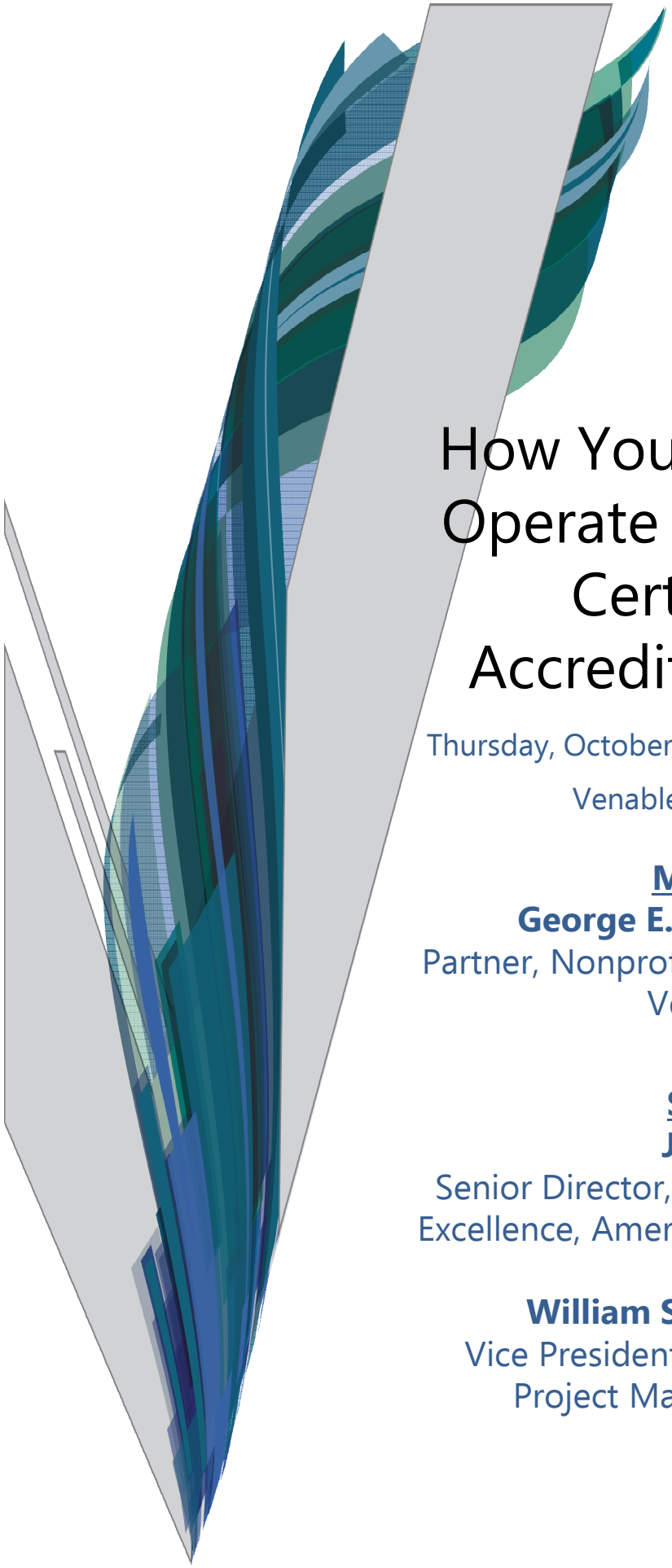


VENABLE® LLP

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

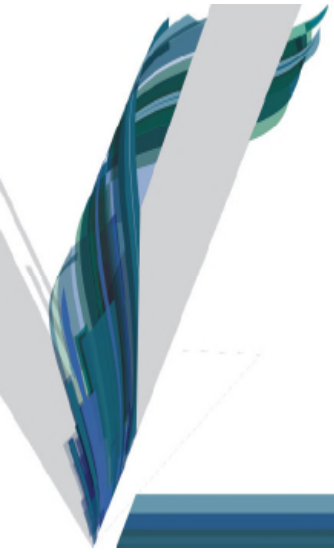
Moderator

George E. Constantine, Esq.
Partner, Nonprofit Organizations Practice,
Venable LLP

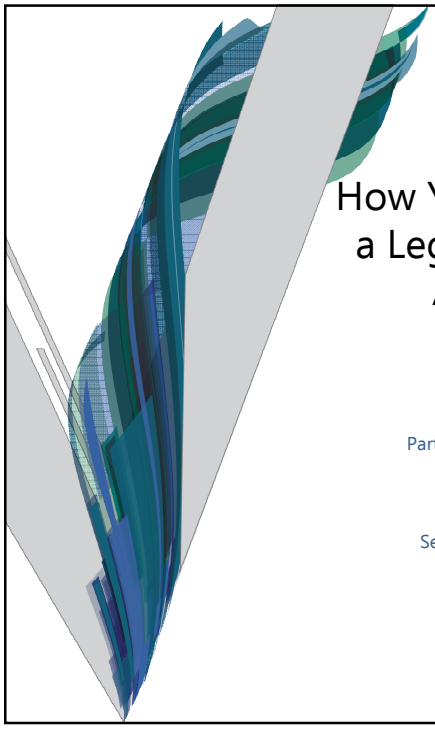
Speakers

Julie Hart
Senior Director, Museum Standards and Excellence, American Alliance of Museums

William Scarborough, Esq.
Vice President and General Counsel,
Project Management Institute



Presentation



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CAE Credit Information

*Please note that CAE credit is available only to registered participants in the live program.

As a CAE Approved Provider educational program related to the CAE exam content outline, this program may be applied for **1.5 credits** toward your CAE application or renewal professional development requirements.

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Upcoming Venable Nonprofit Events

Register Now

- **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

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Agenda

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

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Accreditation and Certification

Legal Background

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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

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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

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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

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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

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Legal Background

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

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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)

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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

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Accreditation and Certification

Case Studies and Lessons Learned

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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

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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

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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

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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

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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

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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

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About AAM

American Alliance of Museums

- 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

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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

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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

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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

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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

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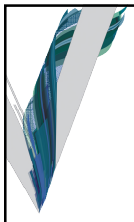

Questions?

George E. Constantine, Esq.
Partner, Nonprofit Organizations Practice,
Venable LLP
geconstantine@Venable.com
t 202.344.4790

Julie Hart
Senior Director, Museum Standards and Excellence,
American Alliance of Museums
jhart@aam-us.org
t 202.218.7712

William Scarborough, Esq.
Vice President and General Counsel,
Project Management Institute
William.Scarborough@pmi.org
t 610.356.4600

To view an index of Venable's articles and presentations or upcoming programs on nonprofit legal topics, see www.Venable.com/nonprofits/publications or www.Venable.com/nonprofits/events.

To view recordings of Venable's nonprofit programs on our YouTube channel, see www.YouTube.com/VenableNonprofits or www.Venable.com/nonprofits/recordings.

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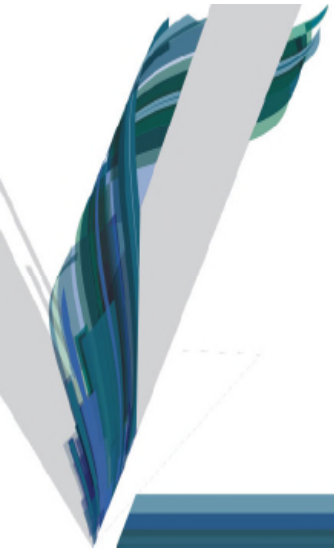

Speaker Biographies

VENABLE® LLP

our people

George E. Constantine

Partner — *Washington, DC Office*

T 202.344.4790 F 202.344.8300 geconstantine@Venable.com

George Constantine concentrates his practice exclusively on providing legal counseling to and advocacy for nonprofit organizations, including trade associations, professional societies, advocacy groups, charities, and other entities. He has extensive experience with many of the major legal issues affecting nonprofit organizations, including tax-exemption, antitrust, governance, and lobbying and political activity matters.

Mr. Constantine is well-versed on matters related to association standard setting and enforcement, certification, accreditation, and code-of-conduct reviews.

Mr. Constantine has represented Internal Revenue Code § 501(c)(3), 501(c)(4), and 501(c)(6) clients on a number of critical tax-exemption matters, including representing clients that are undergoing Internal Revenue Service examinations challenging their exempt status; he has assisted associations and other nonprofit organizations going through mergers, consolidations, joint ventures, and dissolutions; and he has provided ongoing counseling on numerous transactional and operational matters that are unique to nonprofit organizations.

Mr. Constantine is the former Staff Counsel of the American Society of Association Executives (ASAE), the 25,000-member national society for trade and professional association executives. As ASAE's sole staff attorney, he gained in-depth experience with the many legal issues facing associations. He also represented ASAE's interests before Congress and federal agencies. He previously served as a member and chair of ASAE's Legal Section Council and is a frequent speaker and writer on topics of interest to nonprofit organizations. Mr. Constantine co-chairs Venable's 80-plus-lawyer Regulatory Practice Group.

AREAS OF PRACTICE

Political Law

Tax-Exempt Organizations

Tax Controversies and Litigation

Tax and Wealth Planning

Regulatory

Antitrust

INDUSTRIES

Nonprofit Organizations

Credit Counseling and Debt Services

Art Law

BAR ADMISSIONS

Maryland

District of Columbia

EDUCATION

J.D., University of Maryland School of Law, 1998

- Recipient, Order of the Coif law school honors society
- Recipient, Judge R. Dorsey Watkins Award for excellence in torts

B.A., Loyola College In Maryland, 1989

HONORS

Recognized in *Legal 500*, Not-For-Profit, 2012 - 2015

PUBLICATIONS

Mr. Constantine is the author of numerous articles regarding legal issues affecting associations and other nonprofit organizations published by ASAE, the Greater Washington Society of Association Executives, the American Chamber of Commerce Executives, the New York Society of Association Executives, and the Texas Society of Association Executives.

- August 4, 2016, When the Convention Parties Are Over: How Public Charities Can Be Involved in the 2016 Elections and Talk about the Issues, Nonprofit and Political Law Alert
- July 18, 2016, New Mandatory IRS Notification Process for 501(c)(4) Nonprofit Organizations Finally Announced, Nonprofit Alert

- July 15, 2016, New Mandatory IRS Notification Process for 501(c)(4) Organizations Finally Announced, Political Law Briefing
- February 4, 2016, Nonprofit Chapters and Affiliates: Finding Structures and Relationships that Address Your Challenges and Work Well for Everyone
- December 1, 2015, Charitable Solicitation and Associations
- November 12, 2015, Third Annual Nonprofit Executive Summit: Bringing Nonprofit Leaders Together to Discuss, Legal, Finance, Tax, and Operational Issues Impacting the Sector
- June 2, 2015, Association Codes of Ethics and Conduct: Minimizing the Liability Risks
- May 6, 2015, Federal Appeals Court Affirms Mandatory Filing of Unredacted Donor List by Charities Registered for Solicitations in California
- April 2, 2015, Boycotts and Association Meetings: Managing Your Organization's Risk
- March 2015, Association TRENDS 2015 Legal Review
- January 27, 2015, IRS Publishes New Revenue Procedures Addressing Applications for Tax-Exempt Status
- November 19, 2014, Enhancing the Nonprofit Governance Model: Legal Pitfalls and Best Practices
- October 2, 2014, Best Practices for Enhancing the Nonprofit Governance Model
- June 24, 2014, Multi-Entity Organizations
- March 27, 2014, Top Five Nonprofit Legal Issues of the Past Year
- February 28, 2014, Key House Committee Chairman Releases Long-Awaited Tax Reform Overhaul: Major Changes Proposed for Nonprofits
- February 2014, Informing Regulators When You Alter Your Mission
- January 2014, Is Your Nonprofit Selling Goods Online? U.S. Supreme Court Provides Reminder of Potential Sales Tax Liability
- September 27, 2013, New Developments on Federal Tax Matters Impacting Associations
- September 26, 2013, Nonprofit Executive Summit: Bringing Nonprofit Leaders Together to Discuss Legal, Finance, Tax, and Operational Issues Impacting the Sector
- July 9, 2013, A Look at the IRS Final Report on the Nonprofit Colleges and Universities Compliance Project: UBIT and Executive Compensation Lessons for All Tax-Exempt Organizations (presentation)
- May 14, 2013, Revisiting "Force Majeure" for Nonprofit Meetings and Events
- May 2013, IRS Releases Final Report on Nonprofit Colleges and Universities Compliance Project: UBIT and Executive Compensation Lessons for All Tax-Exempt Organizations (article – short version)
- March 25, 2013, Revisiting 'Force Majeure' for Association Meetings and Events
- March 12, 2013, Protecting Your Nonprofit Housing Counseling Agency's 501(c)(3) Status
- March 2013, IRS Denials of Tax-Exempt Status to Mortgage Foreclosure Assistance Providers Offer Lessons for Housing Counseling Agencies
- March 1, 2013, Safe Passage: Managing Legal Risks when Your Association Meets Abroad
- February 5, 2013, IRS Releases Exempt Organizations 2012 Annual Report and 2013 Workplan
- February 4, 2013, IRS Examinations of Nonprofit Housing Counseling Agencies
- October 2012, IRS Releases Group Exemption Questionnaire as Part of Compliance Check Initiative, *Nonprofit Alert*
- July 12, 2012, Nonprofit Chapters and Affiliates: Key Legal Issues, Pitfalls and Successful Strategies
- June 12, 2012, Nonprofit Contracts: Best Practices, Negotiation Strategies, Practical Tips and Common Pitfalls

- May 2012, FCC Orders TV Stations to Post Their Political Files Online
- May 2012, Groups Sponsoring Electioneering Communications Must Disclose All Donors Pending Appeal of District Court Order
- May 17, 2012, Nonprofit Contracts: Best Practices, Negotiation Strategies, Practical Tips, and Common Pitfalls
- May 2012, Representing Foreign Entities
- May 2012, Tax-Exempt Organizations the Focus of Upcoming Congressional Hearings
- April 26, 2012, Changes in Store for Group Tax Exemptions?
- March 2012, Association TRENDS 2012 Legal Review
- January 10, 2012, Top Ten Things Every New Nonprofit General Counsel Should Know
- December 19, 2011, The New DC Nonprofit Corporation Act Takes Effect on Jan. 1, 2012: Everything You Need to Know to Comply
- November 18, 2011, The New DC Nonprofit Corporation Act Takes Effect on Jan. 1, 2012: Everything You Need to Know to Comply
- November 4, 2011, Top Ten Things a New Nonprofit General Counsel Should Investigate
- September 27, 2011, Protecting and Licensing Nonprofit Trademarks: Key Trademark and Tax Law Issues
- August 3, 2011, Could Your Nonprofit's Chapters Be Considered "Franchises" under State Law?
- Summer 2011, Grassroots Lobbying: A Legal Primer
- July 20, 2011, Related Foundations of Associations: Top Five Legal and Tax Pitfalls to Avoid
- February 2011, Recent IRS Determination Highlights Importance of Separation Among Affiliates
- December 16, 2010, So You Want To Be On The Internet ®
- November 3, 2010, Cyberspace Risk: What You Don't Know Could Hurt You
- July 22, 2010, Lobbying for Your Agency: Avoiding the Tax and Legal Pitfalls
- May-June 2010, The IRS Tax-Exempt Examination Process
- April 27, 2010, IRS Provides Guidance to Nonprofits Assisting Homeowners
- April 9, 2010, Legal Traps of Internet Activities for Nonprofits
- March 30, 2010, DC Circuit Paves Way for Unlimited Contributions for Independent Expenditures
- March 2010, DC Circuit Paves Way for Unlimited Contributions for Independent Expenditures, Political Law Alert
- February 18, 2010, *Citizens United:* How the Supreme Court's Decision Will Impact Associations and Their Members
- January 2010, Supreme Court Strikes Down Laws Banning Corporate Expenditures, Political Law Alert
- October 6, 2009, Legal Traps of Internet Activities for Nonprofits
- July 16, 2009, Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center, and Meeting Contracts
- March 3, 2009, Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center, and Meeting Contracts
- September 22, 2008, The New IRS Form 990: What Does It Mean for Your Organization?
- May 19, 2008, The New IRS Form 990: What Does It Mean for Your Nonprofit Organization?
- March 4, 2008, The New IRS Form 990: What Does It Mean for Your Nonprofit Organization?
- February 15, 2008, Political Activity, Lobbying Law and Gift Rules Guide

- January 10, 2008, The Honest Leadership and Open Lobbying Act: New Lobbying and Ethics Rules
- June 13, 2007, Contracts - 10 Steps to a Better Contract
- November 2006, Pension Protection Act of 2006: Provisions of Interest to Exempt Organizations
- October 1, 2006, New Tax Law Establishes Additional Standards and Requirements for Credit Counseling Agencies
- September 7, 2006, Legal and Tax Issues for Nonprofit Associations
- January 2005, IRS Issues 'Virtual' Trade Show Guidance
- January 4, 2005, Characteristics of a Tax-Exempt Credit Counseling Agency
- October 27, 2004, New IRS Ruling Could Have Taxing Impact on 501(c)(3) Associations with Certification Programs
- August 10, 2004, Association Codes of Ethics: Identifying Legal Issues and Minimizing Risk
- April 16, 2004, Antitrust Concerns with Association Information Exchanges
- March 25, 2004, Untangling the Web - Internet Legal Issues for Associations
- November 4, 2003, Avoiding Association Tax Pitfalls in Cyberspace
- May 6, 2003, Summary of Provisions in S. 476 — The Charity Aid, Recovery, and Empowerment Act of 2003
- December 16, 2002, Good Governance — Ensuring That Your Association's Governing Documents Pass Legal Muster
- September 1, 2002, Association Activities Targeted in Recent Antitrust Enforcement Actions
- May 1, 2002, Corporate Sponsorship: The Final Regulations
- April 1, 2002, Associations and Campaign Finance Reform
- January 1, 2002, Recent Antitrust Decision on Salary Surveys Highlights Risks to Associations
- November 1, 2001, Legal and Tax Considerations for Capital Campaigns
- January - February 2001, New Campaign Finance Disclosure Law Hits the Wrong Target, *Journal of Taxation of Exempt Organizations*

SPEAKING ENGAGEMENTS

Mr. Constantine is a frequent lecturer on association and tax-exemption organization legal topics, including corporate and tax issues.

- October 13, 2016, How Your Nonprofit Can Operate a Legally Sound Certification or Accreditation Program
- November 12, 2015, "Nonprofit Chapters and Affiliates: Best Practices, Common Pitfalls, and Successful Approaches to Change" at the Third Annual Nonprofit Executive Summit: Bringing Nonprofit Leaders Together to Discuss Legal, Finance, Tax, and Operational Issues Impacting the Sector
- November 19, 2014, Enhancing the Nonprofit Governance Model: Legal Pitfalls and Best Practices
- October 2, 2014, "Best Practices for Enhancing the Nonprofit Governance Model " at the Second Annual Nonprofit Executive Summit: Bringing Nonprofit Leaders Together to Discuss Legal, Finance, Tax, and Operational Issues Impacting the Sector
- August 11, 2014, "Association Law Review for Aspiring CAEs" at the 2014 ASAE Annual Meeting & Exposition
- August 10, 2014, "Comparing Compensation: Effective Approaches to Benchmarking Pay and Perks" at the 2014 ASAE Annual Meeting & Exposition
- June 24, 2014, "Multi-Entity Organizations" for the Greater Washington Society of CPAs (GWSCPA)
- June 3, 2014, "The Impossible NO (A Panel on Getting Funders to YES)" at the 2014 Nonprofit Empowerment Summit hosted by Raffa, PC

- April 25, 2014, "Trade Association Update" for Georgetown Law's Representing and Managing Tax-Exempt Organizations CLE
- April 15, 2014, "Certified Association Executive (CAE) Prep Course Webinar," American Society of Association Executives
- September 27, 2013, "New Developments on Federal Tax Matters Impacting Associations" at ASAE's Annual Association Law Symposium
- September 26, 2013, Nonprofit Executive Summit: Bringing Nonprofit Leaders Together to Discuss Legal, Finance, Tax, and Operational Issues Impacting the Sector
- September 10, 2013, "Certification Review Course" for American Society of Association Executives
- August 5, 2013, "Association Codes of Ethics" at ASAE's Annual Meeting
- July 9, 2013, Legal Quick Hit: "A Look at the IRS Final Report on the Nonprofit Colleges and Universities Compliance Project: UBIT and Executive Compensation Lessons for All Tax-Exempt Organizations" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- May 14, 2013, Legal Quick Hit: "Revisiting 'Force Majeure' for Nonprofit Meetings and Events" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- March 12, 2013, Protecting Your Nonprofit Housing Counseling Agency's 501(c)(3) Status
- September 6, 2012, "Association Legal Review" for American Society of Association Executives
- July 12, 2012, Nonprofit Chapters and Affiliates: Key Legal Issues, Pitfalls and Successful Strategies
- June 13, 2012, "Starting and Sustaining a Nonprofit Organization" for the Washington, DC Economic Partnership
- June 12, 2012, Legal Quick Hit: "Nonprofit Contracts: Best Practices, Negotiation Strategies, Practical Tips, and Common Pitfalls" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- May 17, 2012, Nonprofit Contracts: Best Practices, Negotiation Strategies, Practical Tips, and Common Pitfalls
- May 2, 2012, "Risk and Reward – Keeping Your Tax-Exempt Status" for the Nonprofit Risk Management Center
- January 18, 2012, "Generating New Revenue Streams—Legal and Tax Issues for Nonprofit Organizations" at NYSAE Finance & Management Institute Luncheon
- January 10, 2012, Legal Quick Hit: "Top Ten Things Every New Nonprofit General Counsel Should Know" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- December 19, 2011, The New D.C. Nonprofit Corporation Act Takes Effect on Jan. 1, 2012: Everything You Need to Know to Comply
- October 21, 2011, "IRS Group Exemption Procedures" for ABA
- September 27, 2011, Association of Corporate Counsel Webcast: "Protecting and Licensing Nonprofit Trademarks: Key Trademark and Tax Law Issues"
- July 20, 2011, "Related Foundations of Associations: The Top Five Legal and Tax Pitfalls to Avoid" for the Association Foundation Group
- June 22, 2011, "Play on Natural Turf: Authentic and Transparent Grassroots Lobbying" for the American Society of Association Executives
- May 12, 2011, "Starting and Sustaining the Growth of a Nonprofit Organization" for the Washington, DC Economic Partnership Program
- November 12, 2010, Protecting Your Association from Cyber Attacks and Financial Fraud
- November 3, 2010, "Cyberspace Risk: What You Don't Know Could Hurt You," Nonprofit Risk Management Center
- September 13, 2010, "Board Leadership: Legal Issues" at Greater DC Cares Nonprofit Board Leadership Program

- July 22, 2010, "Lobbying for Your Agency: Avoiding the Tax and Legal Pitfalls" at the Association of Independent Consumer Credit Counseling Agencies Summer 2010 Conference
- June 8, 2010, Legal Quick Hit: "Lessons in Tax Compliance: The Broad Impact of the IRS' Interim Report on the Colleges and Universities Compliance Project" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- April 9, 2010, "Legal Traps of Internet Activities for Nonprofits" a Lorman Teleconference
- March 16, 2010, The Form 990: Dealing with the Fall Out (Audioconference)
- February 18, 2010, *Citizens United*: How the Supreme Court's Decision Will Impact Associations and Their Members
- February 18, 2010, "Legal Issues 2010: Keeping Your Association Out of Trouble" for the American Association of Medical Society Executives
- October 13, 2009, "Risk Management for Events and Meetings" course at the George Washington University's School of Business
- October 13, 2009, Presentation on meeting contracts to George Washington University students
- October 6, 2009, Legal Traps of Internet Activities for Nonprofits
- July 16, 2009, Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center, and Meeting Contracts
- July 16, 2009, Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center and Meeting Contracts: A Roadmap for Nonprofits
- March 3, 2009, Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center and Meeting Contracts
- February 24, 2009, Legal Issues for Nonprofit Associations
- October 1, 2008, The New IRS Form 990: What Does it Mean for Your Organization?
- September 22, 2008, The New IRS Form 990: What Does It Mean for Your Nonprofit Organization?
- May 19, 2008, New IRS Form 990 Audio conference
- January 10, 2008, The Honest Leadership and Open Lobbying Act: New Lobbying and Ethics Rules
- November 5, 2007, American Public Health Association Annual Meeting
- September 28, 2007, Annual Association Law Symposium
- June 13, 2007, Contracts - 10 Steps to a Better Contract
- September 7, 2006, Legal and Tax Issues for Nonprofit Associations
- February 10, 2004, American Society of Association Executives Winter Conference
- November 4, 2003, Avoiding Association Tax Pitfalls in Cyberspace
- October 3, 2003, American Society of Association Executives 2003 DC Legal Symposium
- August 25, 2003, American Society of Association Executives' Annual Meeting
- April 17, 2003, Board Fiduciary Duties
- March 13, 2003, Protecting Your Chamber's Intellectual Property
- March 7, 2003, The Ins and Outs of Nonprofit Liability
- February 7, 2003, Legal and Tax Aspects of Raising Non-Dues Revenue
- December 10, 2002, ASAE 2002 Winter Conference

William Scarborough, J.D.

Vice President and General Counsel

William G. Scarborough, J.D., serves as PMI's General Counsel. Prior to coming to PMI he had his own private practice for 18 years. Mr. Scarborough's areas of practice include association law, antitrust and commercial transactions. He is a member of the American Bar Association, Association of Corporate Counsel and the American Society of Association Executives. He also serves on the American National Standards Institute Committee on Intellectual Property Rights and is a past chair of the Ethics Committee of the American Society of Association Executives. Mr. Scarborough has collaborated with various PMI members on articles that have appeared in PMI Today® and PM Network® on topics of intellectual property, ethics and Board of Director responsibilities. Mr. Scarborough was the staff liaison to the Ethics Standards Review Committee and participated in the drafting of the PMI Code of Ethics and Professional Conduct. William supports the work of the Ethics Review Committee and the Ethics Member Advisory Group, which has been tasked by the PMI Board to educate the project management community on the PMI Code of Ethics and Professional Conduct. When he does get a chance to get out the office, he is active in a variety of local charitable and church committees. He also enjoys outdoors sports, running, hiking and reading.

Email: william.scarborough@pmi.org

Julie Hart
Senior Director, Standards & Excellence Programs
jhart@aam-us.org
202.218.7712

Julie Hart provides the overall strategic and administrative direction and vision for a portfolio of programs and activities that support AAM's goal of "nurturing excellence" in museums: Accreditation Program; Museum Assessment Program; Peer Review; Standards & Ethics; Information Center; Pledge of Excellence; Core Documents Verification; and the Continuum of Excellence.

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February 2009

ASSESSING A TRADE ASSOCIATION'S TORT LIABILITY RISK

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When assessing potential sources of legal liability for trade associations, threats from products liability litigation probably is not one of the first topics that comes to mind. This is so because causes of action in products cases are often founded on theories of both warranty and tort law, claims that do not normally find their way into complaints filed against trade associations or other organizations outside of the stream of design and production. However, to an increasing degree, trade associations have found themselves targets of products liability litigation lawsuits in state and federal court. Understanding how this can happen and what theories plaintiffs have relied upon to bring products cases against trade association defendants can provide valuable information for developing a strategy to avoid - or successfully defend against - these types of lawsuits.

Historically, plaintiffs have alleged "traditional" products liability claims against trade association defendants on theories such as negligence, strict products liability, and breach of actual or implied warranties. However, these claims often failed with respect to trade associations because the plaintiffs could not prove that the association defendants had any hand in manufacturing the product in question, were in the chain of distribution, or had any specific duty to the plaintiff. While trade associations typically are able to avoid these more "traditional" types of products liability lawsuits, plaintiffs have nonetheless found some success in suing trade associations, along with their manufacturer members, under theories such as misrepresentation/concealment, conspiracy, and negligence under the "Good Samaritan" doctrine (1). With few exceptions, the success or failure of these cases has turned on the trade associations' release of information to the public and the control the associations exercise over their members.

Misrepresentation/Concealment

Trade associations have been sued for either misrepresenting or concealing data that allegedly would have affected a consumer's decision to use a product. A well-known example of such a case comes from the tobacco industry litigation, where several tobacco companies, along with their trade associations, were alleged to have known of the dangers of cigarette smoking but hid those dangers from the public (2). Other industries, such as lead-based products manufacturers and pool and spa manufacturer associations, have defended against similar allegations based on negative research that was not released to the public (3).

In misrepresentation/concealment cases, plaintiffs typically must prove that the defendant had a duty to the plaintiff to provide the information in question, and that the plaintiff relied on the information he/she received from the defendant. This is a difficult bar to overcome, as courts have repeatedly found no legal duty from a trade association to the general public, or have held that the plaintiff did not rely on statements made by the defendant association. However, courts have noted a significant difference between *fraudulent* and *negligent* concealment. When an association *knowingly* conceals or misrepresents data, a court is more likely to find liability even if the nexus between the plaintiff and defendant is not strongly defined (4). Therefore, a trade association's success on a misrepresentation claim may hinge on how and why the allegedly false information was or was not released to the public.

Civil Conspiracy

Products liability plaintiffs also have attempted to sue trade association defendants under a theory of civil conspiracy. To state a viable claim, often the plaintiff must prove: (a) a combination between two or more persons, (b) to commit an unlawful act, (c) an act in furtherance of the unlawful act, and (d) damages to plaintiff (5). Conspiracy has become an oft-used tool for plaintiffs who are unable to prove a duty to the public on the part of the trade association, but who can show that the association worked in concert with manufacturers or other entities that *did* have a duty to the public in a way that harmed the plaintiffs. Because cases involving trade associations typically involve multiple defendants coordinating

their actions, a conspiracy claim is a not uncommon addition to a products liability lawsuit.

Negligence Through the "Good Samaritan" Doctrine

The "Good Samaritan" doctrine arose from the concept that if a person undertakes a certain action, usually to assist another, they have a duty to not perform that action negligently (6). This doctrine has become a common basis for negligence claims brought against trade associations. In Good Samaritan products liability claims brought against trade associations, plaintiffs frequently argue that the association undertook a specific duty to the general public when they advertised, advocated for, or performed research about their particular industry (7). Good Samaritan cases are often successful against trade associations that perform standard-setting for their industry. On the other hand, if a trade association does not promulgate standards for the industry to follow - and thereby arguably does not undertake a duty to the public - plaintiffs have difficulty proving an undertaking for purposes of the doctrine (8).

Heightened Risks in the Products Liability Arena Associated with Trade Associations

Based on past products liability cases, trade associations have an increased risk of liability if they purport to undertake a duty to consumers or employees within their industry, set standards, exert control over members of the association, make statements not supported by actual research, or commission research but then fail to publicize substantive, unfavorable results.

Undertaking a Duty to Consumers/Employees

Claiming any type of "duty" to the general public as a whole or to particular members of the public, such as employees within the industry, can expose a trade association to a wide range of products liability lawsuits. A simple reference to "the needs of the consumer" by a trade association has been held in the past to mean that the trade association assumed a duty to the public to provide accurate safety information it had in its possession (9). However, a review of the cases shows that trade associations that were not deemed to have specifically undertaken a duty to the public have successfully avoided liability for negligence actions, even when those associations produced suggested standards or guidelines that ultimately were used in their respective industries (10).

Standard-Setting/Control

When trade associations become the "rulemakers" for their particular industry or exert control over association members, their tort liability may increase. This appears to be the case because courts have reasoned that trade associations that exert control over their members have become more involved in the production and marketing of the allegedly harmful products and therefore have breached a duty to the public. The clearest example of this comes from a number of blood bank cases in the late 1990s (11). In these cases, the American Association of Blood Banks ("AABB") set national standards for blood donations, blood storage, and transport. That, along with the fact that the AABB exerted strict control over its members, led the courts to hold the association to a higher level of duty to the public than trade associations that did not exert the same level of control over their industry. As a result, the courts found the AABB potentially liable for promulgating standards that did not adequately ensure the safety of blood donations. Once a trade association crosses the line from merely suggesting methods of conducting business to mandating certain policies and enforcing their use, they become standard-setters in their industry and could face increased court scrutiny in products liability cases.

Making Statements Not Supported by Actual Research

While this category may seem more intuitive than the others, it is still worth noting. If a company spokesperson releases a statement on the trade association's behalf and the claims made in the statement are later revealed to have little to no factual backing, this person's statement could create liability for the trade association under claims of fraudulent or negligent misrepresentation (12). One who negligently gives false information can be subject to liability for physical harm caused by actions taken in reasonable reliance upon that information, whether the negligence was in failing to ascertain the accuracy of the information, or the matter in which it was communicated (13).

Conclusion

Because of the possibility of collecting from an additional defendant, and one with seemingly "deep pockets," plaintiffs and their attorneys have taken aim at trade associations when filing products liability lawsuits. The level of success on these claims has often depended on the level of duty or involvement the trade association had with regard to the public and to its own industry. When creating a trade association or developing a new business strategy within an existing association, directors would be well-served to consider the potential products liability pitfalls that could loom on the horizon. While there is no "bullet-proof vest" to protect a trade association from all products liability lawsuits, knowing the bases and elements of these claims can provide a solid foundation for successfully avoiding or

defending these types of lawsuits.

Mr. Smith is a partner and Mr. Williams is an associate in Venable's commercial litigation practice, resident in the firm's Washington, D.C. office. For more information, contact Mr. Smith or Mr. Williams at 202-344-4000 or at ***hgsmith@venable.com*** */* ***jbwilliams@venable.com****.*

Endnotes

1 This article is not intended to be an exhaustive review of the existing case law involving products liability cases against trade association defendants. Instead, it is intended to provide a general overview of the current state of the law in this area.

2 *Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168 (5th Cir. 1996).

3 *New York v. Lead Indus. Ass'n*, 190 A.D.2d 173 (N.Y. App. Div 1993); *Meyers v. Donnatacci*, 531 A.2d 298 (N.J. Super. Ct. Law Div. 1987).

4 For example, in *Lead Indus. Ass'n*, a lead-based products association was accused of several acts of deception centered around the safety of the association's products. The court refused to dismiss a claim for fraud, noting that "[m]isrepresentations of safety to the public at large, for the purpose of influencing the marketing of a product known to be defective, gives rise to a separate cause of action for fraud." 190 A.D.2d at 177.

5 RESTATEMENT (SECOND) OF TORTS 2d § 876 (1965). As with many of the legal theories discussed here, the elements of civil conspiracy will vary from state to state, but often the differences are minimal and the threshold questions for these causes of action are similar.

6 RESTATEMENT (SECOND) OF TORTS 2d § 324A (1965).

7 *See King v. Nat'l Spa and Pool Inst., Inc.*, 570 So. 2d 612 (Ala. 1990) (citing the Good Samaritan doctrine and holding that a trade association could be held negligent for promulgating inadequate safety standards for the construction of swimming pools).

8 *See, e.g., Meyers*, 531 A.2d at 404-05 (refusing to impose a duty on a trade association because "[i]t would amount to raising [the association] to the status of a rule-making body which the facts clearly show is unwarranted and legally unsupportable.")

9 *King*, 570 So. 2d at 615-16.

10 See, for example, *Bailey v. Edward Hines Lumber Co.*, 719 N.E.2d 178 (Ill. App. Ct. 1999), where the court held that a trade association did not owe a duty of care to users who relied on recommendations released by the association to the industry.

11 *Weigand v. Univ. Hosp. of New York Univ. Med. Ctr.*, 659 N.Y.S.2d 295 (N.Y. Sup. Ct. 1997); *Snyder v. Am. Ass'n of Blood Banks*, 676 A.2d 1036 (N.J. 1996).

12 *Lead Indus. Ass'n*, 190 A.D.2d at 177.

13 RESTATEMENT (SECOND) OF TORTS 2d § 311 (1965).

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October 27, 2004

NEW IRS RULING COULD HAVE TAXING IMPACT ON 501(C)(3) ASSOCIATIONS WITH CERTIFICATION PROGRAMS

In a recently released ruling, the Internal Revenue Service ("IRS") determined that a Section 501(c)(3) membership association's certification program generates taxable unrelated business income to the association. The ruling — a private letter ruling (**PLR 200439043, June 28, 2004**) issued by the IRS addressing the particular facts of one organization — provides valuable insight into the IRS' approach regarding certification program revenue received by 501(c)(3) organizations, and could have a significant impact on a large number of professional membership associations. The impact may be more far-reaching than the mere imposition of unrelated business income tax ("UBIT"), and may result in the wholesale reshuffling of certification activities – as well as related study guides, educational seminars, and other programs that support the certification function – into affiliated Section 501(c)(6) entities.

Background

In general, most membership organizations — whether trade associations or professional societies — qualify as tax-exempt organizations under Section 501(c)(6) of the Internal Revenue Code. Section 501 (c)(6) is reserved for organizations that operate primarily for the benefit of a line of business or profession. However, many professional societies, particularly those in the medical and scientific fields, have been able to qualify for recognition under Section 501(c)(3) of the Internal Revenue Code in the past. (It appears as though the IRS at present is far less likely to recognize an individual membership organization as exempt under Section 501(c)(3) than in the past.) Membership organizations that qualify under Section 501(c)(3) do so because they have been able to demonstrate to the IRS that they are organized and operated exclusively for one or more publicly beneficial purposes. Thus, the primary beneficiary of the activities of a 501(c)(3) organization should be the public; the primary beneficiary of the activities of a 501(c)(6) organization should be a line of business or profession. While it is more difficult to qualify under Section 501(c)(3), such status often is viewed as preferable to Section 501(c)(6) status — donations to 501(c)(3) organizations are tax-deductible as charitable contributions; many government and private sector grants are limited to 501(c)(3) organizations; and state and local sales, use and property tax exemptions generally are limited to certain 501(c)(3) organizations, for example.

In the past, even medical and scientific membership organizations that otherwise would have had little difficulty qualifying for Section 501(c)(3) status usually were not successful if a substantial portion of their activities included the offering of some type of professional certification program. For example, the IRS released a technical advice memorandum in 1986 refusing to allow an educational organization to convert from Section 501(c)(6) to Section 501(c)(3) status. That refusal was based, in large part, on the organization's operation of a certification program, which the IRS determined was "designed and operated to achieve professional standing" for the professionals who are certified and "to enhance the respectability of those who have been certified."

Further, a 1973 IRS revenue ruling addressed whether a medical specialty board qualified for tax-exempt status under Section 501(c)(3) when a primary activity of the organization was to administer written examinations and issue certificates to individual members of the particular medical specialty who passed such examinations. According to the IRS: "Although some public benefit may be derived from promoting high professional standards in a particular medical specialty, the activities of the board are directed primarily to serving the interest of the medical profession. Under these circumstances, the board is not organized and operated exclusively for charitable purposes. … Accordingly, the board is exempt from Federal income tax under section 501(c)(6) of the Code, but is not exempt under section 501(c)(3)."

Recent Private Letter Ruling

While it is clear that the IRS consistently has taken the position that an organization that is seeking recognition under Section 501(c)(3) will not be successful if a substantial portion of the activity is

certifying professionals, until now, it has not been clear how the IRS would treat a 501(c)(3) organization that: (1) had a certification program that did not constitute a substantial portion of its overall activities; (2) instituted a certification program subsequent to being recognized by the IRS as exempt under Section 501(c)(3); and/or (3) offered educational and training programs and publications (for a fee) to help prepare individuals for the certification exam, and perhaps in connection with recertification as well. This recent PLR sheds some critical light on these questions.

The organization at issue in the new PLR was one that was organized for "scientific and educational purposes for the advancement of the theory and practice of certain disciplines, and their allied branches and related arts and sciences." (While PLRs are public documents, they are only released in redacted form; thus, any information that might serve to disclose the identity of the taxpayer is omitted.)

The organization has a number of different activities and boards, one of which oversees a membership society; the membership society is, in effect, a subdivision of the 501(c)(3) organization, but is part of the same legal entity. The membership society created a certification program with four basic qualification requirements: (1) exam-based testing; (2) experience-based qualifications; (3) minimum continuing professional education; and (4) compliance with a code of conduct. As part of the program, the organization was planning to offer various workshops and educational programs, an online study guide, a book of sample questions, and a specific training curriculum. Additionally, in order to apply for certification, candidates must either: (1) be a member of the membership society or an equivalent professional association; or (2) be registered as a professional with a state.

The IRS analyzed the factual situation and determined that the program is very similar to the one described in the medical specialty board revenue ruling — the primary beneficiary of the certification program is the profession represented by the organization, and the public benefits only incidentally from the program. Further, the IRS determined that the seminars and study guides developed in conjunction with the certification examination, while educational, are "designed primarily to assist candidates in passing the examination."

The IRS went on to determine that even though the activities of the certification program do not accomplish a Section 501(c)(3) exempt purpose, the activities constitute an insubstantial part of the total activities of the organization. Thus, the certification program will not jeopardize the organization's tax-exempt status, but it does constitute an unrelated trade or business, subjecting the revenues derived from the program to the federal tax on unrelated business income. Further, the IRS determined that the sale of study guides and the offering of exam preparatory courses were a part of the overall certification program, and, thus, income from such activities also would be subject to UBIT.

What Does It Mean?

A PLR, by its very terms, states that it is directed only to the organization that requested it; the Internal Revenue Code makes clear that PLRs may not be used or cited as precedent. Thus, this PLR should not be interpreted to mean that the IRS will never treat a 501(c)(3) organization's certification program as related to its exempt purposes. However, PLRs are helpful in providing insight into the IRS' positions on key issues affecting trade and professional associations. This PLR indicates that many 501(c)(3) associations may need to reconsider how they handle certification and related educational and training activities – and in what legal entity they are "housed."

While much of the PLR reiterates past precedent — that is, the IRS generally will not allow an organization to maintain Section 501(c)(3) status if a substantial portion of its overall activities is the operation of a certification program — it also made clear that the IRS will treat certification program income received by a 501(c)(3) organization as taxable to the organization when the certification activities are insubstantial. Further, this PLR indicates clearly that the IRS will include in its calculation of certification program revenue the income that an organization receives from the sale of study guides and from educational programs that are "designed primarily to assist candidates in passing" a certification examination.

Possible Approaches

Going forward, a 501(c)(3) organization that engages in or seeks to engage in certification activities has a number of options. Specifically:

- The safest approach for a 501(c)(3) organization that is operating or plans to operate a certification program would be to establish a separate, affiliated 501(c)(6) organization that operates the certification program and related preparatory activities. This can be accomplished in a manner that does not result in the 501(c)(3) organization relinquishing all control over the certification activities: by contract and through the entities' organizational documents, the 501(c)(3) entity can be authorized to appoint (and remove) the officers and board members of the affiliated 501(c)(6)

organization, can reserve the right to approve all amendments to the 501(c)(6) entity's articles of incorporation and bylaws, and can restrict the 501(c)(6) organization from operating independently of the 501(c)(3) entity without its consent. Moreover, the 501(c)(3) entity can lease staff, office space, and office services to the 501(c)(6) organization at fair market value, eliminating the need for the 501 (c)(6) entity to do so on its own. The IRS has stated clearly that a properly-run certification program is very much consistent with Section 501(c)(6) status; thus, the organization should have little difficulty in having a related certification entity recognized as tax-exempt under Section 501(c)(6). Finally, housing the certification program in a separate legal entity has the added benefit of helping to insulate the 501(c)(3) organization's assets from the not-insignificant potential liabilities that accompany the operation of most certification programs.

- The organization can take the position that its certification program activities are distinguishable from those in the PLR and other IRS rulings, and thus such activities are substantially related to and in furtherance of valid Section 501(c)(3) purposes. For example, organizations may argue that their certification programs are "lessening the burdens of government" (a valid Section 501(c)(3) purpose), although the IRS has proven reticent to recognize this argument absent some tangible manifestation from a government entity that the activity would otherwise be the responsibility of government were it not for the organization's activities. As there is little favorable precedent from the IRS to guide an organization in this regard, this approach likely will carry with it significant tax risk and should only be undertaken with the assistance of experienced tax counsel.
- The organization may determine that its certification program activities, taken as a whole, are not substantial and that the organization may continue to operate the certification program but treat revenue from such activities as subject to the federal tax on unrelated business income. Many organizations' certification programs are operated on a break-even basis; careful monitoring and documenting of applicable expenses could result in little to no net tax owed by an organization that follows this approach. The risk with this approach is making the determination as to whether or not the certification program is "substantial"; if the IRS determines it is substantial, the organization's tax-exempt status likely would be revoked or converted to Section 501(c)(6). Again, this analysis should be undertaken with the assistance of experienced tax advisors, taking into account not only certification program fees, but also revenue from study guide sales and related training programs, for example.

Ultimately, any action taken by a 501(c)(3) association affected by this recent IRS ruling should be undertaken only after careful consideration of the available options, based on a weighing of all of the relevant risks and benefits of each approach.

For more information, contact Mr. Tenenbaum at 202/344-8138 or jstenenbaum@venable.com, or Mr. Constantine at 202/344-4790 or geconstantine@venable.com.

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Jeffrey S. Tenenbaum
George E. Constantine

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August 10, 2004

ASSOCIATION CODES OF ETHICS: IDENTIFYING LEGAL ISSUES AND MINIMIZING RISK

Legal Issues Regarding Association Codes of Ethics

Although courts are usually reluctant to interfere with internal association decisions, an association's establishment of any set of restrictions or qualifications on membership may raise legal concerns, primarily in the areas of antitrust, due process, defamation, negligence, and tax.

A. Antitrust

From an antitrust1 perspective, for instance, under the Sherman Act, an association will be at risk of antitrust liability if its enforcement of its code of ethics against a member or prospective member is held to be an *unreasonable* restraint of trade in the relevant market and that restraint causes antitrust injury. The courts and antitrust enforcement agencies have agreed that the mere existence of membership qualifications and standards will not necessarily be considered unreasonable. For example, geographic location, the functional level served, or the type of service performed by the member are routinely considered to be reasonable, pro-competitive restrictions -- essential definitions of the profession or industry that is represented by the association.

However, unreasonable, anti-competitive restrictions may be viewed as prohibited "group boycotts" or "concerted refusals to deal." Obvious examples would be refusal to admit members who offer discounted prices to their customers or who do business with "disfavored" suppliers or customers.

Under the two traditional modes of antitrust analysis (rule of reason and *per se* illegal), the key determination made by the courts in determining whether a challenged activity violates antitrust law is whether the restriction, on balance, promotes or suppresses competition. (It is far more preferable for an association to have a challenged activity viewed under the rule of reason, as it is much more difficult for a plaintiff to demonstrate the requisite anti-competitive injury using the rule of reason.)

Among the more problematic types of membership restrictions are those which seek to guard against immoral or unethical behavior.2 When such "ethical" restrictions are imposed, it is important not only that the restrictions themselves are reasonably tied to a pro-competitive purpose (*e.g.,* discouraging fraud or deception in a profession), but also that there is ample procedural fairness offered to the affected member or applicant.3 Thus, antitrust commentators have strongly recommended that to ensure fairness and uniformity, restrictions and the process for enforcing the restrictions be set forth plainly and objectively in association documents.4 By doing so, associations are able to put members and applicants on notice as to the types of restrictions that apply, and associations are better able to defeat any future assertion that they acted arbitrarily. (Even when an association membership restriction may have strong pro-competitive justifications, if the restriction is applied arbitrarily or subjectively, the association may still be at antitrust risk.5)

B. Due Process

In addition to antitrust issues, associations also may incur legal risk for violating common law "due process" claims based on a lack of either substantive or procedural fairness. Substantive fairness requires the use of objective standards reasonably related to a legitimate organizational purpose, while procedural fairness requires the uniform application of such standards.6

Procedural due process is a doctrine that essentially requires associations to provide notice of a potential adverse decision to a member or prospective member, to provide an opportunity for the affected individual to respond and defend himself or herself, and to provide the individual with an opportunity to appeal any adverse decision.7 Of course, it is incumbent on an association to both have the relevant procedures in place and actually follow all due process obligations it places on itself through such procedures.

C. Defamation

Defamation is the oral utterance or written publication of false or misleading facts, or false or misleading implied facts, that are derogatory or damaging to an individual's, entity's or product's reputation. Accusing someone of dishonesty or other moral deficiency, or of professional or business deficiency, raises particularly significant risks of defamation liability. In the self-regulation context, this risk is most likely to arise: (i) when an individual or entity is denied or expelled from membership, and then damaging statements are made (to one or more third parties) by a representative of the association about the individual or entity; or (ii) when sensitive, potentially damaging, information about a member or applicant becomes known to the association during the code of ethics enforcement process, and that information is subsequently disclosed to one or more third parties (intentionally or unintentionally).

D. Negligence

In general, courts will give great deference to internal association decisions, particularly those involving self-regulation.8 Still, reliance on the fact of membership, certification or accreditation of a professional, entity, product, or service can, in some cases, cause the association that granted the membership, certification or accreditation to be held liable when a patient, client or customer suffers harm (physical, financial or otherwise) at the hands of the member. The most common claim is that the association was negligent in granting membership, certification or accreditation and should therefore be liable for resulting injuries.

This liability risk to third parties generally means negligence liability (a form of tort liability). Court decisions holding associations liable for negligence in the self-regulatory context are relatively rare.9 This type of liability is subject to a number of conditions and remains infrequent, although there have been several high-profile cases in recent years holding associations liable for negligence arising from their self-regulatory programs. In short, an association generally will be found liable under the tort of negligence only if the injured party can prove all of the elements of negligence liability -- duty, breach of duty (negligence), reliance, and causation, along with proof of damages (injury).10

E. Tax

It is conceivable -- although very unlikely -- that an association that is exempt from federal income tax under Internal Revenue Code of 1986 Section 501(c)(6) could run afoul of Code restrictions that prohibit such organizations from providing substantial "particular services" to members. Such a restriction might apply in the event that the Internal Revenue Service ("IRS") reviewed a particular association's code of ethics enforcement program and determined that, in fact, the program's primary purpose is the mediation of intra-membership business disputes. An association would only be in danger of losing its tax-exempt status if the IRS were to determine that the activity constituted greater than 50 percent of the association's total activities. If the questioned activity accounted for less than 50 percent of the association's total activities, the IRS still might seek to tax fees received by the association in exchange for the provision of such services as unrelated business income.

Suggestions to Lessen Legal Risk

There are a number of important steps that an association may take that will lessen its legal risk when it offers and enforces a membership code of ethics:

A. Ethical codes should be clear and unambiguous, reasonable, fair, and objectively grounded -- care should be taken to ensure that valid, objective bases support each code provision. Code provisions should never be arbitrary or capricious, or vague or ambiguous, and procedures should be developed that document the development and reasonableness of, and the objective basis for, proposed code provisions.

B. Code provisions should be no more stringent or rigid than necessary to ensure that minimum acceptable levels of conduct are met.

C. Specific commercial or economic considerations should play no role in the setting or application of the code provisions. In addition, codes of ethics should never be created or used for the purpose of raising, lowering or stabilizing prices or fees, excluding competitors from the market, or limiting the supply or products or services.

D. Prior to finalizing code of ethics provisions, associations should provide interested parties with notice of the proposed provisions and an opportunity to comment, and then fairly and objectively consider such comments in finalizing the code of ethics.

E. The code of ethics should be reviewed and updated periodically to ensure that it is current. In

addition, associations should document any and all complaints or concerns about the code of ethics and act on such complaints or concerns as appropriate.

F. There must be no bias, partiality or inconsistency in establishing or operating the program. The process must be objectively and uniformly administered, without subjectivity, favoritism or discrimination. The rules of the process must be scrupulously, consistently and objectively followed by those administering the program.

G. Due process should be built into the program. Before discipline is enforced, individuals who would receive such discipline should be provided with: (i) notice of an adverse decision and a meaningful opportunity to respond to the notice, (ii) a hearing before a panel of peers, none of whom has a direct economic or personal interest in the outcome of the proceeding, (iii) the right to be represented by another person, including an attorney, and to submit evidence and arguments in defense, (iv) the right to examine the evidence and to cross-examine witnesses (if applicable), (v) the right to a written decision explaining the reasons underlying it, and (vi) the right to appeal an adverse decision to a higher-level decision-making body within the association. Proceedings of this nature should remain strictly confidential.

H. Associations should require full disclosure by those involved in the ethics enforcement process of any factor that might be considered bias or a conflict of interest, and should require recusal or removal if a bias or conflict is particularly severe or pervasive. Generally, reduced volunteer involvement and increased association staff involvement may assist in objectivity and the absence of bias.

I. All decisions should be based completely and exclusively on the record of the review and not on extraneous, anecdotal, subjective, or other outside sources of information.

J. Associations should maintain strict confidentiality with respect to all adverse allegations, complaints, actions, and proceedings that arise in connection with the process.

K. Associations should avoid any implicit or explicit guarantee or warranty of members. To this end, avoid "puffery," do not overstate how a professional or company who is a member of the association performs, and do not use superlatives such as "never fails" or "safest" in describing those that are members, and do not allow members to express or imply that they are endorsed by the association by virtue of being accepted as a member.

*For more information, contact Mr. Tenenbaum at **jstenenbaum@venable.com** or Mr. Constantine at **geconstantine@venable.com**.*

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1 The primary federal antitrust statutes that are relevant to association membership restrictions are Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act.
2 See, e.g., National Society of Professional Engineers v. United States, 435 U.S. 679 (1978). An association for professional engineers sought to enforce an ethical restriction on members engaging in competitive bidding, which the U.S. Supreme Court held to be in violation of Section 1 of the Sherman Act.
3 *Pretz v. Holstein Friesian ss'n of America*, 698 F. Supp. 1531 (D. Kan. 1988).
4 MacArthur, Associations and the Antitrust Laws, p. 38 (U.S. Chamber of Commerce, 1996).
5 *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963). An association's denial of membership must be pursuant to fair procedures. See, also, Northwest Wholesale Stationers, Inc. v. United States, 435 U.S. 679 (1984), holding that while procedural safeguards are not always necessary to escape antitrust liability, they may still be relevant.
6 *See, e.g., Medical Institute of Minnesota v. National Association of Trade and Technical Schools*, 817 F.2d 1310 (8th Cir. 1987).
7 In general, due process is only owed to a person or an entity that would suffer some form of harm based on an association's disciplinary action. While for other legal reasons (*e.g.,* avoiding claims of negligence), it is important to treat complaints about association members with seriousness and objectivity, the "complainants" in an association's code of ethics program are generally not the subject of the association's review, and do not stand to suffer direct harm by an association's decision in its code of ethics enforcement process.
8 *See, e.g., Wilfred Academy v. Southern Association of Colleges and Schools*, 957 F.2d 210 (5th Cir. 1992). This case involved an association's decision to deny a college accredited status. According to the court in this decision: "In reviewing an accrediting association's decision to withdraw a member's accreditation, the courts have accorded the association's determination great deference. ...Courts give accrediting associations such deference because of the professional judgment these associations must

necessarily employ in making accreditation decisions."

9 *See., e.g., Keams v. Tempe Technical Institute*, 110 F.3d 44 (9th Cir. 1997). The court held in this case that an association has no duty to end-users of services provided by institutions that were accredited by the association.

10 Virtually all of the relevant cases in this regard are related to association certification, accreditation and establishment of product safety standards. We are not aware of any court decisions in which an association was held liable for merely allowing an entity (whose negligence caused harm to some third party) to become or remain a member of the association, although the legal principle is the same.

VENABLE LLP

ARTICLES

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ASSOCIATION CERTIFICATION AND ACCREDITATION PROGRAMS: MINIMIZING THE LIABILITY RISKS

AUTHORS

Jeffrey S. Tenenbaum

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Certification and accreditation programs (collectively referred to herein as "certification" programs) sponsored by trade and professional associations are increasingly common. Whether it is the certification of individuals, products or services, the credentialing of professionals, or the accreditation of programs, services or institutions, these programs confer an array of valuable benefits not only to associations and association members, but also to industry, government, and the general public. However, as the recent litigation involving the National Spa and Pool Institute and other associations remind us, standard-setting and certification programs are not without liability risk – potentially significant risks.

Fortunately, proper care in establishing and operating certification programs can go a long way toward minimizing those risks. As association certification programs continue to play an increasingly important role in our society, it is more critical than ever to ensure that associations are not deterred from sponsoring such programs as a result of legal risks that can be effectively managed. This article is designed to outline the principal liability risks facing most association certification programs, and to suggest steps to limit these risks.

Overview

In general, courts are extremely reluctant to interfere with certification programs operated by trade and professional associations. Courts generally are hesitant to second-guess the reasonableness of association standards, policies or decisions, recognizing that professionals in associations have far greater experience than judges in formulating and applying standards of industry or professional excellence. Associations have prevailed in the vast majority of certification disputes. Moreover, courts often have found in favor of associations at the summary judgment stage – in other words, the association prevailed based on a motion at the close of discovery and thus avoided the risk and expense of trial.

However, despite associations' impressive track record of success in certification-related litigation, the significant risks of litigation cannot be ignored. Even if an association ultimately prevails in court, the costs, burdens and distractions of mounting a defense can be overwhelming. Although clearly in the public interest and beneficial to members and others, self-regulation programs such as certification programs raise risks of legal liability under the antitrust laws, under the *Americans with Disabilities Act* ("ADA"), and under common law theories of negligence, warranty, due process, and defamation, among others. Fortunately, there are steps associations can take in structuring and administering a certification program to minimize the risk of being sued in the first instance, and, if a lawsuit does materialize, to ensure that the association will prevail. In addition, appropriate errors and omissions insurance can help protect the association against the financial costs of such litigation.

Areas of Liability Risk

Following is a brief discussion of the five principal areas of liability risk for associations in connection with the operation of certification programs: antitrust, negligence (liability to third parties), due process, defamation, and ADA compliance. Other theories of liability exist as well – such as theories of warranty and enterprise liability – but these five areas make up the majority of claims filed against association certification programs.

1. Antitrust.

Unsuccessful applicants for certification or those whose certification is revoked may seek to use the antitrust laws to obtain certification or to obtain damages for the failure to certify. An association could be held liable under those laws if the challenger can demonstrate (i) that certification is essential in

order to effectively compete in the market, *and* (ii) that the program's exclusion was the result of unreasonable or invalid standards or criteria or of unfair or inappropriate procedures. In addition, certification programs that require membership in the sponsoring association as a prerequisite to obtaining certification may be challenged as an illegal "tying" arrangement, among other antitrust theories. Certification programs that are anticompetitive, discriminatory, unrelated to objective standards, or implemented without fair procedures are most likely to attract antitrust challenges. Moreover, certification programs that charge an unreasonably high price to apply for or receive certification or recertification similarly are subject to and likely to attract antitrust challenge.

As with all antitrust actions, the key factor in an antitrust challenge to an association's certification program or decision is whether the association's actions are unreasonably "anticompetitive" within the meaning of the antitrust laws. In other words, courts will look at all of the facts and circumstances to determine whether the certification program, on balance, restrains competition in the relevant market more than it promotes it. A certification program that, in purpose and effect, is designed to, and does in fact, further, protect and promote the economic health of, or consumer welfare within, a particular industry will generally be deemed to be more procompetitive than anticompetitive – even though those who fail to achieve certification may find it more difficult to compete in the market.

Certifying bodies generally have broad discretion in setting and implementing certification requirements. Courts are particularly reluctant to second-guess technical standards – such as those used as the basis for certification decisions – as long as the standards are objectively established and substantively justifiable. Courts also recognize that certification programs are generally procompetitive in nature. Most importantly, court decisions in this area suggest that taking the steps set forth below in structuring and administering certification programs will significantly limit the antitrust risk arising from such programs.

2. Negligence (Liability to Third Parties).

Reliance on the certification of a professional, entity, product, or service can, in some cases, cause the association that granted the certification to be held liable when a patient, client or customer suffers harm (physical, financial or otherwise) at the hands of the certified individual, entity, product, or service. The most common claim is that the certifying association was negligent in granting the certification and should therefore be liable for resulting injuries.

This liability risk to third parties generally means negligence liability (a form of tort liability), but is sometimes couched in claims such as misrepresentation, failure to warn, warranty, strict liability, and enterprise liability. For instance, the injured party may allege that the association *warranted* or *guaranteed* the individuals, entities, products, or services certified by the association, and therefore should be responsible (under a breach of warranty theory) for resulting injuries to those who purchase, utilize or participate in them.

Fortunately, court decisions holding certifying bodies liable in tort for loss or injury caused by the certified individual, entity, product, or service remain a rarity. This type of liability is subject to a number of conditions and remains infrequent. In short, the certifying body generally will be found liable under the tort of negligence only if the injured party can prove all of the elements of negligence liability – duty, breach of duty (negligence), reliance, and causation, along with proof of damages (injury). If any one of these four elements cannot be established, then liability will not result.

Duty. The first question courts ask is whether or not the certifying association owed a duty of care to the third party (the injured plaintiff who utilized the services of a certified vendor, for instance). While there is generally no duty of care owed to third parties, some courts have held that once an organization undertakes to set standards or inspect, test or otherwise certify individuals, entities, products, or services, it should reasonably know that third parties might rely on those standards or certifications, and therefore must exercise reasonable care in doing so.

Breach of Duty (Negligence). The court will next determine whether the certifying body failed to act with reasonable care (*i.e.*, acted negligently) in granting the certification or in setting a particular standard. In other words, the association is obligated to use due diligence and reasonable care in promulgating the certification standards and in applying them to applicants for certification. For instance, a "mail-order" certification program that establishes no meaningful standards or that exercises no real scrutiny in evaluating applicants could be at risk for breach of its duty of care.

Reliance. It must be proven that the plaintiff *relied* upon the association's certification in utilizing the certified individual, entity, product, or service. It generally is not sufficient for a plaintiff merely to show that the association certified a vendor, for instance, and later an injury occurred; the plaintiff must establish that it was *because of* the association's certification that the vendor's products or services

were utilized. If the association can establish that the plaintiff did not know of the association's certification or that the certification was not a material factor in the decision to utilize the vendor's product or service, then it may be able to avoid liability.

Causation. The negligence of the certifying association must be considered to be a "proximate cause" of the injury to the ultimate user (the plaintiff). While the most direct cause of the plaintiff's injury generally is the negligence of the certified party or product – not the certifying association – where the certifying body expects the public to rely upon the certification, and the injured party does just that in selecting the certified party or product, the causation and reliance criteria both may be met. In other words, if reliance is established, causation likely will be as well.

Damages (Injury). There must be measurable injury (physical, financial or psychological) to the plaintiff for any damages to exist.

3. Due Process.

Certification bodies must provide fair procedures in both setting and implementing standards. It is critical to carefully establish and strictly, consistently and objectively follow written rules and procedures for the administration of the certification program. Certifying bodies are legally bound to follow their own rules and regulations in making certification decisions. While this duty is sometimes described in contractual terms, the obligation is more often labeled as a matter of common law due process or fundamental fairness.

Common law due process has two elements: (i) substantive fairness, and (ii) procedural fairness. Substantive fairness requires the use of objective standards reasonably related to a legitimate organizational purpose. Procedural fairness refers to the procedures of decision-making.

Courts are much more likely to defer to substantive standards established by a certifying association. However, standards and decisions by a certifying association may be overturned if they are arbitrary, capricious or discriminatory, or where they are influenced by bias, prejudice or where they lack good faith. Courts are more likely to scrutinize the fairness of the procedures more closely because these are matters with which they are more familiar.

There is no definitive rule as to what due process requires, but at a minimum it would include notice and an opportunity to respond to an adverse certification decision. In addition, fundamental fairness requires that similarly situated persons and entities be treated the same.

The recommendations below set forth more detailed guidelines for ensuring the satisfaction of common law due process requirements.

4. Defamation.

Defamation is the oral utterance (slander) or written publication (libel) of false or misleading facts, or false or misleading implied facts, that are derogatory or damaging to an individual's, entity's or product's reputation. Accusing someone of dishonesty or other moral deficiency, or of professional or business deficiency, raises particularly significant risks of defamation liability. In the certification context, this risk is most likely to arise: (i) when an individual or entity is denied certification, and then damaging statements are made (to one or more third parties) by a representative of the certifying body about the individual or entity and the failure to be certified; or (ii) when sensitive, potentially damaging, information about an applicant for certification becomes known to the certifying body during the certification process, and that information is subsequently disclosed to one or more third parties (intentionally or unintentionally).

Generally, defamation may be committed even by those who *believe* they are communicating the truth. For a statement to be defamatory, it must be *actually* communicated to a party other than the speaker or author. Anyone who republishes a defamatory statement can be equally responsible with the original speaker or author. The defamed individual or entity may sue anyone who publishes, prints or repeats the defamation, and, depending on the circumstances, may recover from the speaker(s) or author(s) money damages to compensate for the harm to reputation, and to punish the speaker(s) or author(s) as well. Truth is an absolute defense to virtually any defamation claim.

In some circumstances, legal "privileges" apply that may protect the speaker or author from liability even where a statement might otherwise be defamatory. The three principal privileges in the ./ association context are: (i) where the speaker takes reasonable precautions to ensure accuracy in every derogatory detail, including making reasonable inquiry; (ii) where the statement concerns a public official or figure, the speaker will not be liable unless the speaker *actually knew* the accusations were false and made the statement in reckless disregard of its truth or falsity; and (iii) publication or

communication of a derogatory statement within an association – at least within the governing body or bodies of an association – for the purpose of promoting a common interest may be protected by a "qualified privilege." For example, deliberations among a certification board concerning certification-related proceedings are likely protected by this qualified privilege. Where this privilege applies, derogatory statements may give rise to defamation liability only if motivated by spite or ill-will, or if communicated to persons outside of the management or governing group.

The recommendations below set forth guidelines for avoiding defamation liability, as well as ensuring protection of the qualified privilege.

5. Americans with Disabilities Act Compliance.

Private, nonprofit organizations generally are subject to the requirements of the federal *Americans with Disabilities Act* with respect to their general operations – including the sponsorship and administration of certification programs. The requirements of the ADA of most relevance to certifying bodies are the specific and extensive standards contained in the law for private entities that conduct examinations and courses relating to applications, licensing and certification, or credentialing for educational, professional or trade purposes. The U.S. Department of Justice's regulations require that certifying bodies "offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals."

Note that the ADA does not apply if an individual seeking certification does not have a covered disability. For instance, recent U.S. Supreme Court decisions have clarified that available corrective and mitigating measures, such as medication or medical aids, must be considered in determining whether or not an individual has a disability under the ADA. Thus, for example, the Court held that correctable myopia is not a disability, nor is high blood pressure controlled with medication.

A certifying body is responsible for selecting and administering the certification examination in a place and manner which ensures that the examination tests what the examination purports to measure, rather than testing the individual's disability, such as impaired sensory, manual or speaking skills (unless those skills are what the examination is designed to test). This means ensuring that: (i) testing places are accessible to individuals with disabilities; and (ii) auxiliary aids and services are made available to enable individuals with disabilities to take the examination, in accordance with the ADA's requirements.

For example, for individuals with hearing impairments, oral instructions or other orally-delivered materials could be provided through an interpreter, assist of listing device, or other applicable means. For individuals with visual impairments, the examination and answer sheets could utilize large print or Braille, could be provided via audiotape, or could be provided through the use of qualified readers and transcribers to read questions and record answers.

A certifying body does not have to provide auxiliary aids and services in all cases. If providing a particular auxiliary aid or service would fundamentally change the examination or result in an undue burden on the certifying body, it does not need to be provided. This determination is case-specific.

Regarding who decides what type of auxiliary aid or service should be provided, when possible, the individual with the disability should be consulted to determine the type of aid or service that may be needed. When more than one type of auxiliary aid or service will enable a person with a disability to participate effectively, a certifying body may choose what aid or service to make available.

Aside from auxiliary aids or services, other types of modifications may be required. For instance, it may be necessary to modify the manner in which the test is administered. For example, if an individual has an impairment that makes writing difficult, it may be necessary to give that individual more time to complete the exam or to permit the typing of answers.

The individual with a disability may *not* be required to bear the cost of the aid or modification. The certifying body must bear the cost of the aid or modification. However, a certifying body is required only to provide auxiliary aids or modifications that do not pose an *undue burden* on a certifying body and do not *fundamentally change* the examination.

Examinations must be administered in facilities that are accessible to disabled individuals or alternative accessible arrangements must be made. If the facility in which the examination is offered is not accessible, it may be administered to an individual with a disability in a different room or another location. The alternative location should provide comparable conditions to the conditions in which the test is administered to others.

All testing locations need not be accessible and offer specially designed exams, however, if an examination for individuals with disabilities is administered in an alternative accessible location or

manner, it must be offered as often and in as timely a manner as other examinations. Examinations must be offered to individuals with disabilities at locations that are as convenient as the location(s) of other examinations.

Individuals with disabilities cannot be required to *file* their applications to take the examination earlier than the deadline for other applicants in order to enable accommodations to be made. However, a certifying body may require individuals with disabilities to provide *advance notice* to the certifying body of their disability and of any aids and/or modifications that might be required – so long as the deadline for doing so is not earlier than the deadline for others applying to take the examination.

A certifying body may require applicants to provide documentation of the existence and nature of the disability as evidence that they are entitled to an aid or modification – so long as the request is reasonable and limited to the need for the modification or aid requested. Appropriate documentation might include a letter from a doctor or other health care professional, or evidence of a prior diagnosis or accommodation (such as eligibility for a special education program). The applicant can be required to bear the cost of providing such *documentation,* but he or she cannot be charged for the cost of any modifications or auxiliary aids provided for the examination.

Finally, the rules for *courses* are similar to those for *examinations.* They generally require that modifications be made in courses offered by private entities to ensure that the place and manner in which the course are given are accessible to individuals with disabilities. The most significant difference is that the general rule for courses applies to *all* individuals with disabilities – not just those with "impaired sensory, manual, or speaking skills." Modifications in courses may include changes in the length of time allowed for completing the course, substitution of course requirements, or adapting the manner in which the course is conducted or materials are distributed. Advance notice of the opportunity to obtain materials in alternative formats must be provided to disabled individuals. Appropriate auxiliary aids also must be provided, unless to do so would fundamentally alter the course or create an undue burden. If courses cannot be administered in a facility accessible to individuals with disabilities, comparable alternative arrangements must be made. Such arrangements may include offering the course through videotapes, cassettes, CD-ROM, the Internet, or prepared notes. The selection or choice of courses available to individuals with disabilities may not be restricted.

Guidelines for Minimizing Liability Risks.

Court decisions involving association certification programs suggest that taking the following steps in establishing and administering certification programs will significantly limit the association's liability risks for such programs:

- Certification standards should be clear and unambiguous, reasonable, fair, and objectively grounded – care should be taken to ensure that valid, objective bases support each certification standard. Standards should be based on data or on a respected body of industry or governmental opinion linking each particular standard to the qualities that the certification purports to measure. Where possible, standards should be directed at and focus on the *ends,* not the *means.* Where the means are specified, they must be legitimately, demonstrably and directly related to the objectives. Alternative means to achieve a given objective should be permitted where possible. Standards should never be arbitrary or capricious, or vague or ambiguous, and procedures should be developed that document the development and reasonableness of, and the objective basis for, proposed standards.
- Certification standards should be no more stringent or rigid than necessary to ensure that minimum competency or quality levels have been attained.
- Certification programs should be open both to association members and non-members on the same terms and conditions. Moreover, nothing in excess of a reasonable price should be charged to apply for or receive certification or recertification.
- Specific commercial or economic considerations should play no role in the setting or application of the certification standards. In addition, certification programs should never be created or used for the purpose of raising, lowering or stabilizing prices or fees, excluding competitors from the market, or limiting the output or supply of products or services.
- Prior to finalizing certification standards, provide interested parties with notice of the proposed standards and an opportunity to comment. Fairly and objectively consider such comments in finalizing the standards.
- Where appropriate and feasible, consider utilizing and participating in the standard-setting procedures of the American National Standards Institute ("ANSI"), and, where a certification program

is involved, consider obtaining accreditation of the certification program by ANSI.

- Establish equivalent standards or alternative paths to certification wherever possible. As with the standards themselves, the determination as to whether the standards have been satisfied should focus on the *ends,* not the *means.* There must be valid, demonstrable and reasonable bases upon which to determine that applicants for certification have met the standards.
- Periodically review and update all certification standards to ensure that they are current and reflect new legal, technological and other developments. Provide appropriate opportunities for public notice and comment whenever standards are modified, and carefully consider such comments in the revision process. In addition, document any and all complaints or concerns about the standards and revise the standards accordingly if appropriate.
- Ensure that participation in and use of the certification program is completely voluntary.
- Widely publicize the availability of the certification program and permit application by all who choose to apply. Do not limit participation in the certification program to only members of the sponsoring association. However, fees charged to non-members for certification may be higher than those charged to association members to reflect any membership dues or assessments that contribute to funding the program.
- There must be no bias, partiality or inconsistency in establishing or operating the program. The certification process must be objectively and uniformly administered, without subjectivity, favoritism or discrimination. The rules of the certification process must be scrupulously, consistently and objectively followed by those administering the program.
- Due process should be built into the program. Before certification is denied or revoked, those who seek the certification should be provided with: (i) notice of an adverse decision and a meaningful opportunity to respond to the notice, (ii) a hearing before a panel of peers, none of whom has a direct economic or personal interest in the outcome of the proceeding, (iii) the right to be represented by another person, including an attorney, and to submit evidence and arguments in defense, (iv) the right to examine the evidence and to cross-examine witnesses (if applicable), (v) the right to a written decision explaining the reasons underlying it, and (vi) the right to appeal an adverse decision to a higher-level decision-making body within the association. Proceedings of this nature should remain strictly confidential.
- Require full disclosure by those involved in the certification process of any factor that might be considered bias or a conflict of interest. Require recusal or removal if a bias or conflict is particularly severe or pervasive. Full disclosure and appropriate checks and balances generally are effective mechanisms for safely managing most potential conflicts of interest. Generally, reduced volunteer involvement and increased association staff involvement may assist in objectivity and the absence of bias.
- All certification decisions should be based completely and exclusively on the record of the review and not on extraneous, anecdotal, subjective, or other outside sources of information.
- "Grandfathering" of those who do not meet all current certification standards generally should be avoided.
- Require regular recertification as appropriate to ensure that those who are certified continue to meet the program's standards. In addition, review the certification process itself on a periodic basis to ensure it is being properly administered.
- While nothing prevents a certification program from publicizing the names of, and information about, those who are certified, care should be taken to avoid any explicit or implicit disparagement of those who are not certified. Maintain strict confidentiality with respect to all adverse allegations, complaints, actions, and proceedings that arise in connection with the certification program. While it is acceptable for a certifying association to verify that an entity is not currently certified, no further details should be provided.
- Ensure that all certification examinations – as well as all courses that prepare applicants for certification exams – are administered in strict compliance with the specific requirements imposed by the federal *Americans with Disabilities Act* and implementing regulations.
- Maintain strict security regarding all aspects of the certification process. Any missing, stolen or copied examination booklets, for instance, can have a severe impact on the integrity of the certification process.

- To minimize the risk of copyright infringement, maximize copyright rights, and facilitate enforcement of such rights, use a copyright notice on all certification program materials (*e.g.*, standards, applications, brochures) and register such materials with the U.S. Copyright Office. Be sure that the association owns or has the right to use the entire contents of such materials. In addition, as listings of certified entities generally are not protectable under U.S. copyright laws, use a "shrinkwrap" license or other form of contractual commitment to place explicit, binding limits and conditions on the use of the list. The shrinkwrap license also can be a useful vehicle to disclaim any endorsement or guarantee of the certified entities by the association.
- To minimize the risk of trademark infringement, maximize trademark rights, and facilitate enforcement of such rights, use a trademark notice in connection with the certification logo or seal and register the mark with the U.S. Patent & Trademark Office (either as a certification mark or as a service mark). Be sure the association's use of the mark does not infringe anyone else's trademark rights. In addition, codify the terms and conditions of, and limitations on, use of the mark by certified entities in a written agreement, possibly as part of the certification application form or in connection with distribution of the mark. Be sure to include provisions, among others, designed to prevent false or misleading use of the mark and to prohibit any further use upon decertification. Note that the federal *Lanham Act,* and similar state laws, prohibit the use of any false or misleading terms, names or symbols, or any other false or misleading descriptions or representations, that are likely to deceive the public with respect to the affiliation of the user with a particular organization.
- Include binding limitation of liability and indemnification provisions in the certification application form (or other document) to absolve the association from liability to those who are certified, and to hold the association harmless from lawsuits by those injured by the acts or omissions of certified entities.
- Avoid any implicit or explicit guarantee or warranty of certified products, services, individuals, or entities. To this end, avoid "puffery," do not overstate how a product, service or professional performs, and do not use superlatives such as "never fails" or "safest" in describing those that are certified.
- Use written disclaimers where appropriate – such as on marketing materials, in the application form, and on the association's Web site – to clarify the association's limited role with respect to, lack of responsibility for, and absence of guarantees or warranties of, certified products, services or entities. If and where appropriate, require use of similar disclaimers by those that receive certification.
- Maintain sufficient insurance to cover the liability risks of the certification program. Some association professional liability insurance ("APLI") policies provide coverage for certain claims arising from certification programs as part of the basic policy, although some with coverage sublimits. Other APLI policies will not cover such programs without an endorsement to the policy. Importantly, APLI policies do not cover bodily injury or property damage claims arising from these programs. Stand-alone certification insurance policies are available and necessary to insure against these risks. Adequate insurance should be a prerequisite to the operation of any association certification program.

For more information, contact Mr. Tenenbaum at 202.344.8138 or at jstenenbaum@venable.com.