

Association Codes of Ethics and Conduct:

Minimizing the Liability Risks

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- Counsel to tax-exempt trade associations, professional societies
- Former Staff Counsel for the American Society of Association Executives
- Concentrates practice on tax, contracts, corporate governance and other issues affecting tax-exempt, nonprofit corporations
- Provides ongoing ethics counsel to other membership organizations

Legal Aspects

- Associations Generally
 - Tax-exempt status
 - Governing Documents
 - Articles of Incorporation
 - Bylaws
 - Board Policies and Procedures
 - Governance Oversight
 - Board/Executive Committee
 - Ethics Committee

Legal Aspects

- Code of Ethics
 - Compulsory vs. Aspirational
 - Due Process
 - Antitrust
 - Defamation
 - Endorsement

Due Process

- Fair process required—state-based common law issue
- Generally courts will not intervene in self-regulatory activity
- Look to value of item being denied or revoked
- Conflict of interest processes

Due Process

- Not as involved as a civil or criminal process—
 - Notice
 - Opportunity to respond
 - Access to evidence
 - Appeal optional
- In general, protection against arbitrary judgment

Antitrust

- Regulating member conduct can give rise to antitrust risk—concerted refusal to deal
- Greater risk when item being denied is economically valuable
- Even when harm is great, also must show deficiency in the code itself (avoid subjectivity, price-related provisions)

Defamation

- False statement that is published and that causes harm
- Qualified privilege for ethical/conduct proceedings
- Confidentiality nonetheless very important

Endorsement

- Not a high risk
- Could have third-party sue organization, saying it relied on organization's issuance of a certificate when deciding whether to hire someone
- Generally no duty for the association to protect end users, but not all courts agree

Questions?

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