Performance Tests
Basic Overview

- Part of the bar exam in many jurisdictions, but not all jurisdictions - Included in the state portion of the examination

- **Not a test of substantive law**

- Require you to perform a “lawyerly” task a beginning lawyer should be able to accomplish – draft a memorandum, draft a motion, write a letter to a client, etc.

- Some states use the MPT (Multistate Performance Test), while other states have their own performance test(s)
Basic Overview

- 33 Jurisdictions require performance tests:

MPT – Alabama, Arkansas, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Texas, Utah, Vermont, West Virginia and Wisconsin.

Performance Tests – California, Pennsylvania
The MPT

• NCBE offers two 90-minute MPT items per administration – A jurisdiction may select one or both items to include as part of its bar examination

• However, UBE jurisdictions use two MPTs a part of their bar examinations

• “The MPT is designed to test an examinee’s ability to use fundamental lawyering skills in a realistic situation.”

• Each jurisdiction determines its own policy with regard to the relative weight given to the MPT and other scores (Ex: UBE jurisdictions weight the MPT component 20% of overall score. However, Maryland assigns the MPT a weight of 1.5 times as much as a single essay question)
The UBE

- The Uniform Bar Exam is currently offered in 13 jurisdictions – Alabama, Arizona, Colorado, Idaho, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Utah, Washington and Wyoming

- Two day examination - The UBE consists of the Multistate Essay Examination (MEE), two MPT tasks and the MBE

- It is uniformly administered, graded and scored by user jurisdictions and results in a portable score

- MEE and MPT are scaled to the MBE, with the MBE weighted 50%, the MEE 30% and the MPT 20%
The UBE

• Mutistate Essay Examination consists of six 30-minute questions per administration – Offered in 31 jurisdictions

• The purpose of the MEE is to test the examinee’s ability to:

1. Identify legal issues raised by a hypothetical factual situation
2. Separate material which is relevant from that which is not
3. Present a reasoned analysis of the relevant issues in a clear, concise and well-organized composition
4. Demonstrate an understanding of the fundamental legal principles relevant to the probable solution of the issues raised by the factual situation
The UBE

• Areas of law that may be covered on the MEE include the following:

• Business Associations
• Conflict of Laws
• Constitutional Law
• Contracts
• Criminal Law and Procedure
• Evidence
• Family Law
• Federal Civil Procedure
• Real Property
• Torts
• Trusts and Estates
• UCC (Negotiable Instruments and Secured Transactions)
The MPT

- The MPT is designed to examine six fundamental skills lawyers are expected to demonstrate regardless of the area of law in which the skills arise:

1. Sort detailed factual materials and separate relevant from irrelevant facts
2. Analyze statutory, case and administrative materials for applicable 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
The MPT

• The MPT materials include a File and a Library

• The specific assignment the examinee is to complete is described in a memorandum from a supervising attorney

• The File consists of source documents containing all of the facts of the case.

• The File might also include transcripts of interviews, depositions, hearings or trials, pleadings, correspondence, client documents, contracts, newspaper articles, medical records, police reports or lawyer’s notes.
The MPT

• Relevant as well as irrelevant facts will be included in the File materials.

• Facts are sometimes ambiguous, incomplete, or even conflicting – As in practice, a client’s or a supervising attorney’s version of events may be incomplete or unreliable.

• The Library may contain cases, statutes, regulations, or rules, some of which may not be relevant to the assigned lawyering task.

• The Library materials provide sufficient substantive information to complete the task.
The MPT

- Examinees may be instructed to complete any of the following lawyer tasks:
  - A memorandum to a supervising attorney
  - A letter to a client
  - A persuasive memorandum or brief
  - A statement of facts
  - A contract or provision
  - A will
  - A counseling plan
  - A proposal for settlement or agreement
  - A discovery plan
  - A witness examination plan
  - A closing argument
The MPT

- Again, to further underscore, the MPT does not test substantive law

- Examinees are instructed to read all cases as if they are new to them – Do not assume cases, simply because they seem familiar, are precisely the same as you have read before

Consider the following excerpt from the instructions:

“The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.”
The MPT

• How is the MPT graded?

Each MPT is accompanied by a grading guideline designed to assist jurisdictions in scoring the test.

The National Conference of Bar Examiners sponsors a grading workshop on the weekend following the test administration, in conjunction with the MEE Grading Workshop.
The MPT

• Strategies?

• The MPT is as much a time management exercise as a test of basic lawyering skills

• NCBEX – Apportion approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it

• Practice, Practice, Practice
The MPT

• With this part of the exam, as with all aspects of the bar exam, the more routine you can make the experience, the more comfortable you will feel on test day

• First, read the instructions

• Next, identify the File and Library and read the Table of Contents – The Table of Contents will tell you the materials in your File and the nature of your Library.

• You will want to know whether you are faced with a statutory problem or a common law problem – Scanning the Table of Contents will allow you to make this assessment quickly
The MPT

• Next, read the office memorandum directed to you – This is the most important piece of paper in the File because it contains your directions. **You should receive the memorandum twice.**

• Applicants are most often asked to write a memorandum or a persuasive brief, but keep in mind, these are only two of the possible tasks you could be assigned

• By reading the directions, you will have a sense of the tone your writing should take (either objective or persuasive) and this will inform your approach to the materials

• In addition, the office memorandum will reveal the precise issue you are asked to resolve

• Use the memorandum to begin to create an outline – The memorandum will suggest major topics that you will need to address in your writing
The MPT

• Next, read the Library before you read the File – By reading the law first, your subsequent reading of the client file will be informed by your knowledge of the controlling statutes and case law

• When reading the Library, read the statutes and the code provisions first – Obviously, they are shorter than the cases, but they will also help you to immediately identify the area of law in which you will be working and provide the basic elements of the rule you will have to analyze

• After you have familiarized yourself with the statutes and code provisions, read the cases – Next to writing, this is the most time consuming portion of the MPT
The MPT

• Remember that the bar examiners have carefully crafted and selected each case – This generally means that each case has something specific to tell you and is designed to be of use in your particular task

• While thinking about your issue from the introductory memo, as well as the type of argument you need to make, ask yourself these questions as you read each case:
  - Why is this case in my Library?
  - How do I use this case?

• Remember – Everything in the Library is there for a reason – Consequently, do not ignore footnotes, official comments, etc.
The MPT

• As you read the statutes, code provisions and cases in your Library, you want to begin making a mini outline into which you plug relevant facts as you read the File

• Your outline will incorporate the rules and tests you glean from your Library – Your outline will shape your reading of the File as you search for relevant facts

• Write the issue you are seeking to answer at the top of your outline – This will also help keep you focused on those facts that are relevant

• Once you have read the materials in your Library and developed your outline, you are ready to read the materials in your File
The MPT

• The File may feel like a LOT of information to you, but remember, there is both relevant and irrelevant information in these materials

• As you read the File, follow these easy steps:
  
  • First, identify the parties and your client – not just by name, but also by legal relationship
  • As you work through the materials, keeping your issue in mind, add facts to the relevant sections of your outline
The MPT

• Now you are ready to begin writing – However, before you begin writing, read the applicant memo once more

• Before you begin writing, be sure to pay close attention to what you are asked to write, and, conversely, what you are not asked to write

• The biggest challenge will likely be managing your time – 90 minutes may seem like a long time, but it goes by quickly particularly given the amount of material you must review and the nature of the tasks you must perform

• With your writing, as with your essay writing, make it easy for the reader to follow – use headings and subheadings as appropriate
The MPT

- A couple of suggestions regarding time:

  - Listen to the advice of the National Conference of Bar Examiners – Take half your time for organization, half your time for writing

  - As you practice in the summer, consider the following approach:

    - After you have familiarized yourself with one or two MPTs, select a new MPT and read the materials, employing the approach described in the previous slides, timing yourself as you go – This is your baseline reading time

    - Next, proceed to writing the response, timing yourself as you go – This is your baseline writing time.

    - Once you have established your baseline times, you can focus on improving your time

    - Do not be alarmed/disheartened if it takes you a long time to get through the materials initially
The MPT

• A few final notes:
  
  • PRACTICE
  • Remember the purpose of the MPT
  • Have a plan of attack
  • Everything is not relevant
  • Follow directions
  • Manage your time
  • Remain calm
California Performance Test

- California is a three-day exam – The performance tests are offered on the afternoon of Day 1 and Day 3

- In contrast to the MPT, California’s performance tests are scheduled to last three hours

- The written portion of the California bar exam is worth 65% of your overall score – 6 essays and 2 PTs

- 26% of your overall score is based on your PT performance
California Performance Test

• In a lot of ways, the California PT is similar to MPT

• Designed to test an applicant’s ability to understand and apply a select number of legal authorities in the context of a factual problem

• Each question consists of a file and library, with instructions advising the applicant what task(s) should be performed

• The library provides legal authority relevant to the task, the file contains factual information
California Performance Test

• In addition to measuring an applicant’s ability to analyze legal issues, performance test questions require applicants to:

1. Sift through detailed factual materials and separate relevant from irrelevant facts, assess the consistency and reliability of facts, and determine the need for and source of additional facts

2. Analyze the legal rules and principles applicable to a problem and formulate legal theories from facts that may be only partly known and are being developed

3. Recognize and resolve ethical issues arising from practical situations

4. Apply problem solving skills to diagnose a problem, generate alternative solutions and develop a plan of action

5. Communicate effectively, whether advocating, advising a client, eliciting information, or effectuating a legal transaction
California Performance Test

• Bar Exam instructions advise that cases that appear in a performance test Library may be real, modified or written solely for the purpose of the performance test – In other words, you should read each case in the Library as if it were new to you.

• Bar exam instructions advise that you spend 90 minutes of your time during each performance test to read and organize before you begin writing your response.

• You will be asked to complete a specific task – write a memo, draft a contract, prepare a letter, draft a brief, etc.
Pennsylvania Performance Test

- The performance test is intended to test an applicant’s ability to use basic skills that a lawyer should possess to perform a task that a newly admitted attorney would be expected to perform.

- 90 minutes to complete the performance test.

- You will have a File and a Library – The File contains the factual information, The Library contains the only legal principles that are to be considered to complete the assigned task.

- Although an applicant’s general knowledge of the law may provide some background for analyzing a problem, the factual information contained the File and the legal principles contained in the Library are the only materials that should be used in formulating an answer to the assigned task.
Pennsylvania Performance Test

• Example of tasks include preparing:

- Letters to opposing counsel
- Opinion letters to clients
- Contract or will provisions
- Briefs
- Memorandum to a partner
- Legal memoranda
- Petitions
- Motions
- Other tasks that a lawyer might be expected to perform
Pennsylvania Performance Test

• In performing any of the previous tasks, applicants are expected to:

  - Identify the relevant facts
  - Recognize the legal issues raised in performing the assigned task
  - Analyze the legal materials that are provided and identify the applicable principles of law
  - Apply the applicable legal principles to the relevant facts to support a well-reasoned response that is clearly communicated in the manner assigned