



Defending Selection Procedures in Litigation

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Introduction to *Reynolds v. State of Alabama*

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Background



- **Class action race discrimination suit challenging:**
 - **Recruitment**
 - **MQs**
 - **Exams and other selection devices by SPD**
 - **Register and certificate practices**
 - **Interviews by the employer**
 - **Job assignments**
 - **Training**

Background (Continued)



- **After period of litigation, the State entered into settlement discussions with the plaintiffs (consent decree)**
 - **Original proposed consent decree contained both race neutral and race conscious provisions**
 - **Race conscious provisions excised after intervention of non-black employees**
 - **Decree as adopted by court contained 21 articles, all considered to be race neutral**

What to do?



- **Article Two: Minimum Qualifications**

- **New MQs must be content validated**
- **No new MQs that are not shown to be BOTH (a) job related and necessary at entry, AND (b) not measured on the subsequent examination**
- **No new MQs to be implemented without approval of either the plaintiffs or the court**

What to do? (Continued)



- **Article Three: Scoring and Ranking**
 - **New examinations to be developed for all ALDOT classifications: 22 “Project Classifications” and 150 other classifications**
 - **Project class jobs to be completed within 2 years**
 - **All selection procedures must be validated in accordance with *Uniform Guidelines***

What to do? (Continued)



- **Article Fifteen:
Reclassification/Multigrade**
 - **Employees performing duties of higher classifications to be reclassified**
 - **Study of jobs in multigrade series to determine if jobs should be combined or restructured**
 - **Where jobs are combined, pay adjustments for existing employees**
 - **Monitor to keep employees within classification**



Recent Hearings and Findings of the Court

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What to do - Recap



- **Article Two: Minimum Qualifications**
- **Article Three: Scoring and Ranking**
 - **New MQs and examinations to be developed for 22 “Project Classifications” and 130 other classifications**
 - **All selection procedures must be validated in accordance with *Uniform Guidelines***
 - **“No overlap” provision**
 - **Court or plaintiff approval**

How to do?



- **Given the highly litigious nature of the *Reynolds* case and the decree requirements, we needed to accomplish several goals**
 - **Modify the “no overlap” provision**
 - **Develop an MQ procedure consistent with the Uniform Guidelines**
 - **Prevail on certain testing issues, e.g.,**
 - **Job analysis methods**
 - **Weighting method**
 - **Rank order certificates of eligibles (vs. Banding)**
 - **Consideration of alternatives**

Outcome



- **Briefly, we accomplished each of the three goals**
 - **“No overlap” provision was litigated with multiple experts testifying; Roth and Sharf (defendants), Outtz and Lefkowitz (plaintiffs)**
 - **MQ procedure was litigated with multiple experts testifying; Roth and Bobko (defendants), Outtz and Lefkowitz (plaintiffs)**
 - **Testing issues were litigated with multiple experts testifying; Roth and Bobko (defendants), Outtz and Lefkowitz (plaintiffs)**

The Cases - Exams



- **A hearing was held pertaining five examinations:**
 - **Civil Engineer–Construction Option**
 - **Civil Engineer–Design Option**
 - **Civil Engineer Manager**
 - **Civil Engineer Administrator**
 - **Senior Right-of-Way Specialist**
- **All five exams are work samples consisting of multiple components**
 - **Some are 9.5 to 13.5 hours in length**

The Cases - Exams



- **The job analyses and exams were reviewed and approved by Plaintiffs' experts prior to being administered**

- **The Plaintiffs still proffered several arguments:**
 1. **Needed at entry job analysis ratings**
 2. **Content validity of exams using unit weighting**
 3. **Plaintiffs' alternate use argument**
 4. **Banded scoring versus rank ordering**

The Cases - Exams



- **Overall, the Court ruled:**
 - **“After having heard three days of expert testimony, read expert reports and expert depositions, and looked at the defendants' content-validation reports, the court concludes that the exams at issue are highly content valid”**

The Cases - Exams



1. Needed at entry job analysis ratings

- Based upon the individuals who say they use a particular KSA
- The Court said, “. . . it is clear that they chose a professionally acceptable method, one that does not reduce the content validity of the exams at issue”

The Cases - Exams



2. Content validity of exams using unit weighting

Steps:

- Standardize the X sections or components/subscores of the exam
- Sum the resulting standardized scores

NOTE: Standardization is essential to obtaining unit weights. Summation of raw scores will result in a composite score weighted by the standard deviation of each section or component/subscore

The Cases - Exams



- **Plaintiffs argued:**
 - **That the defendants' choice of unit weighting severely reduces the content validity of these exams**
 - **Argued similarly from time to time in the literature**
 - **That the defendants chose unit weighting because it was convenient, not because it related to the validity of the exams in any way**

The Cases - Exams



- **Defendants argued:**
 - **The nature or strategy for measurement of a work sample test is to assess dimensions as they tend to occur on the job**
 - **That unit weighting allows for scores that represent a balance of both content and communications skills, and that it is a compensatory scoring system**

The Cases - Exams



- **That unit weighting was chosen to be true to the exercises and scores that we were given by the test developers**
- **That unit weighting is both acceptable and highly content valid because it produces scores that are highly correlated with those under systems that base their weights on the underlying KSAs**

The Cases - Exams



- The Court ruled:
 - “. . . the defendants' choice to score these exams using unit weighting does not diminish their content validity”
 - “. . . the court finds that, as a result of the procedures used by the defendants, the content of these five exams is highly representative of the content of the underlying job, and the defendants use of unit weighting does not detract from that representativeness. In other words, the exams at issue are highly content valid”
 - “. . . basing a weighting system on the KSAs underlying an exercise does not make that system more content valid than one using unit weights”

The Cases - Exams



3. Plaintiffs' alternate use argument

- The plaintiffs argued that “d” indicates adverse impact. Since some ds were non-zero, we must consider alternatives
- The d statistic is often referred to as the “standardized difference”
- It is defined as the difference between group means (e.g., White versus Black) divided by the pooled standard deviation of the groups (e.g., sample weighted, within-group standard deviation)

The Cases - Exams



$$d = \frac{\bar{X}_W - \bar{X}_B}{\sqrt{\frac{(n_W - 1)(s_W^2) + (n_B - 1)(s_B^2)}{(n_W + n_B - 2)}}$$

Where:

\bar{X} = Mean score for the particular group sample (e.g.,
White or Black)

n = Sample size for the particular group

s^2 = Variance for the particular group sample

The Cases - Exams



- **The plaintiffs argued we should have considered/chosen one of two other weighting systems instead of unit weights**
 - **One was based on SME weights**
 - **The other was based upon the d statistic – inverse weights**
- **The defendants argued that adverse impact is based on selection ratios, not standardized differences**

The Cases - Exams



– The Court ruled:

- “. . . the plaintiffs have produced no evidence about the actual adverse impact of either weighting system,” therefore
 - “. . . the plaintiffs have not proven that the adverse impact of the plaintiffs' weighting system is less than that of the defendants’”
- “The plaintiffs have failed to establish that their proposed weighting system—based on the KSAs underlying an exercise and the exercise's d-statistic—is substantially equally valid to the defendants' system of unit weights”

The Cases - Exams



4. Banded scoring versus rank ordering

- **Unlike consideration of alternatives where the burden was on the plaintiffs to show that their weighting system was substantially equally valid to the defendants, here the Uniform Guidelines clearly put the burden on the defendants to show that these exams are sufficiently valid to be used for ranking**

The Cases - Exams



§14C(9) *Uniform Guidelines* reads:

- **“If a user can show, by a job analysis or otherwise, that a higher score on a content valid selection procedure is likely to result in better job performance, the results may be used to rank persons who score above minimum levels. Where a selection procedure supported solely or primarily by content validity is used to rank job candidates, the selection procedure should measure those aspects of performance which differentiate among levels of job performance”**

The Cases - Exams



***1987 SIOP Principles for the Validation and Use of Personnel Selection Procedures* reads:**

- **“Interpretation of content-oriented selection procedures depends on the measurement properties of the given procedure. If a selection instrument measures a substantial and important part of the job reliably, and provides adequate discrimination in the score ranges involved, persons may be ranked on the basis of its results”**

The Cases - Exams



- **The court has already found that these five exams are highly content valid, so the defendants' remaining burden is to show “that a higher score on a content valid selection procedure is likely to result in better job performance”**
- **The State collected ratings from SMEs regarding the exams' ability to differentiate**
- **“Whether there has been a sufficient demonstration that an exam may be used on a ranking basis is a matter that is within the bounds of acceptable professional practice”**

The Cases - Exams



– The Court ruled:

- “. . . the defendants have met their burden of showing that a candidate who has a higher score on these exams is likely to exhibit better job performance”

Based upon:

- “These exams are highly content valid--reflecting quite closely the content of the underlying jobs--and the SMEs have evaluated the exam exercises to ensure that they distinguish between different levels of job performance“”
- “Dr. Bobko’s testimony that there is an adequate variation in exam scores ”

The Cases - Exams



- The Court further ruled:
 - The plaintiffs “. . . have not undertaken to show that banded scoring is as content valid as ranking, or that it would have less adverse impact than ranking”

The Cases - MQs



- There is very little in the literature on how to develop and content validate MQs, such that the MQs will be consistent with the *Uniform Guidelines*
- There is indeed some literature demonstrating the relationship of education and experience factors to various criterion variables

The Cases - MQs



- The *Uniform Guidelines (§1607.14C(6))* speak directly to the use of prior training and experience in selection

“A requirement for or evaluation of specific prior training or experience based on content validity, including a specification of level or amount of training or experience, should be justified on the basis of the relationship between the content of the training or experience and the content of the job for which the training or experience is to be required or evaluated. The critical consideration is the resemblance between the specific behaviors, products, knowledges, skills, or abilities in the experience or training and the specific behaviors, products, knowledges, skills, or abilities required on the job, whether or not there is close resemblance between the experience or training as a whole and the job as a whole.”

The Cases - MQs



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The Cases - MQs



- **The State Personnel Department developed a procedure (a modification / deviation from the Levine approach)**
- **A hearing was conducted regarding three MQ validation reports**
 - **Senior Right of Way Specialist**
 - **Senior Real Property Valuation Analyst**
 - **Civil Engineer Administrator**

The Cases – MQs



- **The plaintiffs proffered several arguments**
 1. **Lack of specificity**
 2. **Use of so-called compound MQ statements**
 3. **Misuse of scales**
 4. **Consideration of alternatives**
 5. **Documentation requirements**

The Cases – MQs



1. Lack of specificity

- They claimed that the state failed “to correlate the content of the specific behaviors products, skills, or abilities in the experience or training of the job, but instead focused on the experience or training as a whole
- e.g.,
BS degree in Civil Engineering or Civil Engineering Technology and 8 years of engineering experience at the Engineering Assistant level or above, 4 of which must be at the Civil Engineer Manager level.

The Cases – MQs



- The defendants argued that the process satisfies the *Guidelines*, the process begins with KSAs and is finally linked to the KSAs

- The Court ruled
 - “The Defendants have demonstrated content validity by having the SMEs develop the minimum qualification from the KSAs of the job and then link those KSAs to the MQs, thereby confirming the relationship between the two”

The Cases – MQs



- 2. Use of so-called compound MQ statements**
 - It was the plaintiffs' position that, under section 14C(6), the components must be separated during the validation process

i.e., B.A. degree validated separately from experience
 - The Court ruled
 - “Neither the Guidelines nor the Consent Decree prohibits the use of compound statements, nor do they require the validation of the MQ statement by linkage to the KSAs at the individual component level of the MQ statement itself”

The Cases – MQs



3. Misuse of scales

- Two ratings are collected:

The Cases – MQs



One

To what extent is the minimum qualification statement suitable for identifying the barely acceptable applicant?

0 = Not at all

1 = This minimum qualification statement is not enough to expect from a barely acceptable applicant on day one of the job

2 = This minimum qualification statement appropriately defines what is required of the barely acceptable applicant on day one of the job; persons below this level are unacceptable

3 = This minimum qualification statement is more than should be expected from a barely acceptable applicant on day one of the job

The Cases – MQs



Two

Can this KSA be acquired from this minimum qualification statement?"

0 = No

1 = Yes

The Cases – MQs



- The Court ruled
 - “There is ample evidence in the record to support the SPD’s decision to use a dichotomous scale and a 0.50 linkage screen”
 - “The process utilized by the SPD to screen the linkage between the KSAs and the potential MQ statements is supported by the Guidelines, including the use of a dichotomous rating scale”

The Cases – MQs



- 4. Consideration of alternatives**
 - The plaintiffs contended the state did not consider alternatives
 - The defendants argued that alternatives were considered
 - During the MQ development meeting that was conducted as a modified Nominal Group Technique
 - When SMEs rated the various statements in the MQ Questionnaire

The Cases – MQs



- When SMEs responded to several supplemental questions
- The previous task-based system developed in concert with the plaintiffs
- The Court ruled
 - “The evidence establishes that the [State] structured the MQ development process for the three at-issue job classifications in such a way that consideration was given by the SMEs to a wide range of alternatives”

The Cases – MQs



5. Documentation requirements
 - The plaintiffs contended the state did not comply with 15C of the *Guidelines*
 - Hours of the hearing were spent going through the reports item by item to show compliance
 - The Court ruled
 - “The Defendants have documented their MQ Development efforts in a manner consistent with the requirements of the Guidelines and the Consent Decree. The documentation assembled by the Defendants and provided to Plaintiffs’ counsel is adequate to support the Defendants’ determination of content validity”



Surviving Litigation

Lisa Borden, J.D.

**Baker, Donelson, Bearman, Caldwell,
and Berkowitz**

Documented Procedures



- **Develop standardized procedures to be followed in development projects**
- **Document standardized procedures in a manual**
- **Leave room for exercise of professional judgment**

Documented Procedures



- **In developing standard procedures, review literature**
 - **Retain documentation of support for your procedures**
 - **If there is conflicting literature, consider and document reasons for departing from that literature**

Documented Procedures



- **In developing standard procedures, consider legal precedent**
 - **Become familiar with case law**
 - **Consult with counsel**

Documented Procedures



- **Don't go out on a limb**
 - **If there's any question about how to do something, take the most well supported route if possible**
 - **Don't use untested or experimental procedures unless there's no other reasonable choice**

Documented Procedures



- **If litigation is ongoing or anticipated, involve outside expert early**
 - **Expert should contribute to, or review standard procedures**
 - **Expert should review own prior writings and testimony to ensure there is no significant conflict**

Documented Procedures



- **Pay careful attention to the requirements of the Uniform Guidelines**
 - **The Uniform Guidelines are federal regulations, and they remain an important legal standard that courts may apply to determine compliance with the law**

Staffing Development Projects



- **Limit the number of staff members**
 - **A small number of highly trained and well qualified people should perform most development work**
 - **To the extent that less experienced assistants are used, they should be very closely supervised and not make judgment calls**

Staffing Development Projects



- **Carefully consider the background of each staff member**
 - **Prior development experience**
 - **Education**

Staffing Development Projects



- **Carefully consider the ability of each staff member to act as a witness**
 - **Temperament**
 - **Articulateness**
 - **Attention to detail**
 - **Presence**

During Development



- **Carefully document all work**
 - **The smallest, most seemingly insignificant detail may be raised as a problem by the other party**
 - **Meticulous record-keeping can carry the day**

During Development



- **Exception to the meticulous documentation rule:**
 - **Don't correspond with staff in writing about questions and problems, if a telephone conversation or meeting will suffice**
 - **You can always document your resolution of a problem with a memo afterwards**

During Development



- **When a deviation from your normal practice is called for, document it**
 - **Provide an explanation for the decision to change the process**
 - **Include any support in the professional literature**

During Development



- **Beware of deadlines!**
 - **If you must agree to a deadline, decide how much time you are comfortable with, and then add some more time for the unanticipated**
 - **Let the court and/or other parties know of potential obstacles or delays as soon as you know**
 - **Ensure that ways to extend the deadline are set out**

During Development



- **Establish a review procedure for all development work**
 - One or two people provide final review of all completed work
 - Reviewers will be witnesses



Your Counsel

**Your Best Friend
(Obviously)**

Communication with Your Counsel



- **Keep in mind that even experienced counsel is not an expert in your field**
 - **Patiently (and tirelessly) ensure that your counsel has a thorough understanding of the basic requirements for validation**
 - **Ensure that counsel has a thorough understanding of your particular procedures**

Communication with Your Counsel



- **Keep in mind that even an experienced professional in your field (yes, that means you) is not a lawyer**

Communication with Your Counsel



- **Maintain frequent communication with counsel**
 - **Keep your counsel informed of progress, obstacles, delays, unanticipated issues**
 - **Stay informed about legal developments, including hearings, decisions, negotiations**
 - **Be firm about maintaining your role in providing input on selection issues**

Communication with Your Counsel



- **Inform counsel of delays or potential delays as soon as you know, even if a deadline is far off, even if there is no firm deadline**
 - **Extensions can be difficult to obtain, more so when the deadline is close**
 - **Court may get angry if surprised by an unexpected delay**

Assisting Your Counsel



- **Regularly review pertinent literature**
 - Keep counsel informed of professional literature and developments that may relate to your project
 - This means harmful, as well as helpful, information
 - Don't spin info your way – help counsel understand all possible interpretations

Assisting Your Counsel



- **Get to know your opposition**
 - **Gather literature by and about, conference presentations, look into prior selection work, academics, reputation, litigation experience**
 - **Continue to follow the expert's work**
 - **Inform counsel of any publications, selection work, or other activities by opposing experts that might be useful**



Your Own Expert

The devil you know

Choosing Your Expert



- **Use your valuable knowledge of your organization's system to provide assistance in selecting an expert**
 - **Suggest potential experts for counsel's consideration**
 - **Assist in interviewing experts – you speak the same language**
 - **Provide input to counsel on things to look for**

Choosing Your Expert



- **Get to know the candidates**

Choosing Your Expert



- **Investigate the candidate's prior selection work**
 - **Ensure that the candidate has practical, real world experience in the relevant area**
 - **If possible, get feedback from organizations**
 - **Pay particular attention to work similar to your project**

Choosing Your Expert



- **Investigate the candidate's prior litigation experience**
 - Read the opinions
 - Read the candidate's expert reports
 - Read the candidate's testimony

Choosing Your Expert



- **Explore the candidate's relationships with experts on the other side**
 - Antagonistic relationships are probably not good
 - Best pals is not good either
 - Professional working relationship is good

Choosing Your Expert



- **Consider hiring a firm with a big staff**
 - If the project is very large or
 - If the project must be completed quickly
- **An individual expert may consider partnering with a large consulting firm**

Working with Your Expert



- **Keep your expert informed**
 - Regular communication is key
 - Expert needs to keep informed, even about routine matters
 - Don't keep bad information from your expert

Working with Your Expert



- **Make sure your expert keeps you informed**
 - **Schedule regular meetings or conference calls to keep up to date on the work of your expert**
 - **Ensure that the employer's interests remain at the forefront of what your expert does, agrees to do, or talks with others about doing**
 - **Remember that your discussions with your expert may not be privileged**

Working with Your Expert



- **Correspondence between you and your expert may be subject to discovery**
 - **Don't conduct conversations via email**
 - **Correspondence should be kept to a minimum**

Working with Your Expert



- **In the event of a difference of opinion, work it out verbally**
 - **Take the expert's recommended option, if feasible**
 - **If disagreement is over the *best* way to do something, get expert's commitment that he will still support your way as an acceptable practice**
 - **If expert cannot support your method, don't do it**
 - **Be sure that counsel is aware of any differences of opinion and all communications about them**

Working with Your Expert



- **Involve your expert in implementation**
 - Developing and/or reviewing procedures
 - Providing training and instruction
 - Personally conducting some work
 - Reviewing and providing feedback on completed work and reports



The Opposing Expert

The devil you don't know

Contacts with Opposing Experts



- **Always maintain courteous, professional relations with the opposing expert**
 - **Don't respond angrily or snidely to criticism. It's fine to state your disagreement, but do so in a professional tone**
 - **Similarly, don't criticize the expert harshly or sarcastically. You can point out errors without emotion**

Contacts with Opposing Experts



- **Even if you have a friendly relationship, remember that the opposing expert is not your friend**
 - His or her job is to find ways to torpedo your work

Contacts with Opposing Experts



- **If you are in a collaborative mode:**
 - Do your best to receive the opposing expert's input with interest
 - Ask all the questions you need to ask to be sure you fully understand his position
 - Don't agree that the opposing expert's proposal is the correct or better way to proceed
 - Discuss with your counsel before proceeding

Contacts with Opposing Experts



- **Get proposals and communications from the other side in writing**
 - **If you implement the proposal, you may later need evidence that it was, in fact, what the other side proposed**
 - **Maintain every communication from the other side, no matter how minor**



Opposing Counsel

The Devil, Period

Contacts with Opposing Counsel



- **DON'T TRUST THIS PERSON!**
 - Even if she is a terrific human being, it is her job to defeat you
 - Everything you say will be filed away for possible future use

Contacts with Opposing Counsel



- You should almost never be in the presence of opposing counsel without your own counsel by your side
- If it happens, topics of conversation should include the weather, children, pets, and sports

Contacts with Opposing Counsel



- **It's not just what you say, it's how you say it**
 - **Always maintain a courteous and professional tone with opposing counsel**
 - **Remember that opposing counsel is always sizing you up**
 - **If you show him where your buttons are, he will push them later**

Contacts with Opposing Counsel



- **In deposition, always be deliberate**
 - Counsel may deliberately annoy you to see how far you can be pushed
 - If you lose your cool, you lose your credibility
 - There's no shame in saying "I don't know" or "I don't remember"

Contacts with Opposing Counsel



- **Never make commitments to opposing counsel**
 - **Don't commit to do anything at opposing counsel's request, or in opposing counsel's presence**
 - **Say you will discuss it with your counsel**
 - **Say this even if your counsel is present**

Settlement



- **If a consent decree or settlement is contemplated:**
 - **Ensure that all provisions related to selection are reviewed by appropriate professionals**
 - **Insist on opportunity to provide feedback on proposed terms before they are adopted**
 - **Assume that additional time will be needed to complete any project**
 - **Prevent unrealistic procedures and timetables**

Settlement



- **If an agreement is being drafted:**
 - **BE SPECIFIC!! Define terms and provide details**
 - **Make express provision for discretion and judgment of employer**
 - **If agreeing to consult with the other party, include express limitations on frequency, level of detail, and how input must be used**

Settlement



- **Beware of weasel words – be sure you clearly understand every word of any proposed term**
- **When in doubt, insist on a definition of terms**

Settlement



- **If an agreement has been signed:**
 - **Train all staff on requirements of decree**
 - **Seek clarification of any ambiguities up front**
 - **Adopt standard procedures that conform to the decree's requirements and follow them**

Standards for Compliance



- **“Plain language” of decree governs**
 - Court may not impose requirements not unambiguously mandated by plain language
 - If non-compliance alleged, other party must file a contempt motion and prove failure to comply by clear and convincing evidence

Standards for Compliance



- **Professional judgment**
 - Except where steps to implement decree are expressly provided, method of implementation is left to the reasonable professional judgment of the party implementing it
 - Court and other parties may not substitute their own judgment concerning methods of implementation
 - A “better” method does not trump the method chosen by the implementing party

Dealing with Implementation Problems



- **Seek extensions BEFORE deadlines are missed**
- **Give accurate progress reports - don't let the Court and parties develop unrealistic expectations**
- **Document all obstacles and efforts to overcome them**