

THE TESTING COLUMN

COMING TOGETHER: THE UBE

by Susan M. Case, Ph.D.

The Uniform Bar Exam (UBE) may be summarized in a simple albeit somewhat adulterated haiku:

*The UBE is
the MBE, six MEEs,
and two MPTs.*

Of course, the UBE is a little more complicated than that. This column will flesh out some of the details that both enrich the concept of the UBE and make its implementation challenging.

Jurisdictions will decide when (or if) they want to be part of the UBE. Of course, once part of the UBE, they may opt out at any time.

First of all, let me describe the three tests that make up the UBE. Most of you have a basic idea about their formats, but you may not have actually seen an example for some time. Each of the tests has a different purpose, and together they are designed to assess the extent to which examinees have the requisite knowledge and skills to be licensed to practice law.

THE MBE

The purpose of the MBE is to assess the extent to which an examinee can apply fundamental legal principles and legal reasoning to analyze a given



fact pattern. The questions focus on the understanding of legal principles rather than memorization of local case or statutory law. This is not the multiple-choice test that you might remember from school or that is parodied in the popular press. This is a professionally developed examination of the highest quality. Questions are not tricky, nor do they test knowledge of trivial or esoteric facts. Instead they provide 200 sample

cases that require examinees to apply their legal knowledge to situations that a newly licensed lawyer would be expected to handle.

All MBE questions are developed and reviewed multiple times by a committee of content experts and a series of outside reviewers. Both practitioners and law professors participate in the review process. Many MBE questions are also pretested during actual MBE administrations to ensure that they are appropriate in terms of difficulty and the extent to which they separate highly knowledgeable examinees from less knowledgeable examinees. These development steps are essential in order to produce multiple-choice questions for high-stakes examinations. Content experts are reconvened following each MBE administration to review the performance of questions and to ensure that the questions are scored fairly in accordance with generally accepted legal principles at the time of administration.

SAMPLE MBE-STYLE QUESTION AND ANSWER

Sample MBE-Style Question

A man borrowed money from a bank and executed a promissory note for the amount secured by a mortgage on his residence. Several years later, the man sold his residence. As provided by the contract of sale, the deed to the buyer provided that the buyer agreed "to assume the existing mortgage debt" on the residence.

Subsequently, the buyer defaulted on the mortgage loan to the bank, and appropriate foreclosure proceedings were initiated.

The foreclosure sale resulted in a deficiency.

There is no applicable statute.

Is the buyer liable for the deficiency?

(A) No, because even if the buyer assumed the mortgage, the seller is solely responsible for any deficiency.

(B) No, because the buyer did not sign a promissory note to the bank and therefore has no personal liability.

(C) Yes, because the buyer assumed the mortgage and therefore became personally liable for the mortgage loan and any deficiency.

(D) Yes, because the transfer of the mortgage debt to the buyer resulted in a novation of the original mortgage and loan and rendered the buyer solely responsible for any deficiency.

Answer

The correct answer is C because, with a mortgage assumption, the buyer who assumes the mortgage debt becomes primarily liable. The man, absent a release by the bank, also is liable, although the man is secondarily liable. This situation can be contrasted with one in which the buyer purchased "subject to the mortgage," in which case only the man would be liable for any deficiency.

THE MEE

The purpose of the MEE is to assess examinee 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 issues in a clear, concise, and well-organized composition; and (4) demonstrate an understanding of the fundamental legal principles relevant to the probable solution of the issues raised by the factual situation.

The MEE consists of nine 30-minute questions, from which each participating jurisdiction currently selects the questions (usually six or fewer) it will administer. Each question deals with one or more of the following areas:

Business Associations (Agency and Partnership;
Corporations and Limited Liability Companies)
Conflict of Laws
Constitutional Law
Contracts
Criminal Law and Procedure
Evidence
Family Law
Federal Civil Procedure
Real Property
Torts
Trusts and Estates (Decedents' Estates;
Trusts and Future Interests)
Uniform Commercial Code (Negotiable
Instruments (Commercial Paper); Secured
Transactions)

The UBE will include a particular preselected six questions in each administration.

The key to the quality of the MEE is found first in the questions. Like the MBE's questions, these are developed and reviewed multiple times by a committee of content experts and a series of outside reviewers. The MEE questions are also pretested under examination conditions by a group of newly licensed lawyers. This pretesting allows the developers to be assured that each question is appropriate in terms of difficulty, that the time constraints are appropriate, and that the grading materials provide a spread of scores. These development steps are essential in order to produce essay questions for high-stakes examinations.

A second important attribute of the MEE is the grading materials that are provided to aid in grading

each essay. A summary provides a brief synopsis of the type of response that is required. Also provided is a list of the legal problems in the essay question and an outline of points that the question writers believe should be awarded to the sections of the response. Together these grading materials aid the graders in ensuring that they understand the law associated with the essay question and provide the structure that is necessary to ensure fair and consistent grading.

Finally, a grading workshop is held for both MEE and MPT graders immediately after each bar exam to help them become familiar with the essay questions and the grading materials. While this workshop is offered at one central location now, we are exploring ways of providing it by videoconferencing for those who prefer that method.

SAMPLE MEE QUESTION, SUMMARY, AND GRADING EXCERPT

Sample MEE Question

Cal is the CEO and chairman of the 12-member board of directors of Prime, Inc. (Prime). Three other members of Prime's board of directors (the Board) are also senior officers of Prime. The remaining eight members of the Board are wholly independent directors.

Recently, the Board decided to hire a consulting firm to help Prime market a new product. The Board met to consider whether to hire Wiseman Consulting (Wiseman) or Smart Group (Smart). The Board first heard from a representative of Wiseman. The Wiseman representative described some of the projects Wiseman had completed for other clients and outlined the work it proposed to do for Prime for \$500,000. The Board then heard from a representative of Smart, another consulting firm. The Smart representative described a similar work plan and

stated that Smart's proposed fee was \$650,000. Either of these amounts would be a significant outlay for Prime.

After the Board heard both presentations, Cal disclosed to the Board that he had a 25% partnership interest in Smart. Cal stated that he would not be involved in any work to be performed by Smart for Prime. He knew but did not disclose to the Board that Smart's proposed fee for this consulting assignment was substantially higher than it normally charged for comparable work. The Board did not ask about the basis for Smart's proposed fee.

After receiving all of this information, and no other information, the Board discussed the relative merits of the two proposals for 10 minutes. The Board then voted unanimously (Cal abstaining) to hire Smart, even though hiring Smart would cost Prime approximately 30% more than hiring Wiseman. Cal was present throughout the meet-

ing but did not participate except to the extent indicated above.

1. Did Cal violate his duty of loyalty to Prime? Explain.
2. Assuming Cal breached his duty of loyalty to Prime, does he have any defense to liability? Explain.
3. Did the directors of Prime, other than Cal, violate their duty of care? Explain.

Sample Summary

Cal, the CEO and chairman of the board of Prime, owes a fiduciary duty of loyalty to Prime. Even though Cal did not participate in the Board's discussion of the consulting project, and even though the contract with Smart was approved by a majority of disinterested directors, Cal breached his duty of loyalty by failing to disclose the substantially higher fee charged to Prime by Smart, a partnership in which Cal has a financial interest. Here, a court would be unlikely to find that the contract was objectively fair to Prime, given Smart's substantially higher fee. Therefore, Cal has no defense to his breach of the duty of loyalty.

The Board may have violated its fiduciary duty of care when it approved the contract with Smart after only a 10-minute discussion and without seeking or receiving full information about the fees to be charged.

Sample Excerpt from the Grading Materials:

Point Three

Prime's disinterested directors likely breached their duty of care when they approved, with minimal discussion and

without full information, a contract in which a director had an interest.

If the directors do not qualify for the protection of the business judgment rule, they likely will be found to have breached their duty of care in approving the contract with Smart. The business judgment rule creates a presumption that "in making a business decision, the directors . . . acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984).

In this case, there is no evidence of bad faith. At least eight directors were entirely disinterested. Nor is there any evidence that the directors did not have an honest belief that they were acting in the best interests of Prime.

However, a court could find that the directors did not act on an informed basis in reviewing the two alternatives. Because the business judgment rule presumes that the Board was adequately informed, a party claiming that the directors breached their duty of care has the burden of showing that the Board did not have sufficient information to justify going with the higher-priced firm. The fact that Smart was going to charge Prime more than its customary rate suggests that the rate was not justified by added value. Arguably, the \$150,000 price difference required the Board to at least ask more about Smart's rates. Moreover, if the Board had discussed the contract for more than 10 minutes, it might have realized that it lacked full information.

Therefore, it is likely that a court would find that the Board violated its fiduciary duty of care by approving the contract with Smart.

THE MPT

The purpose of the MPT is to assess fundamental lawyering skills in a realistic situation by asking the candidate to complete a task that a beginning lawyer should be able to accomplish.

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.

Each 90-minute MPT is a self-contained case, including a File, a Library, and a task to be completed.

The development process for the MPT is similar to that of the MEE in that materials are developed and reviewed by a committee, materials are reviewed by external reviewers, and each MPT case is pretested. As noted above, a grading workshop is held for both MEE and MPT graders immediately

after each bar exam to help them become familiar with the cases and the grading materials.

The example below illustrates a sample task. Because of the length of the MPT, I will not include the rest of the case materials here, but you may view sample questions, including the instructions, the File, the Library, and a description of the task, as well as the appropriate Point Sheet, on the NCBE website using the following link: <http://www.ncbex.org/multistate-tests/mpt/>.

SAMPLE MPT TASK

Burke & Clements, LLP
Attorneys at Law
4333 Skillman Avenue
Dixon, Franklin 33133

MEMORANDUM

February 22, 2005

TO: Applicant
FROM: Thomas Burke
RE: *In re Rose Kingsley*

We represent Rose Kingsley, a local lawyer, in a fee dispute with Karen Greene, another local lawyer. Recently, Kingsley received \$1 million as her fee for settling the \$3-million Moreno case that Kingsley and Greene worked on. A few days ago, Kingsley received a letter from James Kuntz, an attorney representing Greene, demanding a portion of Kingsley's fee from the Moreno case.

Please draft a memorandum analyzing the following issues:

- (1) whether Greene was a partner or an associate of Kingsley for purposes of Rule 200 of the Franklin Rules of Professional Conduct; and
- (2) whether the requirements of Rule 200 have been met by the fee-splitting agreement between Kingsley and Greene and the communication with Moreno.

In each part of the memorandum, you should incorporate the relevant facts, analyze the applicable legal authority, and explain how the facts and law affect our client's obligations.

SELECTION OF ESSAY QUESTIONS AND GRADING CONSISTENCY

We expect to establish a working group that will participate in conversations about the development of the UBE. One of the early conversations will focus on the selection of questions for upcoming exams and the development of grading materials that can be used by all participating jurisdictions. Use of the same essay questions and the same grading guidelines enhances the consistency of the exam across jurisdictions and ensures that all candidates are assessed on the same material and that scores reflect the same knowledge and skills.

The MEE and MPT will be scored in essentially the same way as they are scored now. The answers for candidates in each jurisdiction will be scored within that jurisdiction, and MEE and MPT scores will be scaled to the MBE scores within that jurisdiction.

Jurisdictions may continue to use the grading scale they are currently using. Scaling the grades for the written portions of the exam to the MBE will place all the grades on the MBE scale regardless of which grading scale the jurisdiction uses to grade the MEE and MPT.

To maintain scoring consistency and comparability of scores, all UBE jurisdictions will adhere to the following:

MEE and MPT scores will be combined and scaled to the MBE.

The MBE scores and the combined MEE/MPT scores will be weighted equally.

The precise allocation will be MBE at 50%, MEE at 30%, and MPT at 20%.

MEE essays and MPT cases will be graded based on uniform criteria.

UBE jurisdictions will use the same MEE essay questions.

OTHER UBE CONDITIONS

Aside from the decision that all UBE jurisdictions will use the MBE, six MEE essay questions, and two MPT cases, many other decisions will remain under the control of the jurisdictions. Stated most simply:

Jurisdictions will retain control over who may sit for the tests and who will be admitted.

Jurisdictions will determine their own passing standards.


Jurisdictions will continue to make character and fitness decisions.

Jurisdictions will continue to make ADA decisions.

Jurisdictions will continue to determine educational requirements.

Jurisdictions will continue to grade their own essays using their preferred score scales.

We recognize that many issues remain, and we expect the UBE to evolve over the next several years. Over time it will be possible to introduce new procedures that will enhance the scoring process. For example, an optional centralized scoring service could be offered to improve the consistency in scoring the MEE and MPT across jurisdictions. Other potential services would include centralized ADA processing and decisions, exam registration, and test administration. It is also possible that decisions outlined above may be modified somewhat as the time of implementation nears. We anticipate working with jurisdictions that wish to ensure that applicants are familiar with local law, either by developing examinations or by use of other methods.

As always, your comments are welcome. 

Coming together is a beginning. Keeping together is progress. Working together is success.

—Henry Ford

SUSAN M. CASE, PH.D., is the Director of Testing for the National Conference of Bar Examiners.