

Top 5 Legal Issues for Certification Organizations

**ABNS Fall 2015 Assembly
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Top 5 Legal Issues

- Liability for Misconduct by Certificants (negligent credentialing)
- Accommodating Disabilities in the Delivery of the Examination
- Copyright Protection
- Trademark Protection
- Disciplining of Certificants

Liability for Misconduct of Certificants

- The status of being a certifying body is not sufficient by itself to impose liability
- A bona fide program that follow best practices will not be found legally deficient
- Bona fide:
 - Body of knowledge/job analysis
 - Test validity
 - Recertification
 - Accreditation

Liability for Misconduct of Certificants

Area of vulnerability: continuing certification of persons *known* to have engaged in wrongful conduct related to their work

- Failure to fulfill promises of investigation and oversight
- Ignoring definitive evidence of wrongdoing

Accommodating Disabilities in the Delivery of the Exam

Any organization that offers examinations related to certification or credentialing “for professional or trade purposes” must do so “in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.” ADA, 42 U.S.C. §12189.

Accommodating Disabilities in the Delivery of the Exam

Purpose of the ADA requirement:

To ensure that the test scores of individuals with disabilities accurately reflect the individual’s aptitude or achievement level rather than the individual’s impairment

Accommodating Disabilities in the Delivery of the Exam

Common accommodations:

- Extra time
- Distraction-free room
- Screen reading software
- Rest breaks

Accommodating Disabilities in the Delivery of the Exam

- Documentation from a qualified professional who has made an individualized assessment of the candidate
- Qualified professional: licensed or otherwise properly credentialed with expertise in the disability
- An absence of previous accommodations is not determinative
- Past testing or academic success is not relevant

Accommodating Disabilities in the Delivery of the Exam

- Cost issues
- Flagging of scores

Copyright Protection

- Examination questions and study materials
- Copyright notice
- Register with the US Copyright Office
- Written transfer of copyright by persons developing the exam and materials
- Appropriate language in the application or registration materials

Copyright Protection

- Candidates agree that they will not copy, reproduce, adapt, disclose or transmit examinations
- They further agree that they will not reconstruct examination content from memory, by dictation, or by any other means or otherwise discuss examination content with others
- Candidates further acknowledge that disclosure or any other use of examination content constitutes professional misconduct and may expose them to liability
- ... and may also result in imposition of penalties against them, including invalidation of examination results, exclusion from future examinations, suspension or revocation of Certification

Trademark Protection

- Certification designation as a certification mark
- Full name as a service mark
- Use of ™ or ®
- License Agreement
- Enforcement

Disciplining Certificants

- Published rules
- Clearly stated rules
- Published process
- Due process
- Balance the interests of the association (e.g., integrity of the program) with those of the certificant (i.e., the ability to practice their profession)

The End
