

HAPPY BIRTHDAY, MPT!

by Judith A. Gundersen

Ten years have passed since the Multistate Performance Test (MPT) made its debut. In that time, it has become a component of the bar examination in more than half of all U.S. jurisdictions. This article recounts the history of performance testing on the bar examination, describes how a typical MPT item is developed, administered, and graded, and sets out an example of a recent MPT task memo.

A HISTORY OF PERFORMANCE TESTING AND THE MPT

The National Conference of Bar Examiners began studying performance testing in 1980 when it co-sponsored experiments by the California Committee of Bar Examiners that ultimately led to the introduction of performance testing on the California Bar Examination. At that time, a majority of U.S. jurisdictions were using the Multistate Bar Examination (MBE), which had debuted in 1972, along with state-drafted essay questions. (The Conference's Multistate Essay Examination (MEE) did not appear until 1981.)

In the 1980s, the Colorado and Alaska boards both became interested in performance testing and developed their own performance tests as well. Alaska's version, first administered in July 1982, was called the "Research Question" and contained more than 50 pages of authorities. Applicants were given three hours to complete the assigned task, usually an analytical memo to a partner. Alaska used the Research Question until

MACCRATE FUNDAMENTAL LAWYERING SKILLS:

1. **Problem solving**
2. **Legal analysis and reasoning**
3. **Factual analysis**
4. **Communication**
5. **Organization and management of a legal task**
6. **Recognizing and resolving ethical dilemmas**

2001, when it adopted the MPT. Colorado's performance test consisted of two 90-minute questions. The Colorado performance test was administered from February 1989 through February 1997, when it was replaced by the MPT.

The concept of performance testing attracted new attention in 1992 when the ABA Task Force on Law Schools and the Profession released the results of its study examining the range of skills and values that a lawyer should possess. This publication, which became known as "the MacCrate Report,"¹ called for greater emphasis on skills training for law students and recommended that bar examinations include the evaluation of fundamental lawyering skills.

In 1993, NCBE conducted a trial performance test study using the California model and concentrating on the MacCrate list of fundamental lawyering skills. Four different performance tests designed

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WHAT IS THE MPT?

The MPT is a skills-based, closed-universe test that presents a hypothetical set of facts and requires the applicant to complete a task that a new lawyer should be able to accomplish. Any given item may test on several of the following MacCrate skills:

1. *Problem solving*
2. *Legal analysis and reasoning*
3. *Factual analysis*
4. *Communication*
5. *Organization and management of a legal task*
6. *Recognizing and resolving ethical dilemmas*

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MEMORANDUM

TO: Applicant
FROM: Gail Brown
RE: *Parker v. Essex Productions*
DATE: July 25, 2006

Our client, Sylvia Parker, a professional singer, has sued Essex Productions, Inc. (Essex) to recover fees owed to her under a promotional singing tour contract. Essex procures live performance engagements for musicians and other performers. Its services include promoting concert tours, finding venues, making the logistical arrangements for its performers, and collecting the fees for the performances and forwarding them to the performers after deduction of its commission and expenses.

In the complaint, we have alleged breach of contract, unjust enrichment, and violation of a state law that imposes penalties on Essex for operating without an employment agency license with respect to the tour it arranged for Ms. Parker, which was sponsored by the soft drink giant, Fizz. John Eagin, an attorney representing Essex, has filed a motion to disqualify our firm from representing Ms. Parker in this lawsuit. The trial court has scheduled a hearing on the motion for August 1, 2006.

The motion to disqualify cites a conflict based on the previous employment of one of our associates, Peter Alexander, at the law firm of Tansy & Pipe. To assist me in preparing for the hearing, please draft a persuasive memo I can use for my argument to the court, setting forth every argument we can reasonably make to show that we should not be disqualified. My experience is that disqualification cases are highly fact specific. Therefore, do not merely restate the law but argue how the facts of our case, in light of the law, support our arguments against disqualification.

All MPTs are set in the fictitious state of Franklin in the fictitious 15th U.S. circuit. Each MPT consists of a File and a Library totaling between 12 and 16 pages. The File provides factual materials—notes, interview transcripts, newspaper articles, letters, ads, etc.—that provide context for the task. The first document in the File is the task or call memorandum, which tells applicants what they are to do: e.g., write a brief, analytical memorandum, or letter to a client or opposing counsel; prepare a will; critique a contract; etc. The Library contains the legal materials that applicants must use to complete the task—cases, statutes, treatises, ordinances, etc. Some File and Library materials may be irrelevant—one skill tested is the applicant's ability to sort out the irrelevancies.

Sixty-one MPTs have been administered since 1997. MPTs (and point sheets) administered through July 2002 are available for free on the MPT web page, www.ncbex.org/multistate-tests/mpt. More recent MPTs and point sheets are available for purchase in hard copy or in downloadable format.

to assess legal and factual analysis and problem-solving skills were administered to approximately 1,500 candidates in three jurisdictions. Experts graded the answers, and the resulting scores were analyzed to determine whether performance testing would complement multiple-choice and essay questions and whether such testing would be practical as well as psychometrically valid.

The National Conference, led by then Chair Robert Potts, NCBE Director of Testing Jane Peterson Smith, and NCBE Trustee Isidoro Berkman, recommended that two 90-minute MPTs be developed, testing on six of the MacCrate skills (see box on p. 18). Georgia, Hawaii, Iowa, and Missouri were the first four states to administer the MPT in February 1997. In July 1997, Colorado, the District of Columbia, Nevada, and New Mexico came on board.

MPT USE AND ADMINISTRATION

Over the past ten years, one or two jurisdictions per year have added the MPT to their bar examinations. (See list below.) On the July 2007 bar exam, 33 juris-

dictions administered one or two MPTs. Wisconsin will try out one MPT on its February 2008 bar exam. Fifty percent of all bar examinees take an MPT. (If those testing in California and Pennsylvania, the two U.S. jurisdictions that develop their own performance tests, are included, 68 percent of bar examinees take a performance test.) Of the 34 jurisdictions that will use the MPT in February 2008, 13 will choose one of the two MPTs offered. The remaining jurisdictions use both MPTs. Like the MEE, the MPT is administered on Tuesday, the day before the MBE is administered.

MPT DEVELOPMENT

NCBE's MPT Drafting Committee is composed of a group of law professors and practitioners who meet semi-annually. An item, including the "File" and the accompanying "Library," will be drafted by a committee member and then edited by the entire group. After that first committee edit, the item and its point sheet (a guide for grading MPT answers) are analyzed by two content experts, a law professor and a practitioner, who review the item and the point sheet for clarity, content accuracy, verisimilitude, bias, MacCrate skills testing, and speededness (whether the task is easily accomplished in the time allowed). The items are also pretested by a group of newly licensed lawyers, who answer the questions under test-like conditions. After taking the items, pretesters are asked to rate the questions for task clarity, sufficiency of the factual and legal materials, and speededness, and whether they think the item is a fair measure of fundamental lawyering skills.

Committee members review and discuss the pretest results and the expert reviews, sometimes making additional edits to the item and the point sheet. The item then goes into a bank until it is slated for an exam form. Once items are scheduled

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JURISDICTIONS USING THE MPT

<i>Alabama</i>	<i>Iowa</i>	<i>Ohio</i>
<i>Alaska</i>	<i>Maine</i>	<i>Oregon</i>
<i>Arkansas</i>	<i>Maryland</i>	<i>Rhode Island</i>
<i>Colorado</i>	<i>Minnesota</i>	<i>South Dakota</i>
<i>Delaware</i>	<i>Mississippi</i>	<i>Texas</i>
<i>District of Columbia</i>	<i>Missouri</i>	<i>Utah</i>
<i>Georgia</i>	<i>Montana</i>	<i>Vermont</i>
<i>Hawaii</i>	<i>Nevada</i>	<i>West Virginia</i>
<i>Idaho</i>	<i>New Hampshire</i>	<i>Guam</i>
<i>Illinois</i>	<i>New Mexico</i>	<i>Northern Mariana Islands</i>
<i>Indiana</i>	<i>New York</i>	
	<i>North Dakota</i>	

MPT FAQs FROM MISSOURI

by Kellie R. Early

Missouri was one of four “charter” jurisdictions that administered the MPT at its inauguration in February 1997. Because of Missouri’s long history with the MPT, bar admission officials from jurisdictions considering adoption of the MPT occasionally call me to get “firsthand information from the trenches” about administering and grading the MPT. From such calls, I’ve put together the following list of frequently asked questions (FAQs). (By doing so, I don’t mean to discourage phone calls, as I always enjoy talking to other bar admission folks.)

When/how does the MPT fit into your examination schedule?

The essay portion of our examination consists of three sessions: (1) a two-hour session of four Missouri essay questions, (2) a 90-minute session of one MPT item, and (3) a three-hour session of six MEE questions. We increased the amount of testing time when we adopted the MPT by starting the examination earlier and ending later.

How many pages are in the MPT answer books that you provide to applicants?

The MPT answer books we provide are eight pages, single-sided, while each essay answer book is six pages. Applicants who need additional answer books may request them, but eight pages is usually more than sufficient for most applicants.

Does it take more time to grade the MPT?

It doesn’t take significantly more time, even though the MPT answers are longer than the essay answers. We test about 850 applicants in July and 350 in

February. We assign two graders to each essay question and two graders to the MPT item. Thus, each grader is responsible for grading half of the answers, or around 425 answers in July and 175 answers in February. All graders attend our mandatory grading conference, at which all grading is completed. The grading conference lasts two and a half days for a February examination and three and a half days for a July examination. Although the MPT graders have never been the first to finish at the grading conference, they also have never been the last to finish. (It is possible that our MPT graders are superhuman grading machines, but they appear to be normal, mild-mannered attorneys.)

Have your MPT graders graded essays in the past? How do they compare the two kinds of answers?

Yes, one of our two MPT graders has graded essay answers in the past. He says the biggest difference with the MPT is that he doesn’t see the “aberrant answers” that he would see when grading essays, i.e., where the applicants totally miss the issue(s) or don’t fully know the applicable rule of law. This might be one reason the MPT graders are able to complete grading in about the same amount of time as the essay graders even though the MPT answers are more voluminous.

Is grading of the MPT more subjective than grading of essay questions?

Our graders use an analytical, as opposed to a holistic, approach to grading for both the essays and the MPT. Prior to the grading conference, each pair of grading partners devises a matrix of the issues tested in the essay or MPT question they are assigned to grade, as well as the maximum points for each issue. To monitor the consistency of each pair of grading

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partners, we calculate each grader's average raw score, standard deviation, and frequency distribution of raw scores. From this information, it appears that the MPT grading partners are just as consistent with each other as are the essay grading partners.

What do your board members and graders think of the MPT items? Do they find them appropriately relevant and of adequate difficulty to create a range of scores?

We consider the MPT to be an extremely relevant or, in psychometric terms, valid component of our examination. An MPT item more closely simulates the actual practice of law than an essay question can. The problems are consistently well-drafted and of an appropriate level of difficulty. Each examination period, the National Conference offers two MPT items from which we select one to administer as part of our examination. After reviewing the two offered MPTs, the board members consistently remark that either MPT would work well, and we are always choosing between two equally strong items.

Our MPT graders report that there isn't a great deal of disparity among the answers because the law is provided. Determining the relative quality of MPT answers is largely dependent on how well the applicants can apply the law to the facts and analyze the issues. The best MPT answers are those that most effectively use the facts.

How do you weight the MPT in relation to the rest of your examination?

You should consult with Susan Case and Mike Kane at the National Conference to decide how much weight to assign to the MPT considering the particular details of your examination, such as the number of essay questions. In Missouri, we initially weighted

the MPT 1.5 times the weight allotted to a single essay question. Effective with the July 2007 examination, we began weighting the MPT twice as much as a single essay.

Is there anything else we should know about the MPT?

Comments from our applicants indicate they like the MPT and consider it to be a better gauge of their ability to practice law than the MBE or the essays.

KELLIE R. EARLY is the Executive Director of the Missouri Board of Law Examiners and serves on the Editorial Advisory Committee of the National Conference of Bar Examiners.

THREE PERSPECTIVES ON THE MPT

by Tim Wong

I am pleased to say a few words on the tenth birthday of the Multistate Performance Test. I have had the opportunity to be involved with the MPT from three different perspectives—as a former grader in Minnesota, as a current member of the Minnesota Board of Law Examiners, and most recently as a facilitator for the NCBE grading workshops on the MPT.

I was a grader for the Minnesota Board when it first began using the MPT in February 2001. The MPT is somewhat similar to essay exams in that it asks for a written answer, but there are some important differences. Because a full set of facts and a library of applicable law are provided in the item, an applicant's mere recitation of the facts and the law alone will not count for much credit. Instead, graders must evaluate the ability to identify critical facts, complete a reasoned legal analysis, and organize and write an answer that reads clearly and concisely. In preparing to grade the MPT, graders need to be

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for an exam form, state boards of bar examiners are given the opportunity to review and comment on them and their point sheets. After state review comments come back, the MPT drafting committee again reviews and edits the item and the point sheet. The final step before printing is editing and proofreading by NCBE testing and editorial staff.

Overall, the development phase for a single MPT item takes anywhere from 15 to 30 months. NCBE testing staff has full responsibility for test development and production, including preparing and printing special accommodations materials.

MPT GRADING


While grading the MPT is the sole responsibility of the user jurisdictions, the Conference holds an MPT grading workshop for graders during the weekend following the bar examination. The weekend includes a plenary grading fundamentals session for those who are new to grading MPTs, followed by several breakout grading sessions held on Saturday afternoon and Sunday morning, each attended by approximately ten graders, both new and experienced, from a variety of jurisdictions. Attendees receive the MPTs and grading materials in advance, so they have adequate time to prepare for the workshop.

Experienced MPT graders, MPT drafters, and/or NCBE testing staff facilitate these MPT grading sessions. Each session begins with an overview of the item and grading materials and then the group reads through several actual examinee answers from various jurisdictions. The answers are chosen by the facilitators based on how well they illustrate answer trends and raise potentially difficult grading issues to be resolved. Attendees share the grades given to sample answers and their rationale for such grades. The main goal of the grading workshop is to identify

trends in MPT answers and foster discussion among graders on how to address grading issues and maintain consistency. Graders from roughly two-thirds of the MPT jurisdictions attend the workshop; all user jurisdictions receive MPT grading materials regardless of whether their graders attend the workshop.

THE FUTURE OF THE MPT

As the MPT heads into its second decade, NCBE testing staff and drafters continue to strive to provide a valid and reliable test instrument that complements state essay and MEE questions and the MBE. NCBE has been lucky to have had dedicated, very capable drafters since the test's inception in 1997.

As the discussion evolves regarding the possibility of a uniform bar exam, so will the MPT's role in any such uniform exam—perhaps as a stand-alone test or incorporated into a larger, skills-based testing battery that includes a test of research skills. 

ENDNOTE

1. LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, THE REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, ABA Section of Legal Education and Admissions to the Bar, 1992.



JUDITH A. GUNDERSEN is the Deputy Director of Testing for the National Conference of Bar Examiners. She joined the Conference in October of 2000, taking on primary responsibility for the Multistate Essay Examination and the Multistate Performance Test. Gundersen received her J.D. from the University of Wisconsin Law School.

mindful of these differences in the MPT answers, and to calibrate accordingly.

As a current member of Minnesota's Board of Law Examiners, I have access to all components of the Minnesota Bar Examination. I have seen how the MPT tests a skill set that is not otherwise tested on the bar examination—the ability to sort relevant and irrelevant facts, analyze the relevant law, and create a document similar to one that might be needed in practice. Because the question provides more time than a typical essay question, the MPT affords applicants with greater opportunity to show their ability to analyze and organize their answers in a compelling manner. I find the MPT to be the most realistic test of what a new attorney might be asked to do.

Most recently, I have had the pleasure of facilitating MPT grading workshops hosted by NCBE in Chicago, the weekend after the bar examination. Before the workshop, NCBE collects sample answers to MPT questions from the user jurisdictions. At the workshops, graders from multiple jurisdictions can review the MPT questions that were just administered, and analyze in small groups the sample answers. Graders engage in dialogue about the exam and sample answers, and identify potential grading challenges particular to a question. In this way, the grading guidelines are tested, questioned, and after discussion, revised for use back in the jurisdictions.

The workshop is particularly helpful to new MPT graders as it provides an opportunity to discuss the exam with more experienced graders from multiple jurisdictions and to accelerate one's learning curve for preparing to grade the MPT. The workshops are also beneficial for experienced graders, particularly if there are a limited number of people grading the

MPT in their jurisdictions making for limited opportunities to discuss the exam with other graders. The workshops have had a good mix of new and more experienced graders, and the discussions among the graders from the different jurisdictions benefit all of the participants. I believe the workshops help to achieve calibration and consistency in grading the MPT.

From the viewpoint of anyone involved in the bar examining process, the MPT has likely been a welcome addition to bar examinations. It has been a pleasure to watch its success. Happy tenth birthday!

TIM WONG is a member of the Minnesota Board of Law Examiners and has served as a facilitator for the MPT grading workshops, which are held in February and July of every year. He is an Assistant General Counsel for 3M Company, specializing in employment and labor law.

TEN YEARS OF MPT USE IN COLORADO

by Christopher T. Macaulay

The Colorado Board of Law Examiners has been using the Multistate Performance Test (MPT) for the last ten years, and for that we wish the MPT a wonderful tenth "Happy Birthday!"

Colorado's interest in administering a performance test began in the mid-1980s. Testing in Colorado up until that point had followed a fairly typical scenario—a day for the Multistate Bar Examination (MBE) and a day answering a bevy of 25-minute essays. The MBE effectively measured minimal legal competence in a three-hour morning session and a three-hour afternoon session, focusing on the core topics of contracts, criminal law, evidence, real property, torts, and constitutional law. Easy to administer and easy to grade, the MBE had become the anchor of Colorado's bar examination.

The short-essay day rounded out our testing by allowing a format for testing on Colorado law, by giving us an opportunity to evaluate a written product from applicants, and by giving an opportunity for testing on topics not necessarily covered by the MBE—business associations, commercial transactions, family law, wills, and estates and trusts, for example. Grading was slightly more difficult than grading the MBE because of the need to ensure that all graders were properly calibrated, but with rigorous calibration sessions we were confident of fair scoring of all short essays.

While we had two testing vehicles that were easy to administer and gave us valid, reliable test scores, we felt that something was lacking. We wanted to find a way to test practical lawyering skills, the kinds of things that young lawyers would likely do early in their legal careers. We felt it important to test on matters such as ability to write a persuasive memo, respond to a research assignment, or perform substantive legal analysis—all tasks left untested in our current system. Our three-legged stool had only two legs and was wobbling.


A Canadian-style yearlong articling requirement was unworkable, so our interest turned to a performance-style exam. We initially drafted our own performance tests, but the results were inconsistent. Then the MPT arrived on the scene.

In July 1997, Colorado added one 90-minute MPT to its testing array and the results were uniformly positive. Applicants felt as though the exam did indeed test real-world skills and our test experts were satisfied that the MPT provided valid and reliable test scores. It was also comforting to use a product that had undergone NCBE's

rigorous pretest drafting and review process. One challenge remained, however, and that was grading the MPT.

Colorado remains one of the very few jurisdictions that grades its exams using an objective or "scorecard" method of grading. Unlike most jurisdictions, which use a subjective or holistic grading method, Colorado grades its exams entirely objectively, using fixed, defined grading points. Our board has always felt that an objective grading approach is inherently more fair to applicants and is easier to defend during the multiple appeal and review opportunities offered to unsuccessful applicants.

Using the scorecard method, our graders check off points as they are identified, and the tallied total becomes the score for the exam. The scorecard method had worked well for grading a short, straightforward essay. The issue was whether the typical performance test answer—memo, pleading, letter, etc.—would easily fit within the scorecard parameters. The answer was "yes." While the scorecards for the MPT often contain 40, 50, or 60 "points" to be located within the applicant's answer booklet, the methodology works. Colorado has recently added a second MPT.

The three legs of the Colorado Bar Examination—the MBE, the MPT, and short essays—give us an exam that balances ease of administration with reliable test scores. The addition of the MPT in 1997 has solidified our confidence in the quality of our exam and the quality of our successful new lawyers. 

CHRISTOPHER T. MACAULAY is the general counsel and vice president of human resources for Source One Management, Inc., a Denver-based outsourcing and information technology company. He is the chair of the Colorado Supreme Court Board of Law Examiners.