

RECENT CHANGES IN NCBE'S MULTIPLE-CHOICE EXAMINATION PROGRAMS

by Beth E. Donahue

Mirroring the accelerating changes of the information age in which we live, NCBE's multiple-choice examination programs—those for the Multistate Professional Responsibility Examination (MPRE) and the Multistate Bar Examination (MBE)—have undergone significant change in the past five years. While most of the changes have been reported and discussed in past issues of *THE BAR EXAMINER*, this article gives an overview of the two programs as a whole and highlights their recent evolutions.

UNDERLYING FOCUS

As with all NCBE exams, our touchstone question in developing the MPRE and the MBE is *What does a minimally competent new lawyer need to know and how can we test for that knowledge?* Although our drafters are experts in their fields and are capable of drafting highly complex problems, they focus on fundamental aspects of the beginning practice of law when they write for our exams, and we have maintained the goal of testing for minimal competence in every recent development.

PRETESTING

For psychometric enthusiasts (they're everywhere, aren't they?), the addition of pretesting—using items on an examination that are being “tried out” but do

not count in the examinees' scores—to the MPRE (in 2005) and the MBE (in 2007) has been an enormous milestone. The pretesting process established 10 unscored question slots on both the MPRE, which moved from 50 questions to 60 questions to accommodate the pretest additions, and the MBE, which remained at 200 questions overall by having the number of scored questions reduced from 200 to 190. Because each of these examinations is administered with eight different forms each time, multiplying the 10 available pretest question slots on each form by the eight forms results in 80 questions being tested on a trial basis during every administration.

The significance of pretesting is hard to overstate. It allows NCBE's drafting committees to rework questions that do not perform as expected, making them harder or easier, or eliminating subtle ambiguities that may have gone unnoticed during the drafting and editing processes. When questions that have been pretested are placed on exams as scored questions, there is greater assurance that they will function as intended (by discriminating between highly knowledgeable applicants and less knowledgeable applicants). With the limited amount of testing time, each question on the examination should shoulder some of this discriminatory burden, and the pretesting process has gone a long way toward ensuring that result.

PRE-EDITING

All multiple-choice questions that appear on NCBE exams are drafted by individual experts and then reviewed multiple times by committees of content experts. Beginning with the MPRE drafters in 2005, multiple-choice-question drafters have been adopting NCBE's pre-editing process in which newly drafted questions are edited and proofed at NCBE, and then reviewed and approved again by the drafters before being reviewed for the first time by the full committees.

Through this process, which has received high praise from the drafters, questions are more focused at their first committee review, making the reviewing process more efficient. From a program-wide perspective, questions have also become more consistent in style and format, making for a cleaner end product. Specifically, multiple-choice questions—which are divided into the fact pattern setting up the problem, or the “stem,” the question at the end of the stem, known as the “lead-in,” and the choices available to the examinee for answering the question, or the “options”—are regularly reframed in the pre-editing process to adhere to the following conventions (supported by psychometric research):

- **Questions should be concise.** Fact patterns and options should be reduced in length wherever practicable, without decreasing the difficulty or complexity of the legal issues being tested.
- **Questions should never be presented in the “K-type” format** (using Roman numerals in complex options—e.g., I is true, but II and III are not true).
- **Common nouns should be used in lieu of proper nouns wherever practicable.** For example, “a painter” might encounter a contract problem rath-

er than “Pat,” “Alpha,” or “Painter.”

- **All of the facts necessary to answer the question should appear in the fact pattern.** The appearance of hypothetical facts in the options of multiple-choice questions (typically introduced by the words “if” or “unless”) has been significantly reduced since 2005. The use of formatting that places different facts in each option, asking the applicant to choose the set of facts that meets a particular standard, has also declined.
- **Quotes should be avoided** unless necessary to the legal issue being tested—e.g., quoting a statute may be required in an interpretation question, or quoting language might be necessary in a contract question.
- **Language in the options should be parallel.** To the extent possible, options should demand that the applicant compare and choose between similar elements—e.g., the four options might lay out four different causes of action, four different defense theories, etc.
- **No option should be the equivalent of “None of the above” or “All of the above.”** Questions should be answered adequately by a single option without speculation.
- **Examination questions should cover a variety of tasks.** Drafters are encouraged to write questions covering a range of skills and tasks—e.g., the ability to gather information, the ability to spot dispositive issues, the ability to synthesize the law with the facts, etc.

We believe that the pre-editing process has made the committee reviews more substantive and efficient for the experts participating, and more importantly, the pre-editing process produces a more integrated and professional examination. (A “before-and-after” example of the process appears on the next page.)

SAMPLE MBE QUESTION: BEFORE AND AFTER PRE-EDITING

| Original Version | Edited Version |
|--|---|
| <p>Buyer and Seller orally agreed that Seller would sell and Buyer would buy all the computer chips that Buyer “shall require” during a specified two-year period. In reducing the agreement to writing, Buyer’s secretary mistakenly typed that Buyer shall buy all that Buyer “shall desire” rather than “shall require.” Both parties signed the written agreement without noticing the typographical error. After three months of performance, Buyer ceased purchasing chips from Seller and instead purchased chips from other vendors. Seller sued Buyer for damages. Buyer’s defense is that there is no enforceable contract.</p> <p>In this suit, Seller will</p> <p>(A) lose, because Buyer’s written promise to buy all that Buyer “desires” is illusory, and the parol evidence rule will bar evidence of the oral agreement.</p> <p>(B) lose, because the written agreement is ineffective due to lack of consideration, and the oral agreement is ineffective as a contract because the parties intended to memorialize it in a writing.</p> <p>(C) win, because the contract can be established by the three months of performance, and evidence of part performance is not barred by the parol evidence rule.</p> <p>(D) win, because a court will reform the writing to make it conform to the oral agreement, and, as reformed, the written agreement is enforceable.*</p> | <p>A buyer orally agreed to buy from a seller all the computer chips that the buyer would “require” for the following two years. In reducing the agreement to writing, the buyer’s secretary mistakenly typed that the buyer would buy all that he would “desire” rather than “require.” Both parties signed the written agreement without noticing the error. After three months of performance, the buyer ceased buying chips from the seller and began buying them from other vendors.</p> <p>In a suit for damages, will the seller prevail?</p> <p>(A) No, because the buyer’s written promise is illusory.</p> <p>(B) No, because the written agreement is ineffective due to lack of consideration.</p> <p>(C) Yes, because the parties’ three months of performance established a two-year contract.</p> <p>(D) Yes, because a court will reform the written agreement to make it conform to the oral agreement.*</p> |

* The asterisk indicates the correct option, or the “key,” for the question.

EXPERT REVIEWS

All of the questions appearing on NCBE's examinations are reviewed by outside experts following their initial approval by drafting committees. In addition to reviewing the accuracy of each question, reviewers had made general comments. Beginning in 2006 with the MBE, we have changed this process to require targeted rankings of individual questions for both relevance and credibility. For example, a reviewer might rank a question as "highly relevant" if it assesses knowledge or skills that are important to fundamental aspects of the beginning practice of law; a question might be "moderately relevant" if it assesses knowledge or skills that are important to significant aspects of the beginning practice of law; a question is "not particularly relevant" if it assesses knowledge or skills that are important only to minor or secondary aspects of the beginning practice of law; and a question is "not relevant" if it assesses knowledge or skills that are important only to tangential or trivial aspects of the beginning practice of law. A similar ranking system is employed for each question's credibility, or the extent to which it presents a realistic scenario from law practice in which to test the core issue.

As a result of the newly revised expert review format, the feedback our drafters receive from outside experts has become more specific, and therefore

more useful during the final review and approval of the questions to be placed on an exam. In addition, the reviews serve as an important check against including questions on the exams that test issues that may be taught widely in law schools but that are not pertinent to the typical beginning practitioner. The NCBE examinations serve as independent assessments of whether applicants are minimally competent to practice law; they are not comprehensive "final

exams." Accordingly, we are now framing our expert reviews in terms of the questions' relevance and credibility to beginning practitioners.

STUDY AIDS

NCBE has for many years made available to applicants study aids for all of its examinations. Traditionally, these study aids have been copies of former

tests, complete with answer keys or analyses. In 2006, the MBE program rolled out a new model: The MBE-Annotated Preview 2006 (MBE-AP) is an online, half-length MBE practice test that provides substantive feedback on each answer choice to applicants preparing for the bar. The feedback was written by actual drafters, giving comprehensive explanations for why each option of each question is either correct or incorrect. In addition, the MBE-AP generates a comparison of an applicant's performance across subject areas, showing, for example, if the applicant is performing relatively better in Constitutional Law than in Real Property. (An example of the MBE-AP

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SAMPLE FEEDBACK SCREEN FOR THE MULTISTATE BAR EXAMINATION - ANNOTATED PREVIEW

Overall Score

The content of the MBE-AP is provided by the National Conference of Bar Examiners solely for educational purposes. Your overall score, which can be found immediately above the box on this page, is based on your responses to questions on the MBE-AP 2006. The overall score may range from 0 to 200. The average scaled score for examinees taking a test containing a similar set of questions as part of an actual MBE was approximately 140, and is depicted by the red vertical line. NCBE cautions you not to make any specific inferences about your future bar examination performance based on an MBE-AP overall score because the exam questions, test formats, and testing conditions, as well as your preparation and motivation, will all be different when you take the MBE as part of an actual bar examination.

Discipline-Specific Performance

Your performance by subject area, which can be found inside the box on this page, is provided to aid in self-assessment. Because of the relatively low number of items in each content area of the MBE-AP, this score report provides performance bands rather than specific scores. The performance bands indicate an estimated performance range in each of the six subject areas, and can be used to evaluate your relative strengths and weaknesses. Performance in two subject areas should be considered different only when the performance bands do not overlap. As with your overall score, you are cautioned against making any predictive inference about your discipline-specific performance because of the contextual differences between the MBE-AP and the bar examination. Please note: If you cannot see a performance band for any of the content areas, it is because your score in that content area was not high enough to fall within the range charted by the performance bands. Your performance bands are likely to be invisible if you have completed only part of the exam.

Overall Score: 101



Additional information concerning the topics covered in each content area can be found in the MBE Information Booklet (http://www.ncbex.org/uploads/user_docrepos/MBE_1B2007.pdf), and some details regarding passing scores on the MBE itself may be found on pages 22-24 of the Comprehensive Guide to Bar Admission Requirements (http://www.ncbex.org/uploads/user_docrepos/2006CompGuide.pdf).

feedback screen can be found above.) NCBE is committed to providing similar study aids in the future, using technology and substance to give applicants a low-cost means of preparing for the exam.

SPECIFICATIONS

Beginning in 2007, all multiple-choice drafting committees were asked to revamp their content specifications to ensure that the MBE and the MPRE are testing content that is important to the beginning practice of law. Although the revision of test specifications is a major undertaking, both substantively

and administratively, it is important to the validity of NCBE exams. Because the practice of law is not static, our exam programs must be flexible enough to change incrementally over time to reflect the tasks and the relative importance of tasks seen by newly licensed lawyers. Our drafting experts have effectively met this challenge, with all new specifications going into effect by 2009.

ADMINISTRATION GUIDANCE

A significant rewrite of the MBE Supervisor's Manual in 2007, done with the advice of several long-term

bar administrators, is serving as a template for other NCBE examination programs. The new manual includes a one-page checklist for test-site supervisors, as well as a more useful organization that emphasizes the timing of administration tasks (e.g., preadministration, postadministration) and substantially reduces the complexity and repetition of the last edition. Security issues are specially highlighted throughout the manual, which also includes a sample set of read-aloud instructions for the test day.


MPRE CONSOLIDATION AT NCBE

Finally, the most extensive but perhaps least noticeable change in multiple-choice programs has been NCBE's in-house assumption of test development and printing duties for the MPRE. In the summer of 2007, we successfully transferred the bulk of preadministration MPRE responsibilities from our former vendor, ACT, to NCBE's Testing Department. The initiative has given us greater control over the exam's content, format, and security, and has expanded our research opportunities. To accommodate the program, the NCBE Testing and IT Departments together built a state-of-the-art database to house the MPRE multiple-choice questions, track different versions of the questions, record attributes such as content specifications, and ensure that each form of the MPRE meets the statistical criteria appropriate to high-stakes professional exams. The transition has been seamless, and the in-house consolidation of tasks should reap many benefits over the years.

INCREASING RELIABILITY

The bottom line for jurisdictions that use NCBE examinations is not, of course, the forms used for expert review or the nature of NCBE's editing process. The bottom line for jurisdictions is reliability—how confident they can be, based on NCBE examinations,

that they are making the “right” decisions about who will be licensed to practice law and who will not. The changes adopted by NCBE in recent years have been implemented with this concern in mind. Indeed, both the MPRE and the MBE have been on sustained upward trajectories in terms of their reliability. Notably, the MBE has increased its reliability even as it “gave up” 10 scored question slots to make room for pretest questions. NCBE is confident that its multiple-choice exams will continue to set the standard for assessment in the legal field. We are committed to further updates and enhancements to our multiple-choice programs wherever they are needed to serve that end, and we anticipate that the improvement process will be ongoing.

As always, we look forward to questions, criticisms, and suggestions from the jurisdictions that use our examinations. 



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