



Advancing American
Competitiveness through
Conformity Assessment:
LEGAL ISSUES AND
BEST PRACTICES



Legal Issues in Personnel Credentialing

Presented by

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Disclaimer: While I am a lawyer, I am not your lawyer, and while this presentation is intended to provide you with general information touching on legal issues, it is not intended to be, nor is it, legal advice

Advancing American Competitiveness through Conformity Assessment:
Legal Issues and Best Practices | September 21, 2010

LEED CERTIFICATION AND PROFESSIONAL CREDENTIALS

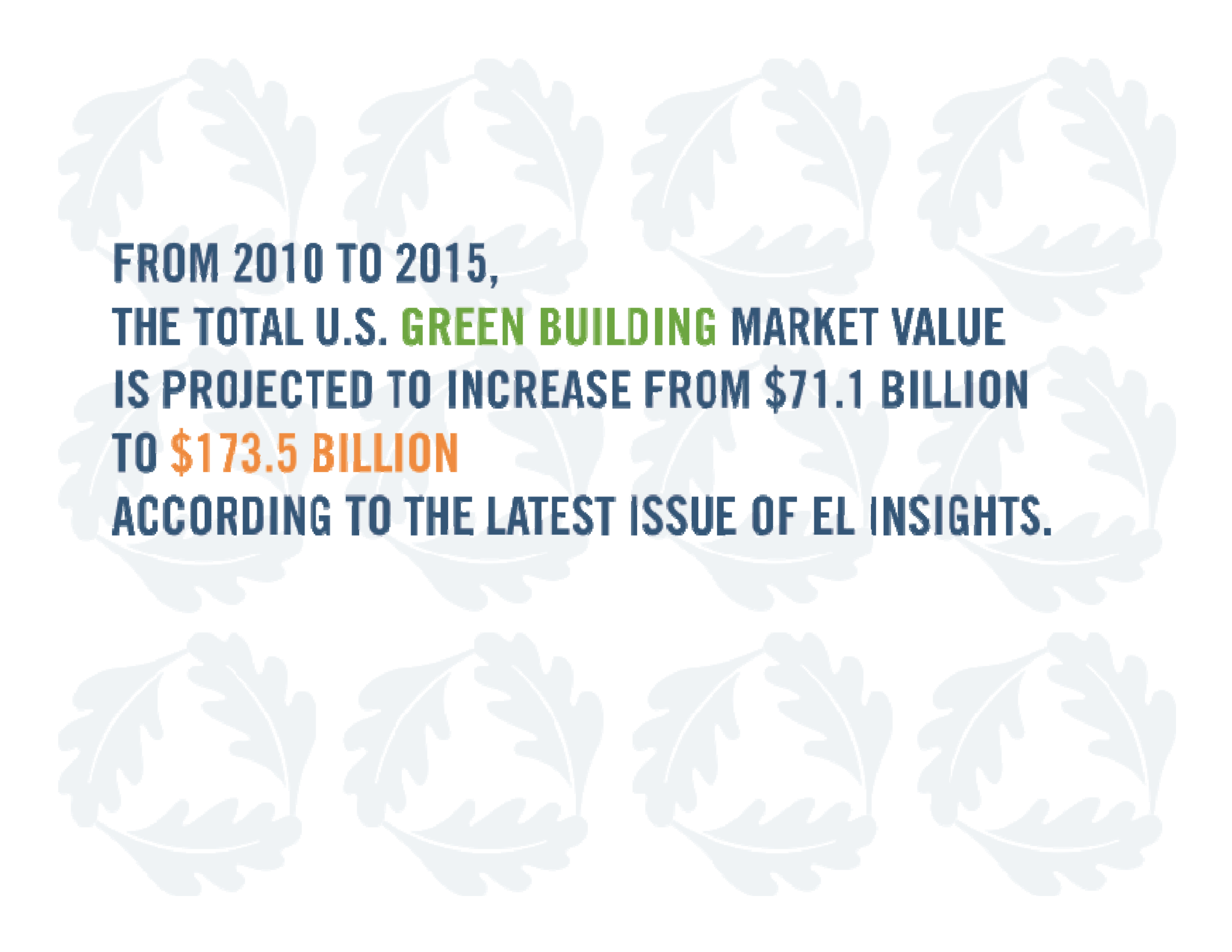


Advancement of policy
and LEED's technical and
scientific development



Third party verification
following ISO standards,
analysis, and auditing



The background features a repeating pattern of light blue oak leaf wreaths. Each wreath is composed of several oak leaves arranged in a circular, overlapping fashion, creating a textured, naturalistic backdrop for the text.

**FROM 2010 TO 2015,
THE TOTAL U.S. GREEN BUILDING MARKET VALUE
IS PROJECTED TO INCREASE FROM \$71.1 BILLION
TO \$173.5 BILLION
ACCORDING TO THE LATEST ISSUE OF EL INSIGHTS.**

**NEW ECONOMY
NEW DEMANDS**

NEW WORKFORCE

GREEN JOBS

Architecture

Brokerage

Commissioning

Consulting

Design

Development

Education

Engineering

Facility

Management

Finance

General
Contracting

Interior Design

Maintenance

Manufacturing

Marketing

Media

Landscape
Architecture

Law

Project Management

Property
Management

Sales

Subcontracting

Urban Planning

GREEN CONSTRUCTION MARKET STATISTICS

Jobs created or saved (includes
direct, indirect and induced jobs)

2000-2008: **2.4 MILLION**

2009-2013 forecast: **7.9 MILLION**



TM

500

LEED Professionals
in 2001



155,000

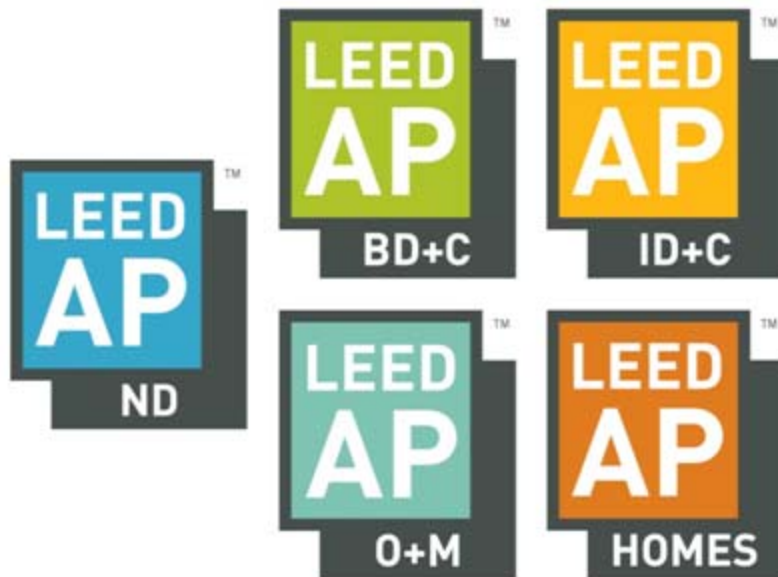
LEED Professionals in 2010
**LOCATED IN OVER 90
COUNTRIES**

LEED GREEN ASSOCIATE



- Support sustainable design, construction, and operation of buildings and neighborhoods.
- For building professionals who support LEED, such as realtors, teachers, product manufacturers, suppliers, brokers, lawyers, students and journalists.

LEED AP



- These specialty credentials represent one's knowledge of rating system-specific, technical information required for the successful implementation of LEED.
- Ideal for building practitioners

What is the Basis for Doing Business?



- As your organization's credential becomes more valuable, you are more likely to be sued when a candidate fails or the credential is negligently granted.

Legal Issues: Overview



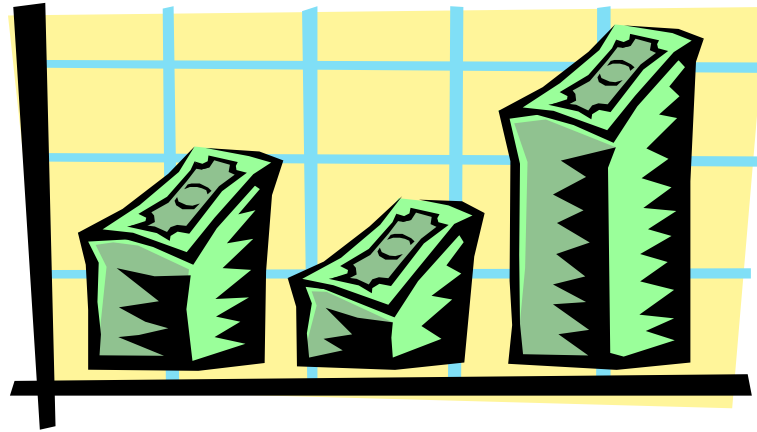
- Trademark issues
- Copyright Issues
- Title VII/ EEOC Issues
- Testing Issues
- Common Law Due Process
- Negligence Liability

The Importance of Trademark

- ❑ Be sure that your organization registers its trademark immediately—and in every country in which your organization does any significant amount of credentialing business
- ❑ As your certification becomes more valuable, it is more likely that others will attempt to infringe on your trademark



Trademark Issues



- ❑ Credentials are “certification marks”
- ❑ Acronyms can be registrable
- ❑ Protection of validity of marks increases their value not only to certification program, but also to certificants, contract management profession, and the public



Trademark Issues

- ❑ Certification marks are viewed by USPTO as generic, and therefore not registrable, if they merely designate certification in a specific profession
- ❑ Example: one USPTO decision: *In re Software Publishers Association*, TTAB No. 74/498,601 (April 2, 2003) - “Certified Software Manager” was not registrable



NCTRC Case

- ❑ In September of 2006, the TTAB reversed the USPTO's determination that the mark "Certified Therapeutic Recreation Specialist" was descriptive and generic. *In re National Council for Therapeutic Recreation Certification, Inc.* TTAB No. 75701344 (September 15, 2006).



Trademark Pointers

- ❑ Important to enforce misuse of marks by certificants and others
- ❑ Set out usage guidelines in a trademark policy
<http://www.gbci.org/Files/gbci-logo-guidelines.pdf>
- ❑ Recertification process that does not require continued practice and continued maintenance of certification may diminish (“dilute”) the certification marks



Copyrights

❑ What is a Copyright?

- A copyright is a form of protection provided to the authors of “original works of authorship,” that are fixed in a tangible form of expression (including literary, dramatic, musical, artistic, and certain other intellectual works). 17 U.S.C. §101 *et seq.*

❑ Examinations can be Registered

- Examinations, which are compilations of facts, are copyrightable if they are original.
- An original compilation requires that the selection and arrangement of facts displays a modicum of creativity. Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).



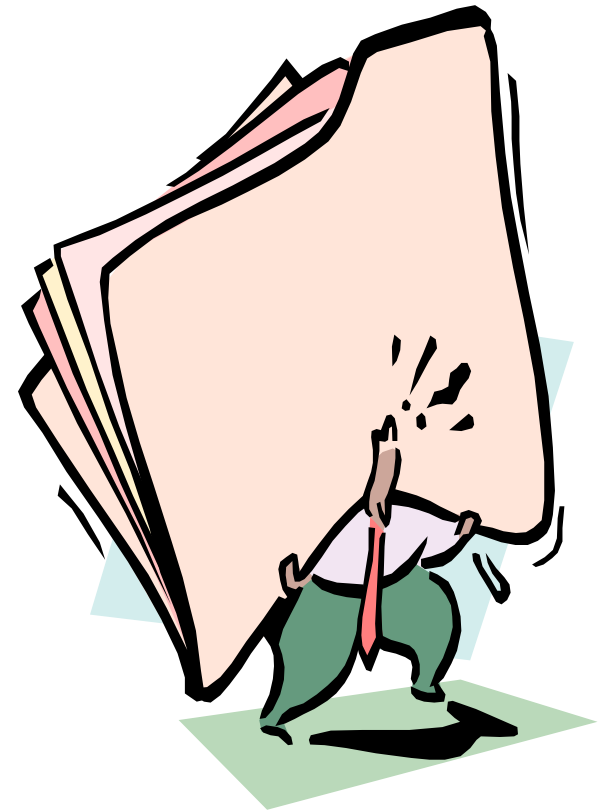
Copyrights

- ❑ Why Register a Copyright?
 - Registration of the copyright in examinations is important in the event of a security breach regarding exam materials
 - The Copyright Act limits the amount of damages that may be recovered in an infringement action to actual proven damages, except when a copyright has been registered. If an examination is registered, an organization is entitled to a more full measure of damages (including lost profits and attorneys' fees).
- ❑ For more detailed information on the requirements for registration of a copyright, go to www.copyright.gov
- ❑ Also, see the United States Copyright Office Circulars 64 and 65 at: <http://www.copyright.gov/circs>



Application

- ❑ Application may be construed as a contract between applicant and certification program
- ❑ Requires careful drafting so as to set out process for revocation and use of intellectual property



A Well Drafted Application...

- Acknowledgement of right to apply sanctions
- Indemnification statement
- Assertion of current and on-going compliance with all policies and eligibility requirements
- Acknowledgement of use/misuse of program's intellectual property; grant of a license if credential granted
- Warranty of truthfulness of statements in application



Title VII/EEOC Issues

- ❑ Certification programs may be bound by Title VII of the Civil Rights Act of 1964
- ❑ Categories of prohibited discrimination include:
 - race
 - color
 - religion
 - sex
 - national origin



Title VII/EEOC Issues

- ❑ Uniform Guidelines on Employee Selection Procedures apply to certification boards
- ❑ UGESP imposes a “fairness” standard upon certification programs
- ❑ To demonstrate “fairness” under UGESP, a certification program must collect demographic data of its applicants/certificants
- ❑ Demographic data is also useful to certification programs in developing role delineations



Veizaga v. National Board for Respiratory Therapy, No. 75 C 3430 (N.D. III. 1980)

- ❑ Title VII claim brought by class of black and Hispanic respiratory therapists who failed a respiratory therapist certification exam and were unable to secure employment as a result.
- ❑ Plaintiffs asserted that the exam was not indicative of ability to perform job as a respiratory therapist and excluded a disproportionate number of black and Hispanic respiratory therapists from jobs.
- ❑ Court ordered a nominal monetary payment and an agreement to modify testing procedures to be more predictive of job performance.



Morrison v. American Board of Psychiatry and Neurology, 908 F. Supp. 582 (N.D. III. 1996)

- ❑ An African American psychologist passed the ABPN written exam, but failed video and live portions of the oral exam.
- ❑ Applicant alleged discrimination under Title VII, and the Court held that the certification board was in a position to interfere with prospective employment opportunity.



Uniform Guidelines

- ❑ 4/5 Test: Certification programs must maintain demographic information to ensure that passing rate for particular classes covered by Title VII compared to overall passing rate. 29 CFR § 1607.4(D)



Testing Issues

- What is the purpose of the examination?
- Set cut score in a manner that reflects this purpose
- Test should be more than rubber stamp on experience requirements
- Use of tests by government agencies, or recognition by outside parties (*e.g.*, VA, ANSI, or NCCA) creates greater responsibility and accountability for certification program

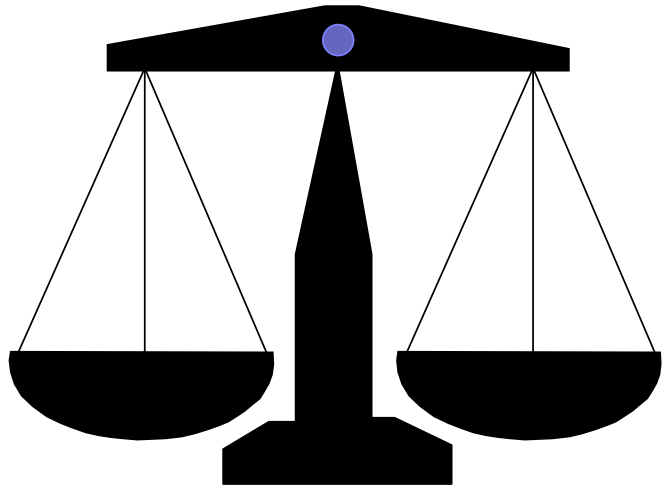


Testing Issues

- ❑ Security of examination statistics and results is essential to integrity of program
- ❑ If exams are to be reviewed by a government body before being used, make sure to be clear that the exam is not a public document
- ❑ Note that some state have open disclosure laws to require that an applicant has an opportunity to view a failed exam.



Common Law Due Process



- ❑ Judicial “nonintervention” applies unless: (1) the Association has failed to afford applicants rudimentary “due process”, or (2) the Association has violated its own charter, bylaws or some external law

Common Law Due Process

- ❑ Certification boards are judged under “fairness” standard and must provide basic due process standards (*i.e.* fair and impartial procedures, use of evidence for decisions, and avoidance of arbitrary and capricious decisions)

Medical Inst. Of Minn. V. National Ass’n of Trade and Technical Schools, 817 F. 2d 1310 (8th Cir. 1987).

North Jersey Secretarial School Inc. v. National Ass’n of Trade and Technical Schools, 597 F. Supp. 477 (D.C. 1984).



Common Law Due Process

- ❑ An established Disciplinary Policy or Code of Ethics can help protect your organization against Due Process claims
- ❑ Such policies establish an organization's rationale in making decisions with regard to applicants.



Noe v National Bd. of Chiropractic Examiners. 141 AD2d 706, (1988, NY App. Div.)

- ❑ In *Noe*, an applicant sued NBCE to review a NBCE certification exam that he failed.
- ❑ The court held that (1) NBCE's examination was not a state action, (2) the applicant had no protectable property interest or "legitimate claim of entitlement" to the kind of review he was seeking, and (3) NBCE's review procedures were reasonable, fair and necessary to protect integrity of its examination and to assure protection of public from unqualified practitioners.



And a few more cases of Judicial Deference when Due Process Afforded

- *Foundation for Interior Design Education Research v. Savannah College of Art & Design*, 244 F.3d 521 (6th Cir. 2001)
- Motion for Summary Judgment granted in *St. Andrews Presbyterian College v. The Southern Association of Colleges and Schools, Inc.*, No. 1:07-cv-02967-WSD (N.D. Ga. September 30, 2009)

http://www.nacua.org/documents/StAndrewsPresbyterianCollege_v_SouthernAssnCollegesSchools.pdf

Negligent Standard Setting: Summary of Restatement Second of Torts 311, 324A, 551, 552

- “Control” over certificants
- Assumption of responsibility for ongoing review of certificants
- Whether certification was negligently granted
- What, if any, reliance on certification was made by the injured party and whether the reliance caused any injury
- Nature of injury (*i.e.* physical or purely monetary)



Snyder v. AABB, 676 A. 2d. 1036 (N.J. 1996)

- Snyder contracted HIV as a result of a blood transfusion.
- As a practical matter, the court found that Blood Banks could not operate without AABB accreditation.
- Court found that AABB owed a duty of care to persons receiving blood from member blood banks.



King v. National Spa and Pool Institute, 570 So. 2d 612 (Ala. 1990)

- ❑ NSPI provided minimum standards for residential pools.
- ❑ King was severely injured and later died after hitting his head on the bottom of a pool after jumping off an diving board that was inappropriate for the size of the pool.
- ❑ Court held that NSPI has liability based upon foreseeability of injuries to consumers if its certification program did not exercise due care in standard setting.



Friedman v. Merck & Co. Inc., 107 Cal. App. 4th 454 (2003)

- ❑ Friedman, a strict ethical vegan, alleged he suffered serious emotional and subsequent physical injuries when he discovered a TB test he had submitted to contained animal products.
- ❑ Friedman alleged that Merck made a negligent representation when it informed a nurse, who in turn informed him that the test was “vegan friendly.”
- ❑ The court found that Friedman had no claim for negligent misrepresentation because he suffered no actual physical harm.

Montgomery G.I. Bill

- ❑ The U.S. government will reimburse eligible veterans and enlisted personnel for the cost of a certification test (up to \$2,000 per test).
- ❑ Approved tests are listed at www.gibill.va.gov
- ❑ Eligible recipients apply through VA regional offices.



What other protection is available?

- Currently, no formal government recognition
- ISO/IEC 17024
- Psychometric

Review

