

# TESTING, TESTING

*by Jane Smith*

**T**he Multistate Performance Test has enjoyed a phenomenal welcome by the bar examining community. It was first administered in February 1997 in four states,<sup>1</sup> and by the February 1999 test date, 19 jurisdictions had officially adopted the test.<sup>2</sup> This column will answer some frequently asked questions about the MPT, with an emphasis on describing the procedures used in its development.

## WHAT KINDS OF TASKS ARE APPLICANTS ASKED TO PERFORM ON THE MPT?

Each MPT item<sup>3</sup> challenges an applicant's ability to complete a task that a beginning lawyer should be able to accomplish. Each consists of a File designed to simulate as much as possible the materials a supervising attorney would give to a new associate and a Library with relevant legal authorities. The first document in the File is a memorandum from the supervising attorney describing the client's problem and assigning a specific task the applicant must complete within 90 minutes. A wide range of tasks might be assigned: drafting a persuasive brief to be filed with a court or an administrative agency, writing an objective opinion letter to the client, or drafting a settlement proposal, a discovery plan, or a closing argument, for example. Brief descriptions of the 11 MPT items administered to date accompany this column.

## WHAT TOPICS DOES THE MPT COVER?

The MPT is not a test of substantive law, so it is not limited to the topics applicants are required to mas-

ter in answering bar exam multiple-choice and essay questions. MPT items contain all the materials and authorities necessary for performance of the assigned lawyering task, and the focus of the MPT is on the ability to perform the task rather than the ability to recall the law. As an accommodation to the process of introducing the new test format, early MPT items have been cast in the familiar settings of the six MBE subjects, the six content families covered by the MEE, and professional responsibility. However, future MPT items can—and will—arise in the context of areas of the law that are beyond the traditional list of bar topics, such as employment law, administrative law, or bankruptcy.

## HOW IS THE MPT GRADED?

MPT answers are graded by the examiners of the jurisdictions in which the MPT is administered. Each MPT item is accompanied by a Drafters' Point Sheet and Grading Guidelines that describe the factual and legal points encompassed within the lawyering task to be completed by the applicant. These materials are provided for the sole purpose of assisting graders in grading the examination by identifying the issues and suggesting resolutions of the problems contemplated by the drafters.

Immediately following administration of the MPT, bar examiners and other graders from all administering jurisdictions are invited to participate in a national grading workshop. Participants review the MPT items and grading guidelines and then read and score samples of actual answers written by

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applicants in the participating jurisdictions. This exercise familiarizes graders with the range of answers they can anticipate as they grade answers in their jurisdictions, but no effort is made to impose a national grading standard.

## WHO CREATES THE MPT?

The National Conference of Bar Examiners' Multistate Performance Test Drafting Committee has principal responsibility for development of test items. The chair of this committee is Jean Gaskill, who retired from active practice after 25 years of labor law practice with Brobeck, Phleger and Harrison in San Francisco and who now serves as a neutral arbitrator and mediator in labor and employment disputes. The members of the MPT drafting committee are Thomas Guernsey, Dean, Southern Illinois University School of Law; Joseph Harbaugh, Dean, Nova Southeastern University Law Center; Elliott Milstein, Professor and former Dean, American University Washington College of Law; and Ann Shalleck, Professor, American University Washington College of Law. This team has more than 75 years' combined experience in developing materials for skills training and testing.

## WHAT PROCESS IS USED TO DEVELOP THE MPT?

MPT items are written by a member of the drafting committee or are commissioned from an outside author. New items are sent to members for review in advance of drafting committee meetings.

### ***First revision.***

At the MPT Drafting Committee meeting, a full day is devoted to editing the materials for each MPT item. Committee members also draft proposed grading guidelines for each item.

## ***MULTISTATE PERFORMANCE TESTS***

***Meley v. Boundless Vacations, Inc. (February 1999, MPT-1).*** Applicants represent a travel agency, Boundless Vacations, Inc. (BVI), whose client, Philip Meley, was robbed and beaten while on the most recent of a series of business trips BVI had arranged for him. Meley's lawyer claims BVI was negligent in reserving a room for Meley at a motel in a high crime area. Applicants are instructed to write a memorandum in which they analyze the legal and factual bases of BVI's potential liability, discuss the facts that support or undercut BVI's position, and identify additional facts that would strengthen BVI's position. The File includes transcripts of interviews with BVI's President and the employee who had arranged for Meley's travel, the demand letter to BVI from Meley's attorney, and an investigative report. The Library consists of excerpts from the Restatement (Second) of Agency and two cases.

***In re Sylvester Parks (February 1999, MPT-2).*** Applicants work for the law firm that has been retained by Bob Parks to challenge the validity of the will his father had executed while in the hospital during his final illness. Sylvester Parks, an eccentric peddler who repaired umbrellas from his pushcart and was known as "The Umbrella Man of Bristol," died rich and left his entire \$750,000 estate to a cult called the Divine Inspiration Society. Applicants are instructed to write a memorandum that states the most persuasive arguments that can be made to attack the will on the theories of insane delusion and undue influence. The File includes notes of an interview with the client, the father's handwritten will, and a newspaper article. The Library consists of three cases.

***In re Marina Martin (February 1999, MPT-3).*** Applicants represent Marina Martin in a dispute involving 100 acres of land. Martin has always believed her father, Steve Bailey, owned the land on which he lived for the last 35 years of his life, but she has received a letter from the current owner of the surrounding 2,475 acres demanding that she stop trespassing. Applicants are instructed to write an objective memorandum analyzing the legal and factual bases on which Martin might assert claims to the property. The File includes excerpts from an interview with the client, an investigative report, and excerpts from an interview with a worker at the hotel that owned the surrounding property during the time Bailey lived there. The Library consists of two cases.

***State v. Baker (July 1998, MPT-1).*** Applicants work for the District Attorney prosecuting Robert Baker for larceny by false pretense. Applicants are instructed to write a memorandum in which they identify the facts that support the indictment, determine whether the indictment is flawed, and

identify what choices are available to cure the defect. The File includes a copy of the indictment and a transcript of the testimony of three witnesses in the grand jury proceedings. The Library includes excerpts from the Franklin Criminal Code, the Franklin Code of Professional Responsibility, and one case.

*In re Laser Lens, Inc. (July 1998, MPT-2).* Applicants work for a law firm whose business client, Laser Lens, Inc. (LLI), wants to expand its operations. Applicants are instructed to prepare a letter to the clients explaining what the legal, economic, and personal consequences would be on the goals they have for themselves and their business if they accept a proposal to raise funds by selling additional stock in the company. The File includes the letter from Industrial Security Insurance offering to purchase LLI stock, the LLI articles of incorporation, a transcript of an interview with the clients, and a newspaper article. The Library consists of excerpts from Franklin Business Corporation Law.

*Piccolo v. Dobbs (February 1998, MPT-1).* Applicants represent the plaintiff in a personal injury lawsuit arising from an automobile accident and pending in the local federal district court. Counsel for the defendant has refused to produce recordings and transcripts of two witness statements taken by an insurance investigator at the time of the accident, claiming work-product protection. Applicants are instructed to write a persuasive brief in support of a motion to compel production of the materials. The File includes a memorandum on how to write persuasive briefs and excerpts from three depositions. The Library contains an abridged version of Rule 26 of the Federal Rules of Civil Procedure and two cases.

*In re Gardenton Board of Education (February 1998, MPT-2).* Applicants work for a law firm that represents the local Board of Education. In response to criticism about the propriety of material appearing in the high school newspaper and in student theatrical productions, the Board wants to adopt a code that will regulate all student communications at the high school. Applicants are instructed to write a memorandum in which they evaluate the constitutionality of the provisions in the draft code the Board has prepared. The File includes a transcript of a discussion with the President of the Board and a copy of the proposed Student Communications Code. The Library includes excerpts from the U.S. and Franklin Constitutions, provisions of the Franklin Education Act, and three cases.

*In re Kiddie-Gym Systems, Inc. (July 1997, MPT-1).* Applicants work for a law firm whose business client, Kiddie-Gym Systems (KGS), contracted to furnish and install play-

### **Review and pretesting.**

Once an MPT item has been edited and proposed grading guidelines have been drafted, the item is subjected to two expert reviews, one by an experienced practitioner and another by a law faculty member. These independent reviewers are asked to critique the item and to respond to a series of questions, such as, "Do the legal materials included in the item misstate the law?" "Does this item present a situation with a realistic mix of relevant and irrelevant facts?" "Is it reasonable to expect a recent law school graduate to complete this task?" The expert review process provides the drafting committee with information from the academic community and from the practicing bar about the accuracy of the legal materials contained in the MPT Library and the realism of the factual materials included in the File.

Next, the MPT items are pretested using recently admitted attorneys as examinees. Pretests are conducted by bar admission administrators under secure conditions, and pretesters are frequently state supreme court law clerks or new associates at the firms of members of state boards of bar examiners. Pretesters answer two 90-minute items, complete a questionnaire for each, and participate in a debriefing session conducted by the administrator, who then summarizes comments in a memo to the drafting committee. Pretests are particularly valuable in determining whether it is reasonable to expect an applicant to complete the assigned task in 90 minutes.

### **Second revision.**

The expert reviews, pretest answers, questionnaire responses, and memos summarizing pretest comments are sent to drafting committee members about four weeks in advance of the next committee meeting. Committee members grade the pretest answers

and submit their scores and a general evaluation of the item prior to the meeting. At the meeting, committee members revise the items and the grading guidelines to respond to problems identified by the pretests or the expert reviews.

### ***Final review and revision.***

Once an item has been selected for administration, the penultimate version is reviewed by bar examiners in the states that will be administering the MPT. July MPT items are available for state review in March and April; February items are reviewed in September and October. The drafting committee makes final revisions to MPT items in response to comments from the states and the materials are sent to the printer about two months prior to the date they are scheduled for administration.

In summary, the MPT drafting committee reviews and revises each item at least three times before it is pronounced ready for administration; with the number of steps required for creation and adequate revision, the minimum gestation period of an MPT item is one year. Dozens of people—editors, outside experts, pretesters, and bar examiners in states that use the test—are involved in the development of every MPT.

## ENDNOTES

1. Georgia, Hawaii, Iowa, and Missouri are the MPT Charter States.
2. Colorado, DC, Nevada, New Mexico joined in July 1997; Illinois, Mississippi, Oregon, Texas, and West Virginia in February 1998; Maine, New Jersey, and South Dakota in February 1999. North Dakota will begin administering the MPT in July 1999; Minnesota in February 2001; and Pennsylvania in July 2001. Alaska and California continue to administer their own performance tests.
3. For an applicant in any given jurisdiction, “the MPT” may consist of one or two 90-minute “items” or tests.

*ground equipment at three malls. Two days after KGS completed the first installation, a fire at the mall destroyed the equipment. Applicants are instructed to prepare an opinion letter addressing the UCC issues relating to which party bears the risk of loss and whether KGS is obligated to pay shipping and handling charges billed by the equipment supplier. The File includes guidelines for preparing opinion letters to clients and copies of the contracts between the parties. The Library consists of excerpts from the Franklin Commercial Code and three cases.*

*State v. Devine (July 1997, MPT-2). Applicants work for the District Attorney prosecuting David Devine for possession of cocaine with intent to distribute. During a one-day recess of the trial, applicants are instructed to write a persuasive brief arguing for admission of testimony of witnesses concerning two instances of prior criminal conduct, one that occurred two days before Devine's recent arrest and a second that occurred 18 months ago and that resulted in a conviction. The File includes a memorandum on how to write trial briefs, a transcript of the trial, and a copy of the 1996 arrest report. The Library contains the applicable criminal statutes, excerpts from the Franklin Rules of Evidence, and one case.*

*Alexander v. BTI and Bell (February 1997, MPT-1). Applicants represent the defendants, Briarwood Tennis, Inc. (BTI) and the club's tennis director, Sandy Bell, in an action for negligence. The plaintiff alleges that she sustained an eye injury during a warm-up session with Bell. Applicants are instructed to prepare a brief in support of a motion for summary judgment on the tort theory of assumption of the risk. The File includes a memorandum on how to write a persuasive brief, a medical summary, and excerpts from depositions of the plaintiff and defendant. The Library consists of two cases.*

*In re Hayworth and Wexler (February 1997, MPT-2). Applicants work for a law firm whose long-time client, Hank Hayworth, has asked to have a premarital agreement prepared in anticipation of his marriage to Wendy Wexler. The firm also represented Wexler in a personal injury case that was settled two years ago. Applicants are instructed to prepare a memorandum to the supervising attorney discussing the ethical issues relating to how Wexler's rights affect the enforceability of the agreement and what particular ethical problems are presented by Wexler's being unrepresented by independent counsel. The File includes notes of an interview with the client and a partial first draft of the premarital agreement. The Library contains a case and excerpts from the Franklin Rules of Professional Conduct.*