



BAKER & MCKENZIE

Legal Documents and Policies Review Regarding Candidate Testing

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Overview of Discussion

- Candidate Agreements
 - What and why
 - Best practices
- Test Security Program Audits
- Other Critical Agreements
- Issues unique to internet-based agreements
- Enforcing candidate agreements in court
- Bolstering your security policies with US Copyright Office registration

What is a candidate agreement? Do I need one?

- **Contract:** An agreement between two or more persons which creates an obligation to do or not to do a particular thing. A legal relationship consisting of the rights and duties of the contracting parties. *Black's Law Dictionary, Sixth Edition*
- Your agreement with test takers defines the relationship
- Memorializes your (and their) rights and obligations
- If done properly, makes expectations (and remedies) clear



Test Security Audit

- Content from Caveon Test Security
- 250 security standards
- Three broad domains
 - Management
 - Development
 - Quality control
- 14 areas – “A to Z”

Someone Needs Responsibility

- Test program manager
- Compliance/standards area
- Legal
- Possibly HR
- Need a budget

Reviews essential

- Objectives of agreement
- Program implications
- Legal by someone who knows
 - Testing
 - The Program

Learning from Others

- Samples of agreements readily available
- No need to “start from scratch”
- Look at similar programs
- Look at range of severity
 - FSBPT = strong example

Willingness to Take Action

- Address from start
- Need senior management buy in
- Work through possible outcomes – what will you do?

Other Critical Agreements

- Transferring Ownership of items
- Prohibiting disclosure by all who have access
- Service providers
 - Items and tests
 - Personal information

Ownership, Control, Confidentiality

- Candidate information
- Identity theft
- Need well-defined rules

Content of Service Provider Agreements

- Adherence to physical and information standards
- Qualifications and training of personnel
- Right to conduct unannounced test security audits

Keep Agreements Current

- Conditions change
 - Roles and responsibilities
 - Legislation and regulations
 - Technology
- Annual review
 - performance appraisal
 - contract renewal

(Some) Candidates Pay Attention

- Monitoring “chatter” after an administration
- Discussion of explicit item content
- “Are we allowed to do this?”
 - Must be OK as they told us about everything else, but not about this

Issues Unique to Internet-based Agreements

- Many test developers offer on-line exam registration
- In these cases, candidates often “click” to signify that they understand and agree to the terms of the candidate agreement
- Case law on web-based contracts (“click-through” agreements) is still developing, but courts do enforce them
- There are several practical steps you can take to minimize later legal challenges to your on-line contracts

On-line agreements: Best Practices

- **Allowing user to view terms before agreeing.**
Don't give the candidate the option of agreeing to the contract terms without first being presented with the terms. Terms should appear automatically or through a clearly visible, easy-to-use link. Require the candidate to navigate through the terms before agreeing.
- **Don't provide full access to the registration site until the candidate has agreed to your terms.**
- **The terms should be easy to view, in clear and legible font.**

On-line agreements: Best Practices

- **The terms should remain available.** The candidate should be able to read at their own pace and navigate forward and backward within the terms. No time limit or single viewing.
- **Make the candidate choose between assent and rejection.**
- **Use clear words of assent or rejection.** For example, “yes” or “no,” or “I agree” or “I don’t agree.”
 - Avoid vague choices like “continue,” “next page” or “submit”

On-line agreements: Best Practices

- **Provide a clear *method* of assent or rejection.** Require the candidate to click a button or icon, or to type in specified words.
 - Downloading a file likely will not be considered an indication of assent.
- **Put the candidate on notice of the consequences.**
 - “By clicking ‘I agree,’ you acknowledge that you have read, understand and agree to be bound by the terms” or “These terms are a legal contract that will be binding when you click the following button”
 - “If you do not agree to these terms, you will not be allowed to register”
- **Keep records of your site’s content and format.**

Candidate Agreements: Security Considerations

- What does your Candidate Agreement say?
- Are candidates on notice that sharing items is a breach?
- Are candidates on notice that studying from recalled items is improper?
- Do you reserve the right to invalidate scores? Suspend access to the examination? To take other action?
- What are the candidate's rights?
- Do you remind the candidates of their obligations before and after the exam?
- Do you regularly review your agreement language?

Can you defend your actions?

- Do you have to prove “cheating”?
- Contract law – “good faith”
 - Language of agreements
 - Documented policies & procedures
 - Taking all steps to show “good faith”



Deference to Exam Administrators

***Murray v. ETS*, 170 F.3d 514 (5th Cir. 1999) (SAT)**

- “ETS’s contract with Murray clearly and explicitly reserved to ETS the right to withhold any scores ETS had reason to believe were not valid. The only contractual duty ETS owed to Murray was to investigate the validity of Murray’s scores in good faith.”

***Langston v. ACT*, 890 F.2d 380 (11th Cir. 1989) (ACT Assessment)**

- “Under the governing law, the outcome of plaintiff’s case does not turn on whether or not plaintiff cheated on his exam, but only on whether or not ACT carried out its contractual obligations in good faith.”

Actions Against Candidates

- How will you handle candidates who *shared* test items?
- What about candidates who *benefitted from* stolen test items?
- What would trigger candidate action in your organization?
- Courts typically treat as a contract matter – thus, the Candidate Agreement is key



Sample Agreement 1

Exam Security Agreement and General Terms of Use

- You must review and agree to the terms of the Exam Security Agreement before starting your test. If you do not agree to the Security Agreement your test will end, and you will forfeit your sitting fee.
- I certify that I am the person whose name appears on the two forms of identification I presented prior to admission to the testing room. I also certify that I am taking the Exam for the sole purpose of seeking licensure in a U.S. jurisdiction and not for any other purpose, OR, I have applied for and received special permission to take the Exam by the Test Developer.
- I affirm that I have read and understand the Candidate Handbook.

Sample Agreement 1 (cont'd)

- I affirm that I have read and will comply with the Testing Center Regulations.
- I understand that all test materials, including my answers, are the property of Test Developer and will not be given to me in any form except on the test itself.
- I affirm that I have not disclosed Exam questions or answers nor received Exam questions or answers from others.
- I understand that the Exam is a confidential and secure test, protected by U.S. and International copyright laws.

Sample Agreement 1 (cont'd)

- I understand and agree that disclosing any exam question or answer, in whole or in part, by any means whatsoever is a criminal act, and I may be charged with theft or attempted theft for doing so. I also understand and agree that if I disclose information about Exam questions or answers or any other product owned by Test Developer, I may receive any or all of the following consequences:
 - lawsuit that may result in my paying monetary damages or in my receiving other court-enforced penalties
 - criminal penalties,
 - cancellation of my test scores,
 - disciplinary action by Test Developer and/or the jurisdiction in which I am applying for licensure.

Sample Agreement 1 (cont'd)

- I agree that I will not discuss the content of the test with anyone, and I will not record, copy, or disclose any Exam question or answer, in whole or in part, in any form or by any means whatsoever (orally; in writing; in any Internet “chat room”, message board, or forum; or otherwise).
- I understand and agree that Test Developer has the right to cancel my scores if it finds any evidence of any irregularities whatsoever.
- I understand and agree that Test Developer is the final authority that determines whether I have the privilege of sitting for the Exam and whether the score I receive is transferred to any licensing jurisdiction.

Sample Agreement 1 (cont'd)

- I understand and agree that if I provide false information or if I violate any of the Exam rules or procedures, or any other terms or conditions stated in the Candidate Handbook or Testing Center Regulations
 - the Test Administrator may immediately dismiss me from the test session;
 - my scores may be canceled, without a refund, and a jurisdiction receiving my scores may be informed of the reason for the cancelation;
 - I may be banned from taking the Exam; and
 - I may face civil or criminal prosecution.
- I understand that if I do not agree to these conditions, I will not be permitted to take the test and I will forfeit my sitting fee.
- Click the **Yes** button to accept these terms.
- Click the **No** button if you do not accept these terms. You must click the **Yes** button to continue with the exam.

“Secure Test” Copyright Registration

- Registering your exams with the US Copyright Office is an important component of a comprehensive security policy
- What is a copyright?
 - A form of protection provided by U.S. laws
 - Protects “original works of authorship”
 - Gives owner the exclusive right to do and authorize the following:
 - reproduce copies, distribute copies
 - prepare derivative works
 - perform or display work publicly
 - Protection exists from time work is created in fixed form
 - Does *not* protect ideas, concepts, principles, etc.

Why register?

- Copyright protection is “automatic”
- **But registration is still very important:**
 - Typically is required before infringement suit may be filed
 - If made within 5 years of publication will establish *prima facie* evidence of validity of copyright
 - If made within 3 months of publication (or before infringement begins) will preserve right to statutory damages and attorney’s fees
 - Allows owner to record registration with U.S. Customs Service to protect against importation of infringing copies

When should an exam be registered?

- Can generally register any time within life of copyright
- But should register within 3 months of first publication (attorney's fees, statutory damages)
- If too late, should register within 5 years of publication
- Typically takes 6 months – 1 year before registration certificate issued
 - If litigation is imminent can request expedited handling (for extra fee)
- Update registration periodically, as item bank grows

“Secure test” Registration Procedure

- A “secure test” is:
 - a “nonmarketed” test (copies are not sold; ownership and control remain with test sponsor or publisher)
 - administered under supervision at specified centers on specific dates
 - all copies of which are accounted for and either destroyed or returned to restricted locked storage after each administration
- Requires in-person appointment with examiner: (202) 707-8250
- Bring with you: (1) application, (2) fee, (3) full copy of exam or database (or 50 unmasked pages) and (4) identifying portions of exam for deposit (redacted sample)
- Copyright Office Circular 64:
<http://www.copyright.gov/circs/circ64.pdf>

Any Questions?

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