

THE MPT™

MULTISTATE PERFORMANCE TEST™

2010

Information

Booklet

February 23, 2010
July 27, 2010



NATIONAL CONFERENCE OF BAR EXAMINERS

NOTE: The information in this booklet is believed to be correct at the time of publication. Since rules and policies of jurisdictions change, examinees are advised to consult the jurisdictions directly for the most current information.

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NOTICE TO EXAMINEES

The following conduct is prohibited during the examination as it undermines the integrity and fairness of the examination process:

- Bringing unauthorized devices (whether turned on or off) or unauthorized materials into the testing room, including, but not limited to, calculators, cameras, cell phones, pagers, personal digital assistants, text messaging devices, audio or video recording devices, scanners, language translators, and written materials;
- Bringing test materials, unauthorized devices, or unauthorized materials out of the testing room during any scheduled or unscheduled break or at the conclusion of the testing period;
- Copying answers from another examinee or sharing answers with another examinee; and
- Continuing to work after a supervisor has instructed examinees to stop writing.

Engaging in prohibited conduct during the examination could result in some or all of the following penalties:

- Civil liability;
- Criminal penalties;
- Cancellation of the examinee's test scores;
- Denial of the examinee's application to sit for future exams;
- Denial of the examinee's bar application on character and fitness grounds; and
- Disciplinary action by a bar authority if the examinee is already admitted to practice law.

INTRODUCTION

The Multistate Performance Test (MPT) is developed by the National Conference of Bar Examiners (NCBE). It is administered by participating jurisdictions on the Tuesday before the last Wednesday in February and July of each year.

Applicants should contact the jurisdiction where admission is being sought to ascertain whether one or more MPT items are administered as part of the jurisdiction's bar examination. Contact information for the jurisdictions can be found at **www.ncbex.org**.

The MPT is but one of a number of measures that a board of bar examiners may use in determining competence to practice. Each jurisdiction determines its own policy with regard to the relative weight given to the MPT and other scores. Grading of the MPT is the exclusive responsibility of the jurisdiction administering the exam. Any questions about scoring procedures should be directed to the appropriate jurisdiction, not to NCBE.

This booklet is intended to provide the applicant with a general description of the MPT, an outline of the skills tested, and summaries of previously administered tests. NCBE has published MPTs and corresponding Point Sheets for MPT administrations since 1997 and has MPT summaries posted at **www.ncbex.org**. Earlier MPTs and Point Sheets are also available free online at **www.ncbex.org** for viewing or downloading. More recent MPTs and Point Sheets are available for purchase via online download for a fee. To order these publications, complete the MPT Study Aids Order Form at the end of this booklet or visit **www.ncbex.org**.

DESCRIPTION OF THE EXAMINATION

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.

The Multistate Performance Test is designed to test an applicant's ability to use fundamental lawyering skills in a realistic situation. Each test evaluates an applicant's ability to complete a task that a beginning lawyer should be able to accomplish.

The materials for each MPT include a File and a Library. The File consists of source documents containing all the facts of the case. The specific assignment the applicant is to complete is described in a memorandum from a supervising attorney. 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. Relevant as well as irrelevant facts are included. 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. Applicants are expected to recognize when facts are inconsistent or missing and are expected to identify potential sources of additional facts.

The Library may contain cases, statutes, regulations or rules, some of which may not be relevant to the assigned lawyering task. The applicant is expected to extract from the Library the legal principles necessary to analyze the problem and perform the task. The MPT is not a test of substantive law; the Library materials provide sufficient substantive information to complete the task.

The MPT requires applicants to (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; and (6) complete a lawyering task within time constraints.

These skills are tested by requiring applicants to perform one of a variety of lawyering tasks. For example, applicants might be instructed to complete any of the following: a memorandum to a supervising attorney, a letter to a client, a persuasive memorandum or brief, a statement of facts, a contract provision, a will, a counseling plan, a proposal for settlement or agreement, a discovery plan, a witness examination plan, a closing argument.

INSTRUCTIONS

The back cover of each test booklet contains the following instructions:

1. You will have 90 minutes to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Olympia and Columbia are also fictitious states in the 15th 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.
3. You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.
4. The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.
5. Your response must be written in the answer book provided. If you are taking this examination on a laptop computer, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
6. Although there are no restrictions on how you apportion your time, you should be sure to allocate ample time (about 45 minutes) to reading and digesting the

materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

7. This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

SKILLS TESTED

The Multistate Performance Test examines six fundamental lawyering skills that are required for the performance of many lawyering tasks. The following description of these skills is based in part on the “Statement of Fundamental Lawyering Skills” from the *Report of the Task Force on Law Schools and the Profession*, ABA, July 1992 (“the MacCrate Report”).

1. **Problem solving.** The applicant should demonstrate the ability to develop and evaluate strategies for solving a problem or accomplishing an objective. Problem solving includes the ability to
 - A. Identify and diagnose the problem;
 - B. Generate alternative solutions and strategies;
 - C. Develop a plan of action;
 - D. Implement a plan of action;
 - E. Keep the planning process open to new information and new ideas.
2. **Legal analysis and reasoning.** The applicant should demonstrate the ability to analyze and apply legal rules and principles. Legal analysis and reasoning includes the ability to
 - A. Identify and formulate legal issues;
 - B. Identify relevant legal rules within a given set of legal materials;
 - C. Formulate relevant legal theories;
 - D. Elaborate on legal theories;
 - E. Evaluate legal theories;
 - F. Criticize and synthesize legal arguments.
3. **Factual analysis.** The applicant should demonstrate the ability to analyze and use facts and to plan and direct factual investigation. Factual analysis includes the ability to
 - A. Identify relevant facts within a given set of factual materials;
 - B. Determine the need for factual investigation;
 - C. Plan a factual investigation;
 - D. Memorialize and organize information in an accessible form;
 - E. Decide whether to conclude the process of fact gathering;
 - F. Evaluate the information that has been gathered.
4. **Communication.** The applicant should demonstrate the ability to communicate effectively in writing. Communication includes the ability to
 - A. Assess the perspective of the recipient of the communication;

- B. Organize and express ideas with precision, clarity, logic, and economy.
5. **Organization and management of a legal task.** The applicant should demonstrate the ability to organize and manage a legal task. Organization and management includes the ability to
- A. Allocate time, effort, and resources efficiently;
 - B. Perform and complete tasks within time constraints.
6. **Recognizing and resolving ethical dilemmas.** The applicant should demonstrate the ability to represent a client consistently with applicable ethical standards. Ethical representation includes
- A. Knowledge of the nature and sources of ethical standards;
 - B. Knowledge of the means by which ethical standards are enforced;
 - C. Ability to recognize and resolve ethical dilemmas.

MPT SAMPLE TESTS

Reprints of previously administered actual MPTs and Point Sheets may be purchased from NCBE using the MPT Study Aids Order Form at the end of this booklet or via the NCBE website at www.ncbex.org. The MPTs and Point Sheets from earlier administrations are available free online for viewing or downloading. Summaries of previously administered MPTs can also be found online. The following are summaries of the February 2007 through February 2009 MPTs:

In re Tamara Shea (February 2007, MPT-1). Applicants' law firm represents Tamara Shea, a real estate broker who believes that she has been cheated out of a commission rightfully owed her in regard to a sale of a 20-acre real estate parcel. Shea and the seller, Ann Remick, entered into a 60-day listing agreement under which Remick retained Shea to serve as her broker. Under the agreement, Shea was to be paid a commission of 10 percent of the purchase price if the property was sold with her assistance during the listing period. Shortly after the listing agreement lapsed, Shea was contacted by Dan Anderson, a potential buyer. Shea then contacted Remick, who confirmed, in a telephone message, her intention to extend the listing agreement. However, Remick neglected to confirm the listing extension in writing. When Anderson, with Shea's assistance, made an offer of \$185,000 for the property, Remick rejected it, claiming it was too low. Shea subsequently discovered that shortly after the listing agreement expired, Remick sold the property directly to Anderson for \$180,000. Remick is now refusing to pay Shea any commission, stating that Anderson informed her she need not compensate Shea because she sold the property directly to him. Applicants' task is to draft an objective memo to the supervising attorney analyzing whether Shea can maintain claims against Remick for breach of contract and against Anderson for interference with contractual relations and/or interference with prospective economic advantage. The File consists of the instructional memorandum from the partner, a transcript of an interview with Shea, the listing agreement, a letter from Shea confirming the extension of the

listing agreement, the MLS listing for the property, and Anderson's initial offer to purchase the property. The Library contains the Franklin statute of frauds and two cases.

Glickman v. Phoenix Cycles, Inc. (February 2007, MPT-2). The client, George Glickman, was demoted from his vice president position at Phoenix Cycles, Inc., shortly after returning to work after taking nine weeks' leave under the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et seq.*, first to recover from a stroke and later to care for his newly adopted baby. Glickman seeks legal advice regarding whether his employer's actions violate the rights accorded under the FMLA, specifically, the right to be restored to a pre-leave employment or an equivalent position. The supervising partner has already spoken to Phoenix's in-house counsel in an attempt to resolve Glickman's claims without resorting to litigation. Applicants' task is to draft a follow-up letter persuasively setting forth the basis for Glickman's claims under the FMLA, discussing the specific FMLA provisions that Phoenix has violated, explaining why the exceptions in the Act for key employees do not apply, and setting forth the forms of relief to which Glickman would be entitled should the matter proceed to litigation. The File consists of the instructional memorandum, a transcript of an interview with Glickman, a Phoenix Cycles press release, a letter to Glickman from the company regarding his FMLA leave, and a management consulting firm's report on Phoenix Cycles. The Library contains excerpts from the FMLA and two federal cases.

Acme Resources, Inc. v. Robert Black Hawk et al. (July 2007, MPT-1). Applicants' law firm represents Robert Black Hawk and other members of the Black Eagle Tribe who have sued Acme Resources, Inc., a mining company, in tribal court seeking to recover for damage caused by Acme's mining coal bed methane from under reservation land, in addition to an injunction ordering Acme

to cease its mining activities. The Tribe members claim that their water wells are running dry, leaving them without water for livestock and crops, because Acme's mining activities are depleting the water table. Acme's answer to the tribal court complaint denies liability for the alleged harm and also denies that the tribal court has jurisdiction in this matter. Subsequently, Acme filed suit in federal court requesting a declaratory judgment that the tribal court lacks jurisdiction over Acme and seeking an injunction against the tribe members' prosecution of the tribal court action. Applicants are asked to draft the argument section of a brief in support of a motion for summary judgment in the federal action or, in the alternative, to dismiss or stay the action on the grounds that the tribal court has jurisdiction and that Acme has failed to exhaust its tribal court remedies before pursuing its complaint in federal court. The File contains an instructional memorandum, a transcript of a client interview, a copy of Acme's complaint filed in U.S. District Court, a draft motion for summary judgment or, in the alternative, to dismiss or stay, and affidavits from a tribe member and a geologist. The Library contains excerpts from the tribe's constitution and tribal code and one case.

In re Mistover Acres LLC (July 2007, MPT-2). Applicants' law firm represents Petra Flynn in her individual capacity as one of the three members of Mistover Acres LLC, a Franklin limited liability company. Mistover Acres LLC (the LLC) grows and sells apples, salad greens, and other produce. Recently, the LLC received a demand letter from counsel for a neighboring trout farm. The demand letter asserts that a substantial amount of the farm's trout stock has died and claims that aerial pesticide spraying by the LLC is the cause. According to the demand letter, it will cost upwards of \$1 million to clean and restock the trout ponds; the trout farm will sue the LLC if a settlement cannot be reached. The LLC has its own legal counsel. Petra, however, is seeking legal advice in her individual capacity because she is concerned that the LLC business structure may not protect her from being held personally liable for the alleged harm to the

trout fishery. Unlike the other two members of the LLC, Petra has significant assets of her own; she fears that she could be an attractive “deep pocket” defendant from the trout farm’s perspective. Applicants’ task is to write an objective memorandum discussing (1) whether the LLC’s pesticide spraying constitutes an ultrahazardous activity under tort law, and (2) whether Petra, through her activities as a member of the LLC, is at risk of being personally liable for the trout farm’s claim. The File contains an instructional memorandum, notes from the client interview, the LLC operating agreement, an excerpt from the pesticide user’s guide, and a copy of the public notice of pesticide application on Mistover Acres’ fields. The Library contains excerpts from the Franklin LLC statute and two cases.

In re Velocity Park (February 2008, MPT-1). Applicants’ law firm represents Zeke Oliver, a local entrepreneur who is building Velocity Park, which will soon open as the first skateboarding park in Banford, Franklin. Zeke has asked the law firm to advise him on an appropriate liability waiver to be signed by skate park customers, many, if not most, of whom will be teenagers. Applicants are asked to review the draft waiver that Zeke has brought in and to draft a memorandum analyzing whether the waiver in its current form is legally enforceable under Franklin law. In completing this task, applicants are expected to address both the language of the document and its format and suggest specific revisions. In addition, applicants must grapple with the issue of whether liability waivers signed only by minors will be enforced to bar actions for negligence arising from injuries suffered by those minors while engaging in recreational activities. The File contains the instructional memorandum from the supervising partner, a transcript of the client interview, a liability waiver Zeke assembled by taking language from a triathlon liability waiver, and a newspaper article about the risks associated with skateboarding. The Library includes a Franklin statute regarding civil actions and two cases, one from Franklin and one from the state of Columbia.

In re Lisa Peel (February 2008, MPT-2). Applicants' law firm represents Lisa Peel, a private citizen who operates an Internet blog on which she posts news stories about local government, as well as movie reviews and items about her family activities. Following Peel's post about a local school official taking \$10,000 in audiovisual equipment for personal use, the district attorney subpoenaed Peel to testify before the grand jury and to produce all of her interview notes in an effort to get her to reveal the identities of the sources for her story. Peel seeks the law firm's advice on whether she can resist the subpoena. Applicants' task is to draft a memorandum analyzing whether Peel would be considered a "reporter" under the Franklin Reporter Shield Act and would therefore be protected from being compelled to reveal her confidential sources. The File contains the instructional memorandum from the supervising partner, a transcript of the client interview, a copy of Peel's school-corruption post, a copy of the subpoena, and a news article about the development of blogs as the newest form of journalism. The Library contains excerpts from the Franklin Reporter Shield Act, various dictionary definitions, and two cases.

Bohmer v. Bohmer (July 2008, MPT-1) Applicants are associates at a Franklin law firm, which has agreed to represent Jessica Bohmer, mother of a six-year-old daughter, in a child custody dispute with the child's father, Alex Bohmer. Jessica and Alex are still married, but Jessica has recently relocated from Franklin to Columbia with their daughter because of Jessica's concerns about Alex's violence. Alex has filed for custody in Franklin. Applicants' task is to draft an objective memorandum analyzing the provisions of the Franklin Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and discussing whether the UCCJEA, and the Franklin cases interpreting the statute's home-state jurisdiction and inconvenient forum provisions, will permit the firm to persuade a Franklin court that the state of Columbia is the preferable jurisdiction to address the Bohmers' child custody dispute. The File contains the instructional memorandum, a transcript

of a telephone call between the partner and a legal services attorney in Columbia who is helping Jessica in that jurisdiction, the legal services intake form, a civil protection order, and an e-mail from Alex to Jessica. The Library includes the relevant provisions of the Franklin UCCJEA and two Franklin cases.

Williams v. A-1 Automotive Center (July 2008, MPT-2) The client, Robert Williams, took his minivan to A-1 Automotive Center (A-1) for a routine oil change. After being told by the repair shop's owner that the minivan's transmission was in imminent danger of failing, Williams agreed to have a rebuilt transmission installed for approximately \$1,700. Williams subsequently found out from a local dealership that A-1 had not performed the agreed-upon work but had in fact reinstalled the original transmission. He now wants to file suit against A-1. Applicants' task is to analyze several potentially actionable statements made by A-1's owner and to determine which statements are actionable and which are not. Next, applicants are to draft a cause of action for fraud based on those statements determined to be actionable. In doing so, applicants are expected to follow the firm's drafting guidelines, which provide an example of a well-pleaded cause of action. The File contains the instructional memorandum from the supervising attorney, the law firm's guidelines for drafting causes of action, client interview notes, a memorandum from the supervising attorney identifying four potentially actionable statements, and Williams's receipt from A-1 for the alleged repair. The Library contains three cases discussing the pleading requirements for a cause of action for fraud.

Phoenix Corporation v. Biogenesis, Inc. (February 2009, MPT-1) The law firm of Amberg & Lewis LLP represents Biogenesis, Inc., a large biotechnology company that is the defendant in a breach-of-contract suit regarding payment of patent royalties. A jury trial is set to begin in a month and is expected to last six weeks. The plaintiff in that

suit, Phoenix Corporation, has filed a motion to disqualify the Amberg firm as Biogenesis's attorneys, arguing that Amberg inadvertently received a letter covered by the attorney-client privilege and that Amberg's actions with respect to that letter violate the Franklin Rules of Professional Conduct and will incurably prejudice Phoenix's case. Applicants are associates at the law firm that has agreed to represent the Amberg firm in defending it against the motion to disqualify. Applicants' task is to prepare an objective memorandum evaluating the merits of Phoenix's argument for the Amberg firm's disqualification. The File contains a task memorandum from the supervising attorney, a transcript of the client interview, the privileged letter that is the subject of the motion to disqualify, and Phoenix's brief in support of its motion for disqualification. The Library contains the text of the Franklin Rules of Professional Conduct at issue and two cases.

Ronald v. Department of Motor Vehicles (February 2009, MPT-2) In this performance test, applicants work for a sole practitioner who represents Barbara Ronald in an administrative proceeding before the Franklin Department of Motor Vehicles (DMV). The DMV suspended Ronald's driver's license for allegedly operating a motor vehicle with a blood-alcohol level of at least 0.08 percent, the legal limit. Ronald requested an administrative hearing to challenge the suspension. Because this is an administrative proceeding, and not a criminal prosecution, the DMV must prove by a preponderance of the evidence that Ronald drove a motor vehicle with a prohibited blood-alcohol content. The administrative hearing officer has heard the evidence and has directed the parties to submit written briefs. Applicants' task is to draft a persuasive memorandum arguing that the police officer did not have a reasonable suspicion warranting the stop of Ronald's car, that the hearing officer cannot rely solely on the blood test report to find that Ronald was driving with a blood-alcohol content of 0.08 percent or more, and finally, that in light of all the evidence, the DMV has not proved that

Ronald was operating a motor vehicle while intoxicated. The File contains the memorandum from the supervising attorney, the administrative hearing transcript, the police report, and the blood-alcohol test results. The Library contains a selection of Franklin statutes and three cases.

STUDY AIDS AVAILABLE

NCBE publishes study aids for the MPT that contain the original items from previous administrations and, for each item, a discussion of the issues and suggested resolution of the problem contemplated by the drafters. You may order printed or downloadable study aids by using the form on the next page or the form on the website at www.ncbex.org. Some of the earlier MPTs and Point Sheets are available free online at www.ncbex.org for viewing or downloading. The July 2009 MPTs and Point Sheets will be available to download for a fee in late 2009.

To order using the form on the next page, fill out the form and send it, with a check or money order payable to the National Conference of Bar Examiners or with completed credit card information, to the address below. If you are paying by credit card, you may also fax the form to (608) 661-1276.

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302 South Bedford Street
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NOTE: There will be no refunds or adjustments for late delivery of materials ordered less than one week prior to the date of the examination. No orders will be accepted beginning three days before the corresponding examination is administered. **ALL SALES ARE FINAL.**

An updated order form for NCBE study aids, including materials which may have been published after this booklet was printed, and including materials for other NCBE tests, is available at www.ncbex.org. If you have questions about ordering NCBE study aids, call (608) 280-8550, x3000.

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