

“[The studies concluded that performance testing measures skills not tested by the multiple-choice or essay portions of the bar exam.]”

## THERE'S A NEW TEST IN TOWN: PREPARING STUDENTS FOR THE MPT

BY NANCY L. SCHULTZ

*Nancy L. Schultz is Professor of Law at Chapman University School of Law in Orange, California. She is the co-author of Legal Writing and Other Lawyering Skills (3d. ed. 1998) and Persuasive Writing for Lawyers and the Legal Profession (1995) with Louis J. Sirico, Jr., a member of the Perspectives Editorial Board.*

### What Is the MPT?

For many years, California bar examinees have been challenged to demonstrate their prowess on a form of examination largely unknown to the rest of the country.<sup>1</sup> But times are changing and now more than 20 states have added or will soon add the performance examination to their bar examinations.<sup>2</sup> What exactly is the performance examination? The National Conference of Bar Examiners (NCBE) describes the new Multistate Performance Test (MPT) this way:

The Multistate Performance Test is designed to test an applicant's ability to use fundamental lawyering skills in a realistic situation. ... The MPT requires applicants to (1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for principles of law; (3) apply the relevant law to the relevant facts in a manner likely to resolve a client's problem; (4) identify and resolve ethical dilemmas, when present; (5) communicate effectively in writing; (6) complete a lawyering task within time constraints.<sup>3</sup>

Examinees receive two types of materials during each 90-minute examination: a client file setting forth the facts of the matter they will be asked to discuss, and a library that contains the applicable law they will be asked to analyze. The file may include memos, transcripts, correspondence, background documents, and the like. The library may include relevant cases, statutes, rules, and regulations. Instructions regarding the specific type of document to be prepared are also included. The bar examiners do not restrict themselves in the types of documents that may be required. Examples of possible documents to be

prepared include a memo, brief, discovery plan, client letter, trial plan, counseling plan, will, contract provision, closing argument, or settlement proposal.

Research conducted by the NCBE supports the reliability and validity of the test, and it looks like it is here to stay.<sup>4</sup> Among other findings, the studies concluded that performance testing measures skills not tested by the multiple-choice or essay portions of the bar exam, and that practicing lawyers do better on the performance tests than they do on other portions of the bar exam. Thus the test appears to be a step toward getting the bar exam closer to measuring skills that are relevant to lawyering.

### Designing a Course to Prepare Students for the MPT

What can you do to prepare your students to succeed at the MPT? It is highly likely that you are already teaching many of these fundamental skills to your students in your legal writing classes. However, most of us do not present legal writing assignments with time constraints. At Chapman, we tried an experimental course, called “Advanced Legal Analysis and Writing,” that was designed to give our students a head start in their preparation for the bar exam, while at the same time (we hoped) giving them additional practice at skills they would need for their entire lives in practice.

Here are the topics and assignments covered in the course:

<sup>1</sup> New Jersey has also included a practice dimension in its bar examination for many years.

<sup>2</sup> Colorado, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Maine, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Texas, and West Virginia. Nat'l Conference of Bar Examiners, *Multistate Examination Use* (visited Sept. 15, 1999) <<http://www.ncbex.org/tests/testuse.htm>>.

<sup>3</sup> Nat'l Conference of Bar Examiners, *The Multistate Performance Test: Introduction* (visited Sept. 15, 1999) <<http://www.ncbex.org/tests/mpt.htm#Introduction>>.

<sup>4</sup> See, e.g., Stephen P. Klein, *The Costs and Benefits of Performance Testing on the Bar Examination*, *The Bar Examiner*, Aug. 1996, at 13; Marcia A. Kuechenmeister, *A Performance Test of Lawyering Skills: A Study of Content Validity*, *The Bar Examiner*, May 1995, at 23; Jane Peterson Smith, *The July 1993 Performance Test Research Project*, *The Bar Examiner*, May 1995, at 36.

TOPIC	ASSIGNMENT
Basic Legal Analysis; Outlining	In-class exercise
Understanding Rules	
Framing Issues	
Using Facts	
Analysis Review	Memo
Advocacy	
Objective v. Advocacy Writing (Summary)	Motion (no time pressure)
Jury Instructions	Jury instructions
Letters	Letter
Contracts	Contract (no time pressure) Two additional in-class exercises requiring students to analyze contract-related issues

All of the listed assignments, with the exception of the motion and the contract, were prepared by the students in class during a set time period. The class periods were only 75 minutes, so we had to design assignments that could reasonably be completed within that time frame. Since the MPT is a 90-minute exam, a slightly longer time period would more closely approximate the real thing. Sometimes we gave the students the law ahead of time and discussed it in class; other times they had to read the law for the first time during the preparation of the written product. We tended to require original reading as part of the assignment later in the semester rather than earlier.

All eight of the listed assignments were graded, though we did several other exercises throughout the semester that were not. Usually those exercises involved creating parts of larger documents, or providing an opportunity to practice the skills that would later be required on a graded assignment. For example, we asked the students to draft the fact section of a memo in class; we also gave them a chance to practice jury instructions for a problem other than the graded one, since that was a type of document they were unfamiliar with.

We had two goals in teaching the course. One was the previously stated goal of giving our students a head start on their preparation for the bar exam. But we also wanted to reinforce writing, analytical, and organizational skills that would be necessary long after they took the bar

exam. Hence the two non-time-pressured assignments, which the students prepared outside of class and turned in typed and in final form.

Our focus in the course was on organization and structured analysis, clarity of expression, strategic thinking, and efficiency. During the class, we emphasized the need for outlining and gave the students plenty of opportunity to practice. We took sample problems from the text and prepared an outline of the required analysis on the board. The students were asked to suggest the appropriate order of analysis (usually based on elements of a tort or from a statute) and then analyze the problem from both sides and predict a likely conclusion. We did this in a discussion format before asking them to perform similar tasks in writing. We discovered that it was very difficult to get them to actually perform the analysis in the designated order—they kept wanting to jump to other elements, or to combine analysis on elements that seemed related or that used similar facts as the basis of the analysis.

We gave written feedback on every assignment, even the smaller in-class assignments that were not graded. We gave the students repeated opportunities to practice all skills, both in class discussion exercises and in written exercises. We deliberately chose to give exercises that would reinforce familiar skills, such as memos and briefs, along with others that would challenge the students to apply their analytical skills in unfamiliar contexts, such as jury instructions and contract drafting. We did this partly because the students will be expected to prepare new types of documents in practice, and partly because the bar examiners have given themselves such a wide range of options for the MPT.

We also talked about reading strategies—searching for information related to the goal of the assignment, identifying issues, and formulating tentative answers as the reading progressed. Students tend to read every word from beginning to end and then go back and look for relevant or important information. This may work fine for law school classes, but it will use up precious time in the examination process, and it is not how most of us read legal material when we are trying to solve a specific problem. We tend to scan a document for information that looks

“We deliberately chose to give exercises that would reinforce familiar skills, such as memos and briefs, along with others that would challenge the students to apply their analytical skills in unfamiliar contexts, such as jury instructions and contract drafting.”

“One or two students reported that sitting for the [MPT] exam was ‘just like being in class.’”

particularly helpful, then to go back and fill in gaps as needed. We tried to guide the students toward this more strategic and efficient approach to reading.

### Assignments Used in the Course

We limited the substantive areas of law to basic topics: criminal law, contracts, and torts. All of the graded exercises revolved around three fact patterns. We gave several assignments for each fact pattern.

My co-teacher for the class, Michael Gennaco, is a U.S. attorney in Los Angeles who prosecutes criminal civil rights violations. At the time, he was working on a very interesting case involving hate speech over the Internet. We used this case as the basis for several exercises, some graded and some not. For each graded exercise, we would choose a particular legal issue to be analyzed and give the students two cases and any relevant statutes, as well as instructions regarding the document they were to prepare. We kept the amount of material to be read in class relatively small, since as mentioned previously the class period was only 75 minutes long.

Another case was a tort case involving issues of defamation and false imprisonment. It was a shoplifting case, which allowed us additional opportunity to focus on statutory analysis. Again, we limited the legal analysis for each exercise to one or two issues, to make it manageable. Our goal was not to see how many issues the students could spot and analyze at one time, but to focus on their ability to organize and communicate about each issue. The idea was that if we could get them into the habit of organizing and communicating clearly on one issue, maybe they could translate those skills to multiple-issue problems they might encounter on the bar exam. Also, it is likely that they will be required to do more in-depth analysis on fewer issues in the MPT than in other parts of the bar exam.

The final series of assignments, involving a contract, required them to draft an employment contract, and then, in the last two classes, to analyze legal issues raised by the contract, including a covenant not to compete issue. For the last two classes, we repeated the process of giving the students two relevant cases, which they had to

read during class time, and then asking them to answer a specific question related to the contract.

### Evaluating the Course

How did we do? The overall bar pass rate of the students who took the course was not appreciably higher than the overall pass rate for the school, but students who took the course tended to do better on the written portions of the exam—the essays and the performance test. Those who did not pass failed on the multiple-choice portion of the test.<sup>5</sup> Students also reported feeling much more comfortable during the written portion of the exam because of the course. One or two students reported that sitting for the exam was “just like being in class.” The students were grateful for the experience, and several of them suggested that the course be required. Overall evaluations for the course were extremely high.

We, on the other hand, frequently found the process frustrating. In the early weeks of the course, we were not seeing much reflection of the lessons we hoped we were teaching. Although some students did well on each exercise, we found disheartening amounts of disorganized writing and muddy thinking, which of course tend to go together. Even though we spent what seemed to be a disproportionate amount of class time emphasizing the need for structure, we saw very little of it in the written product. We even took a few classes to walk the students through the process of constructing a document, trying to give them formulas to use as starting points for developing their own writing styles. We discovered that it was particularly difficult for many students to prioritize their discussions of issues, and to stay on one issue until it was completed. As mentioned previously, they tended to want to wander off and discuss several issues at one time, and they frequently left thoughts unfinished.

However, our efforts did not go entirely unrewarded. Suddenly, when we got to the last two in-class graded assignments, more students were structuring their analyses, discussing

<sup>5</sup> This is anecdotal information, based on casual conversations with some of the students who took the course. We did not do a formal follow-up study.

.....

relevant issues carefully and thoroughly, and communicating clearly and efficiently. We finally felt that we were getting through. This reinforced the need for practice and repetition. It also reminded us that teaching frequently requires a good deal of patience.

### Conclusion

So, in the final analysis, what can you do to help your students prepare for the MPT? You do not have to create an entire course, although it is a worthwhile effort to do so.<sup>6</sup> If you do not have the time or resources for such a concentrated effort, you can draft an occasional time-pressured writing exercise. You can accomplish a lot if you spend just a class or two discussing the skills required for the MPT and giving students a chance to practice. Encourage your colleagues to do the same. Remember always that the key is repetition and practice. You cannot expect that your students will be ready for the MPT with only a single exercise, but if several members of the faculty commit to an exercise or two, the overall impact on the students' abilities should be immense.

With any luck, the existence of this exam will encourage many law professors, not just those who teach legal research and writing, to focus more on analytical and communications skills than they have previously. Legal writing teachers can be instrumental in this process. We have the experience with problem design and providing meaningful feedback on written work that many of our colleagues lack.

Perhaps ultimately students will get more opportunity to practice the fundamental lawyering skills of fact gathering and analysis, organization of material, and clear and cogent written presentation of legal analysis. These are obviously important not only to the MPT, but also to successful lawyering.

© 1999 Nancy L. Schultz

“With any luck, the existence of this exam will encourage many law professors, not just those who teach legal research and writing, to focus more on analytical and communications skills than they have previously.”

<sup>6</sup> For more information about the Chapman course, or for sample materials, feel free to contact me at [nschultz@chapman.edu](mailto:nschultz@chapman.edu).