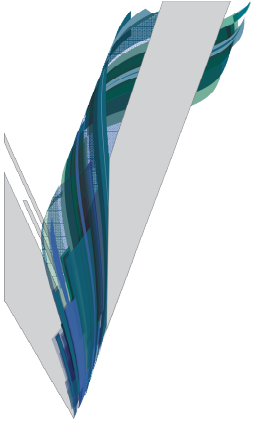
Legal Background

- Tax Exemption:
 - Certification activities generally more common for 501(c)(6) organizations; IRS has taken the position that regardless of the educational nature of a certification program, it is substantially focused on individual professional advancement
 - Some very limited exceptions
 - E.g., relieving burdens of the federal government
 - Accreditation programs which accredit in the arts, healthcare, and education fields may qualify under 501(c)(3)



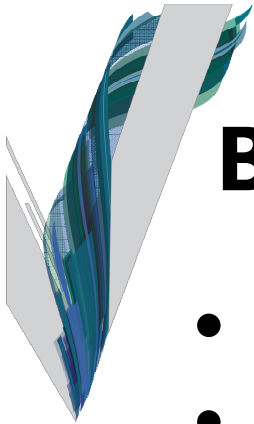
Legal Background

- Tort Liability:
 - Risk arises particularly in accreditation arena – when a third party relies on accreditation and uses a product or service and is subsequently harmed
 - Still, relatively limited risk can be managed with strong standard-setting, commonsense marketing language, and indemnification provisions
 - Defamation can be at issue when removal of a certification is being considered; confidentiality is key



Accreditation and Certification

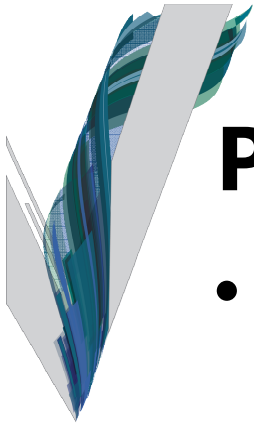
Case Studies and Lessons Learned



Background on PMI

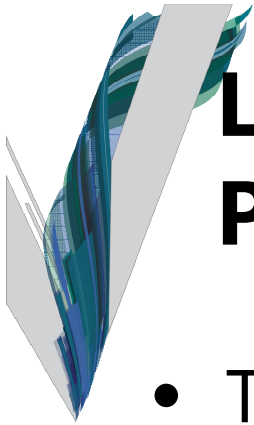


- Project Management Institute
- Professional membership association for anyone interested in project management
- Formed in 1969
- Almost 500,000 members in 183 countries
- 800,000 global active certification holders (46% North America)
- First certification was the Project Management Professional(PMP)® in 1988
 - Now eight certifications



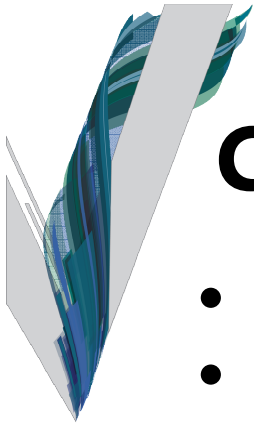
PMI Certifications

- Do not have to be a PMI member to become a certification holder
 - Members get discounts for certification fees
- Structure of examination is based on periodic role delineation studies conducted by third-party experts, and exam questions are developed by volunteer lead writing sessions, based on those studies
- PMP exams are four hours long, given at proctored, paper-based exam sites and at computer-based testing centers
 - Disabilities are accommodated
- Subject to U.S. OFAC regulations



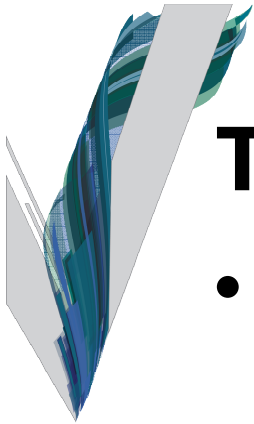
Legal Issues in the Certification Program

- Training Companies:
 - Claim to have a 100% pass rate
 - Claim to have access to real test questions
 - Setting up “certifications” that compete with PMP
- Individual Test Takers:
 - Claim to have been certified
 - Attempting to take the examination to obtain test questions



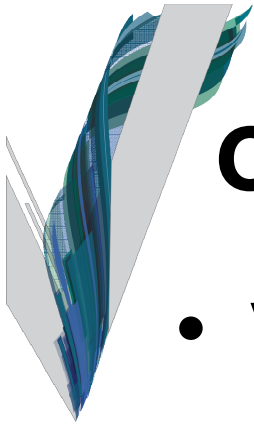
Copyright as a Protection

- Who owns the copyright to the questions?
- Obtain copyright assignments at item writing sessions
- File copyright registrations (including a secure copy of the test questions) to secure enforcement of your rights against infringers
- Do internet searches to see who is representing that they have copies of the test questions
- Include agreement to confidentiality in the certification agreement with the applicant and agreement to be bound by the PMI Code of Ethics and Professional Conduct



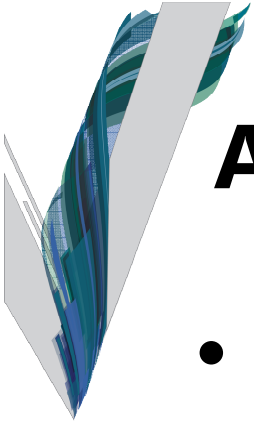
Trademarks as a Protection

- People claiming to have your certification and using the certification mark as part of their title
 - E.g., John Jones, PMP
- Trainers and testing companies using the mark in their company names and titles
 - E.g., PMProgram
- Register your certification mark in as many classes as appropriate
 - Class 41 Education and Training
- Maintain search capability to seek out offenders



Other Preventive Mechanisms

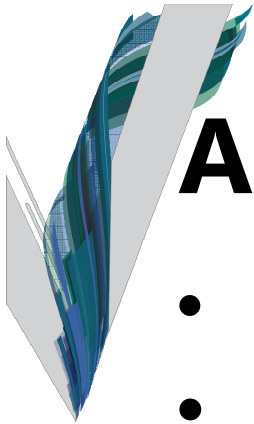
- Voluntary online register of certification holders
- Limit the number of times an individual can take the test in a year's time
- Registered Education Provider Program:
 - Participating trainers get to use an REP logo in exchange for a fee
 - Agree to abide by marketing and trademark guidelines



About AAM

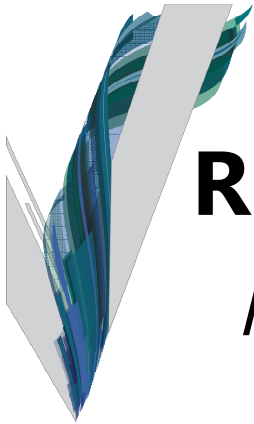


- American Alliance of Museums
- Champion museums and nurture excellence in partnership with our members and allies
- Formed in 1906
- 32,000 members (4K institutions + 28K people)
- Standards, ethics, best practices, assessments
- Professional development and training
- Advocacy
- Thought leadership



AAM Accreditation Program

- Since 1971
- 1054 accredited museums (<5% ; 1 non-U.S.)
- Resources:
 - 1500 peer reviewers (site visits) – volunteer
 - 7-9 Accreditation Commissioners – volunteer
 - 3 AAM staff
- Core Documents Verification + Apply + Self-Study + Site Visit + Commission; Reaccreditation every 10 yrs
- Open to all museum types/sizes/non-members



Risk Factor: Peer-Based Program

*Program dependent on volunteers to function:
asset and liability*

Issues:

- Consistency, quality, and accuracy of evaluation
- Behavior
- Availability

Preventative measures:

- Transparent and open Commissioner selection
- Peer Reviewer application form + résumé
- Published criteria for service/responsibilities
- Training and evaluation
- Use standardized forms and process everywhere possible to minimize variation



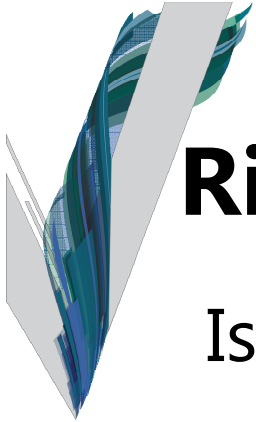
Risk Factor: Participation Levels

Issues:

- Enough participation impact to be meaningful?
Representative of the field? Accessible and applicable to all types and sizes? ROI?

Factors:

- Cost (dollars and time)
 - Review fee and site visit challenges for small-budget organizations
- Value proposition
 - Mostly internal; not used by the public as criteria to visit; not directly tied to funding
- Burden of process
- Misperceptions about standards and how applied



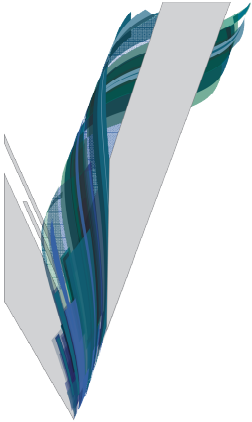
Risk Factor: Enforcement

Issues:

- Ensuring the process has enough “teeth”
- “Museum police”

Strategies:

- Mandatory reaccreditation
- Probation and allegation processes (not anonymous)
- Define scope of authority



Questions?

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