

Legal Issues in Regulatory Testing

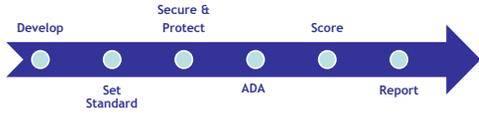
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Introduction

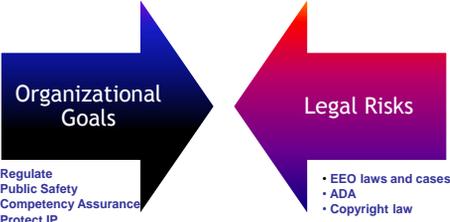
Regulatory agencies and professional associations face key decision points in developing and operating examination programs.



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The Challenge

The challenge is to ensure that the goals of the testing program are met, while minimizing legal risks and maintaining measurement quality.



- Regulate
- Public Safety
- Competency Assurance
- Protect IP

- EEO laws and cases
- ADA
- Copyright law

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Agenda

This session will review key points in the testing cycle that pose legal risks to credentialing organizations.

Test Dev	<ul style="list-style-type: none">• Validation• Set Passing Score
Test Admin	<ul style="list-style-type: none">• ADA Test Accommodation• Cheating Detection• IP Protection
Scoring	<ul style="list-style-type: none">• Subgroup Differences in Passing Rates

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Audience Question #1

What is your involvement in licensure or credentialing testing?

- A. Test program administrator
- B. Test developer
- C. Association executive
- D. Regulatory agency leader
- E. Other

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Audience Question #2

Why do you use tests for credentialing or licensing?

- A. Legislative mandate
- B. We've always tested
- C. To control the number of practitioners
- D. To protect public safety
- E. To assure competence in a profession
- F. Other

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Key Decision

	Scenario A	Scenario B
Purpose	Public safety	Public safety
Level	Ensure occupational effectiveness to protect the public	Ensure minimum competence to protect the public
How	Assess requisite knowledge and skills based on a review of occupational requirements	Give a test
Standard	Proficiency level to be established based on a review of job requirements	Cut score shall be "70"



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Test Development & Validation

Legal Considerations

- Under the law the state that uses a licensing test must only show that the test is "rationally related", that is it serves some legitimate state purpose.
- Title VII validity standards are not applicable to cases involving constitutional challenges to use of tests.
 - Washington v. Davis



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"A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."

- *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 238-9 (1957)



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Test Development & Validation

- Instead, the court personally examined the challenged test and concluded the skills it measured, such as reading and comprehension, memory, note-taking and verbal skills, were useful attributes for a policeman, particularly one in a supervisory position. Based on this conclusion, it upheld the test on the ground that “ [i]t bears a rational relationship to the ability to perform the work required.” *Allen v. City of Mobile*, S.D.Ala.1971, [331 F.Supp. 1134](#), 1146, [3 FEP Cases 1226](#)



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“We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.

Washington v. Davis, 426 U.S. 229, 239 (1978)



At 238, 239

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- Title VII disparate impact does not apply
- Lower Rational Relationship standard is all that is required
- Adverse impact is not controlling
- However... states have begun requiring the reporting of subgroup pass rates...



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Test Development & Validation

Professional Standards

The scientific community's best practices for test development and validation

- *Standards for Educational and Psychological Testing* (AERA, APA, NCME, 2014, Ch 11)
- *NCCA Standards for the Accreditation of Certification Programs*
- *NOCA / ANSI 1100 - Quality Standard for Assessment-Based Certificate Programs*
- Others: SIOP, CLEAR, ATP, ITC



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Test Development & Validation

Standard 11.3 (AERA et al, 2014)

- *When evidence of validity based on test content is a primary source of validity evidence in support of the use of a test for employment decisions or credentialing, a close link between test content and the job or professional requirements should be demonstrated.*



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Standard 11.13

- *The content domain to be covered by a credentialing test should be defined clearly and justified in terms of the importance of the content for credential-worthy performance in an occupation or profession.*
- *A rationale should be provided to support a claim that the knowledge or skills being assessed are required for credential-worthy performance in an occupation and are consistent with the purpose for which the licensing or certification program was instituted.*



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Considerations for Content Validity

- Job/practice analysis
- Appropriate content weighting
- Linking items to the job
- Technical documentation



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The Setting of the “Passing” Score



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The Setting of the “Passing” Score

Standard 11.16

- *The level of performance required for passing a credentialing test should depend on the knowledge and skills necessary for acceptable performance in the occupation or profession and should not be adjusted to regulate the number or proportion of persons passing the test.*



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The Setting of the “Passing” Score

Traditional criterion-referenced standard setting methods rely on “expert” judgments...

... informed by empirical data

- Nedelsky (1954)
- Angoff method and variants (1971)
- Ebel (1972)
- Bookmark (Lewis, Mitzel & Green, 1996)



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The Setting of the “Passing” Score

Psychometric Considerations

- SME Management - recruiting, training & calibration.
- Rater Reliability - measuring and acting on results.
- Aligning with *a priori* standards.
- Discrepancies between SME judgments and empirical data.
- When to Recalibrate Standards.



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The Setting of the “Passing” Score

Legal Considerations

- Is it possible to set a passing score so high that it could be challenged as not being “rationally related” to the state purpose of selecting qualified persons for the licensed profession?
- When the legislature sets a passing score of 70 how do you show this score is related to a legitimate state purpose?



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On the other hand?



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DO YOU WANT A MINIMALLY
COMPETENT PILOT?



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ation
g.org

Or the guy who did this?



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gulation
g.org

Unanimous?



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Audience Question #3

How does your organization set the passing score on credentialing examinations?

- A. Pre-established by legislation
- B. Angoff or other SME-based method
- C. Contrasting groups method
- D. Predictive equation
- E. Other

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Audience Question #4

Has your passing score been challenged?

- A. Yes
- B. No

Discuss the Yes answers.

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ADA Test Accommodations



A diamond-shaped logo with four quadrants containing icons: a person in a wheelchair, a person with a white cane, a person with a hearing aid, and a person with a prosthetic arm. The text 'Americans with Disabilities Act' is written around the diamond.



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ADA Test Accommodations

Legal Considerations

- Public sector employers have a legal obligation to offer “reasonable accommodation” in their testing practices to the “disabled.”
 - BARTLETT v. N.Y.S. BD. OF LAW EXAMINERS
226 F3d 69 (2nd Cir. 2000)



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ADA Test Accommodations

Professional Standards

Standard 3.9

- Test accommodations, when appropriate and feasible, should be provided to **remove construct irrelevant barriers** that otherwise would interfere with a test taker’s ability to demonstrate their standing on the target construct(s).



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ADA Test Accommodations

Standard 3.12

- When a **test is changed** to remove barriers to the accessibility of the construct being measured, **empirical evidence of the reliability, validity, and comparability** of interpretations for uses made from the scores from the changed test should be obtained and documented, where sample sizes permit



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ADA Test Accommodations

Practical Considerations

- How and when are requests made?
- What types of modifications to tests are reasonable?
- How to ensure validity, reliability, comparability?
- How should modified tests be scored?



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Audience Question #5

How do you decide whether or not to grant a request for test accommodation?

- A. Allow all requested accommodations
- B. Test administrator decides
- C. Expert panel recommendation
- D. Ask test developer to recommend
- E. Wait for law suit
- F. Other



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Audience Question #6

What steps do you take to ensure validity, reliability and comparability of modified test?

- A. Assume that there is no change
- B. Acknowledge difference and flag the scores
- C. Rely on SME opinion
- D. Conduct study to document
- E. Other



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Cheating Detection



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Cheating Detection

Legal Issue

- If there is broad based cheating in a testing program then can it be said the applicants who cheat are not demonstrating the ability being tested for and therefore there is no demonstrable “rational relationship” between the “test” and the “protection of the public.”



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Cheating Detection

- On the other hand, arguably, the non-cheating applicants are being denied the opportunity to practice their chosen profession when others are allowed to obtain the license without demonstrating proficiency in the area.



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Cheating Detection

Professional Standards

Standard 6.6

- Reasonable efforts should be made to assure the integrity of test scores by eliminating opportunities for test takers to attain scores by fraudulent means.
- New ITC Security Standards, July 2014
<http://www.intestcom.org/upload/sitefiles/tsguidelines.pdf>



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Cheating Detection

Psychometric Considerations

- How are cheating detection (forensic) analyses used?
 - Investigation / monitoring
- What types of cheating can be detected?
 - Collusion,
 - Quasi-key/access,
 - Harvesting,
 - Stand-in
 - Compromised content



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Audience Question #7

What forensic analysis methods do you regularly use to detect cheating?

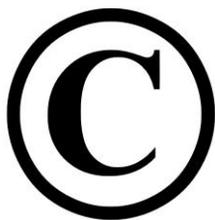
- A. Identify candidates with matching answers
- B. Identify candidates who spend a lot of time to answer a small number of items
- C. Look for high score increases among repeat candidates
- D. Patrol the internet
- E. Monitor trends in test scores
- F. Other



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IP Protection



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IP Protection

To prove copyright infringement, it is sufficient to show (1) plaintiff's ownership of the copyright and (2) defendant's copying of protected material.

There is no need to prove anything about a defendant's mental state to establish copyright infringement; it is a strict liability tort.

The Copyright Act provides that ownership of copyright is automatic once an original work (such as the MSAT forms at issue here) has been created. 17 U.S.C. § 102(a).



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IP Protection

The Act also provides that an employer such as ETS automatically owns the copyright in any work created by its own employees within the scope of their employment and in any work created by non ETS employees for ETS, so long as those individuals have signed "work for hire" agreements. 17 U.S.C.A. § § 101, 201(b) (West Supp. 1998)"

ETS v. Simon, 95 F. Supp. 2d 1081 (C.D. CA 1999)



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IP Protection

Standard 9.21

- Test users have the **responsibility to protect the security of tests**, including previous editions, to the extent that developers enjoin users to do so.

Standard 9.22

- Test users have the **responsibility to respect test copyrights**, including copyrights of tests that are administered via computer or the internet.



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IP Protection

Standard 9.23

- Test users should **remind all test takers**, including those taking computer- or internet-administered tests and others who have access to test materials that the **legal rights of test publishers**, including copyrights, and the legal obligations of other participants in the testing process may prohibit the disclosure of test items without specific authorization.



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IP Protection

Practical Considerations

- Copyright registration (creates presumption of copyright)
- Ownership/Confidentiality agreements with developers
- Integrity agreements with test takers
- Security practices



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Conclusions

- The testing lifecycle is full of risks and potential pitfalls
- Following professional best practices help mitigate risks and address goals of the organization



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Thank you

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