



“Silver Threads of Wisdom: The Experts Respond to your Questions”

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For other sources of information check the CLEAR website: clearhq.org/publications

- CLEAR Exam Review
- Development, Administration, Scoring and Reporting of Credentialing Examinations: Recommendations for Board Members, Revised Edition, August 2004
- Principles of Fairness: An Examining Guide for Credentialing Boards
- Resource Briefs
- Frequently Asked Questions

Frequently Asked Questions About Licensing Exams

Excerpted from the "The Answer Key," *CLEAR Exam Review*, Summer 1990 through Winter 1997
Authors: Norman R. Hertz and Eric Werner
Selected by Chuck Friedman

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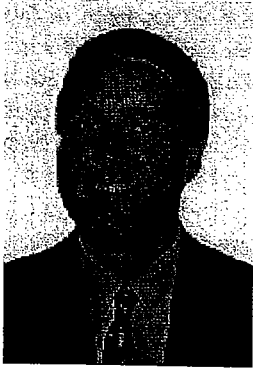
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LEGAL BEAT

A LESSON IN JURISDICTION AND DAMAGES

Dale J. Atkinson



"Candidates are inundated with suggestions and/or requests to report back to the preparation course and relate their examination experience, including test results, examination questions, content areas and the like."

Test security and the ability of owners to protect examination items and other proprietary information are essential elements in establishing and maintaining the integrity of such programs. Entities, whether licensing boards or certification organizations, rely upon the validity and defensibility of the examination program as one criterion in the credentialing process. Review courses and additional test preparation outfits continually attempt to provide candidates with materials that purport to be "actual test questions" or materials that will best prepare the examinees for the testing experience. In some instances, candidates are encouraged to memorize items on the examination and report them to the preparing entity. Candidates are inundated with suggestions and/or requests to report back to the preparation course and relate their examination experience, including test results, examination questions, content areas and the like. Also, candidates form study groups and attempt to assist fellow candidates in preparation for these high-stakes examinations.

Further complicating matters of security from the perspective of the examination owner is the development and advancement of technology. The evolution of the computer age has expanded the ability of individuals and groups to not only communicate on a "real time" basis, but to also move enormous amounts of information to an endless number of recipients with the push of a few buttons. Additional technological gadgets allow candidates to reproduce or actually copy test materials through modern recording devices. Cheating scandals have been publicized in the news on a regular basis.

Finally, cultural issues play a role in how candidates view the gathering and sharing of examination information data. Certain cultures carry a belief that information sharing is appropriate, irrespective of any intellectual property interests of the examination owner. Of course, cultural beliefs do not excuse non-compliance with applicable laws. Combining the cultural issues with the global nature of the economy and the technological advance-

ments can create interesting and challenging legal issues for examination owners, administrators, regulatory boards and credentialing entities. These issues can be especially complex in the area of which law applies, which court should hear a particular matter, and whether alleged infringers from foreign jurisdictions must appear in United States courts to defend themselves. Consider the following.

The Graduate Management Admission Council (GMAC), a non-profit corporation, developed and owns the rights to the Graduate Management Admissions Test (GMAT). The GMAT is used to assess the qualifications of applicants to approximately 1,700 graduate business management programs in the United States and elsewhere. Because such examination questions are original copyrightable materials, GMAC takes the necessary steps to protect its intellectual property interests of the examination programs, in part, through registrations with the United States Copyright office. These protections provide the GMAC with the exclusive rights to copy, distribute, display, publish, and prepare derivative works related to the GMAT. In addition, the GMAC has registered the "GMAT" with the United States Patent and Trademark office.

A citizen of India (Defendant) registered the domain names of <gmatplus.com> and <gmatplus.net> through a few different registrars located in Canada and Europe, which were eventually housed with VeriSign Global Registry Services, located in Herndon, Virginia. Using the domain names, the Defendant operated a website under the name "GMATplus" which sold GMAT test questions for preparation purposes. The site pur-

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ported to sell seven books containing “100% actual questions, which were never published in any GMAT books and materials.” These books sold for as much as \$199. The promotional text on the website claimed that 74% of the recent test takers scoring above 700 on the GMAT were from India, China, Korea, Japan, and Taiwan (even though only 22% of all test takers were from those five countries). The website attributed this success rate to the fact that “...most of [these examinees] have access to 100 percent of unpublished previous questions in these countries.” On at least two occasions, the Defendant sold and delivered these books to individuals located in Virginia.

The GMATplus website facilitated the ordering of materials through a two-step process combining a money transfer arranged through a third party and online ordering through a provided e-mail address. Customers are directed by the website to contact Western Union or Moneygram to set up payment to the Defendant in Hyderabad, India, and then send an e-mail to *gmatplus@yahoo.com* containing the customer’s address, telephone number and money transfer reference. To focus on customers in the United States and Canada, the website provides toll-free numbers for U.S. and Canadian Western Union and Moneygram offices while those located in other countries are provided hyperlinks to the respective websites. The United States and Canada are the only countries mentioned by name on the ordering page of the website.

In April 2002, GMAC filed a five-count complaint in Federal District Court in Virginia against the Defendant alleging copyright infringement, trademark infringement, trademark dilution, cyber piracy, and unfair competition. After filing the complaint, GMAC was confronted with the issue of how to effectuate service of process on the Defendant. Under applicable sections of the Federal Rules of Civil Procedure, GMAC served the Defendant via registered international mail. The Defendant did not answer the complaint. In an effort to take a default judgment on the Defendant, the court addressed the issue of whether the court had “jurisdiction” over the Defendant. A magistrate judge filed a report and recommendation that the court did not have personal jurisdiction over the Defendant. GMAC filed an objection to the report causing the District Court judge to examine the issue.

In addressing personal jurisdiction over a defendant, the court examined the applicable sections of Rule 4 of the Federal Rules of Civil Procedure that determines how to effectuate service upon a defendant and the territorial limits of effective service of process. The court applied the customary two-part test of determining personal jurisdiction. First, whether the facts of the case fall within the long-arm statute of the state where the federal court resides, in this case Virginia, and second whether recognizing jurisdiction meets the constitutional principles under the Due Process clause of the United States Constitution.

As to the first issue, the court easily held that the conduct of the Defendant placed him within the Virginia long-arm statute. The long-arm statute provides for personal jurisdiction over a person “causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth.” The court held that the Defendant’s actions in operating the website and selling test prep materials clearly caused tortious injury in Virginia through the alleged activities in violation of federal trademark and copyright laws. The court added that it is well established that solicitation of business through a website accessible by Virginians satisfies the conduct portion of the long-arm statute.

Regarding the due process analysis, the court summarized the constitutional requirements that the defendant must have certain minimum contacts with the forum such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.” In the instant case where the Defendant’s contacts with Virginia also make up the basis for the suit, the court reviews whether there exists a basis for specific jurisdiction. Specific jurisdiction is assessed by considering: (1) the extent to which the defendant purposefully availed itself of the privilege of conducting activities in the State; (2) whether the plaintiff’s claims arise out of those activities directed at the state; and (3) whether the exercise of personal jurisdiction would be constitutionally reasonable.

Taking into consideration the modern realities of Internet activities and widespread electronic communications, the court applied the test of whether the nature and quality of the commercial activities dictate the application of personal jurisdiction under the circumstances. First, the court held that the “passive” nature of the website—that is, the fact that the Internet activities were not necessarily directed at Virginians—point ultimately to the absence of personal jurisdiction. It stated that the mere registration of the domain name with a company in Virginia does not, in and of itself, support a finding of personal jurisdiction. Second, the court also found the potential for damage to the schools and colleges in Virginia that rely on the GMAT was too indirect and too diffuse to support a finding that the Defendant specifically targeted the citizens of Virginia. Third, the shipment of two booklets to individuals in Virginia did not provide a sufficient basis for finding of personal jurisdiction. Finally, the court held that the location of the GMAC in Virginia did not override the absence of the additional factors to consider in determining the constitutionality of imposing jurisdiction on the Defendant. Thus, the court agreed with the magistrate and rejected the arguments of the GMAC, which sought to impose judicial jurisdiction on the Defendant.

However, the court on its own volition, referenced another section of the Federal Rules of Civil Procedure not cited by either party. Rule 4(k)(2) provides an alternate basis for personal jurisdiction. It provides for personal jurisdiction through nationwide service of process over any defendant provided: (i) the exercise of jurisdiction is consistent with the Constitution and the laws of the United States; (ii) the claim arises under federal law; and (iii) the defendant is not subject to the jurisdiction of the courts of general jurisdiction of any state. Rule 4(k)(2) was added to deal with the gap in federal personal jurisdiction law in situations where a defendant does not reside in the United States and lacks contacts with a single state to justify personal jurisdiction, but has enough contacts with the United States as a whole to satisfy the due process requirements.

Under this Rule 4(k)(2) analysis, the court uses the same constitutional analysis under the Due Process clause; however, rather than using a state as the reference point in determining "fair play and substantial justice," the court uses the United States as a whole as the forum. In other words, the court asks whether the Defendant's contacts with the United States support the exercise of jurisdiction consistent with the Constitution and the laws of the United States. Under this test, the court in the instant case found that the Defendant did maintain sufficient contacts with the U.S. to justify jurisdiction. Clearly, the Defendant directed electronic activities into the United States, did so with the manifest intent of engaging in business in the U.S., and such activities created a potential cause of action in a person within the United States that is cognizable in the United States' courts. Thus, the court found that the exercise of jurisdiction over the Defendant complied with the constitutional mandates of the Due Process clause.

Just as easily, the court held that the second element of Rule 4(k)(2) was satisfied in that the complaint alleged violations of federal intellectual property laws in copyright and trademark. Accordingly, the court held that the Federal District Court for the Eastern District of Virginia lawfully maintained jurisdiction over the Defendant in this matter. The court stated:

"To find otherwise would not only frustrate GMAC's attempts in this case to vindicate its rights under United States law, by requiring GMAC to turn to foreign courts to vindicate those rights against a likely elusive defendant, it would also provide a blueprint whereby other defendants bent on violating United States trademark and copyright laws could do so without risking suit in a United States court."

Graduate Management Admission Council v. Raju, 241 F. Supp. 589 (D.C. Virginia 2003).

The above opinion was entered on January 23, 2003, finding that the District Court maintained jurisdiction over the Defendant. Thereafter, GMAC moved for a default judgment against the Defendant based upon the failure to answer or otherwise plead on the complaint filed and served. A hearing was held before the magistrate who recommended judgment be entered. The court adopted the recommendation of the magistrate and entered a judgment against the Defendant in the amount of \$3,500,000. In addition, the court ordered that the Defendant be:

"...permanently enjoined and prohibited from infringing, in any manner, on the GMAC existing and future copyrights and prohibited from copying, duplicating, distributing, displaying, selling, adapting, publishing, reproducing, preparing derivative works based on renting, leasing, offering, or otherwise transferring or communicating in any manner, orally or in written, printed, photographic, or any other form, any test questions that are identical or substantially similar to actual copyrighted GMAT test questions or any other copyrighted material obtained from GMAC's tests, test forms, computer-based item pools, or any other source, or aiding, abetting or licensing any other person to do the same."

A similar order was also entered with regard to the GMAC trademark rights, prohibiting the Defendant from infringing upon the protected rights of GMAC. An order was also entered requiring the return or destruction of infringing materials in the possession of the Defendant.

Regarding the damages award, the court upheld a judgment recognizing the maximum statutory damages. Under applicable federal intellectual property laws, GMAC was entitled to up to \$150,000 per infringed works for willful activities of a defendant. The court recognized the 22 test forms of the GMAT and found that the actions of the Defendant were willful. Thus, the court awarded \$3,300,000 (\$150,000 x 22) for copyright infringement damages.

Regarding the cyber piracy count, the court also awarded the maximum statutory damages of \$100,000 per domain name infringed for an additional award of \$200,000.

Collecting on such a judgment may pose additional issues for GMAC; however, setting an example of how the testing entity will protect its interests may provide disincentives to future infringers.

Graduate Management Admission Council v. Raju, 267 F. Supp. 505 (D.C. Virginia 2003).

EVIDENCE-CENTERED DESIGN FOR CERTIFICATION AND LICENSURE

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What is Evidence-Centered Design?

Evidence-Centered Design (ECD) (Almond, Steinberg, & Mislevy, 2002; Mislevy, Steinberg, & Almond, 2003) is a methodology applied at Educational Testing Service that emphasizes an evidentiary chain of reasoning for assessment design. This approach results in a more complete representation of the design rationale for an assessment, better targeting of the assessment for its intended purpose, and a more substantial basis for a construct-representation validity argument supporting use of the assessment. The approach encourages test developers to design with intent and provides several advantages:

Clarity of purpose – representation of assessment goals and the relevance of design decisions to those goals.

Interrelated design – modeling the interactions of design decisions and how changes in one aspect of design affect other design elements.

Evidentiary requirements – explication of what constitutes relevant evidence of ability and how such evidence bears on assessment-based decision-making.

Validity – a documented chain of reasoning and rationale underlying design decisions and their relevance to the criterion of interest.

Innovation – a guide for developing assessments targeting elusive domain constructs or using emerging technologies and new item types.

The foundations of ECD stem from validity theory (Messick, 1989), psychometrics (Mislevy, 1994), philosophy (Toulmin, 1958), and jurisprudence (Wigmore, 1937). They adapt the evidence-oriented approach to evaluating the degree to which conclusions about people can be made on the basis of collected evidence. The ECD process centers around four key questions:

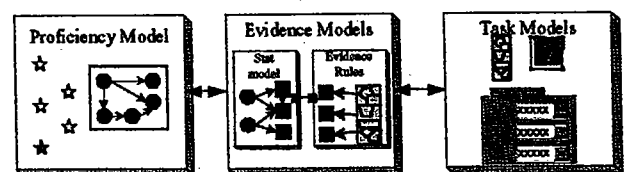
1. **Claims:** Who is being assessed and what will be declared about them as a result?
2. **Proficiencies:** What proficiencies must be measured to make appropriate decisions?
3. **Evidence:** How will we target, recognize, and interpret evidence of these proficiencies?
4. **Tasks:** Given practical constraints, what situations will elicit the kind of evidence needed?

Addressing these questions results in three fundamental assessment design models, represented here as Figure 1. These ECD models include:

- **Proficiency Model** – defines the claims and constructs of interest for the assessment and their interrelationships.
- **Evidence Models** – define how observations of behavior are considered as evidence of proficiency.
- **Task Models** – describe how assessment tasks must be structured to ensure opportunities to observe behaviors constituting evidence.

These interrelated models comprise a chain of reasoning for an assessment design that connects the design of assessment tasks to evidence of proficiencies targeted by the assessment, which in turn are formally associated with claims made on the basis of assessment results.

Figure 1: Fundamental Models of Evidence-Centered Design



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