The MPT: Assessment Opportunities beyond the Traditional Essay

by Diane F. Bosse

"For the first time, I felt I knew whether or not a candidate was going to be a good lawyer." So said a longtime grader of the New York bar exam, following his first experience grading the Multistate Performance Test (MPT). His observation reflects the nature of the test: the MPT requires a candidate to do what lawyers do—marshal the facts, master the law, and apply the law to the facts so as to solve a client's problem.

As those who labor in bar admissions vineyards know, the MPT, currently administered in 36 jurisdictions, is one of the measures available to assess the competence of a candidate to practice law. It is a skills test involving legal analysis, fact analysis, problem solving, resolution of ethical dilemmas, organization and management of a lawyering task, and written communication. The MPT tests a candidate's ability to complete a task that a beginning lawyer should be able to accomplish.

The candidate is assigned a task that is explained in a memo from a supervising lawyer. The task may be, for example, to draft a memo to the supervising lawyer, a letter to a client, a persuasive 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, or a closing argument. A File of source materials and a closed-universe Library are the tools available to accomplish the task. (See the sidebar on page 18 for brief descriptions of the MPT task, context, and contents of the File and Library for both MPTs offered in July 2011.)

The candidate reviews the source materials contained in the File to master the facts of the case. The source materials may include the following: transcripts of interviews, depositions, or trial testimony; pleadings; correspondence; contracts; newspaper articles; medical records; police reports—any of the variety of documents that constitute a lawyer's file. The facts may or may not be complete, and some of the facts provided may be irrelevant. The Library may contain cases, statutes, regulations, or rules, some of which may not be directly on point or controlling. And the clock is ticking—the candidate is expected to complete the assignment in 90 minutes.

Grading the MPT: New Dog, Old Tricks

Grading the MPT is like grading a traditional essay in many ways. To further assist the jurisdictions in grading the MPT, NCBE provides Point Sheets that describe the factual and legal issues encompassed in the lawyering task to be completed by the candidate. The methodology used by a jurisdiction in grading the MPT can be the same as that used in grading traditional essays, whether the Multistate Essay Examination (MEE) or state-crafted essays.

There are two primary methods of grading the written component of the bar exam. The *holistic approach,* familiar to participants in NCBE grading

In re Field Hogs, Inc. (MPT-1)

In this performance test, examinees are employed by the law firm that represents Field Hogs, Inc., a manufacturer of heavy lawn and field equipment for consumer use. The company has been sued four times on various products liability and tort theories; the firm successfully defended two of these cases, but two others resulted in substantial jury awards for the plaintiffs. Field Hogs wants to limit its costs and any unwanted publicity in future litigation. To address these concerns, Field Hogs has asked the law firm to draft an arbitration clause to be added to its sales contracts. Examinees' task is to draft an objective memorandum analyzing whether the proposed arbitration clause would cover tort claims against Field Hogs and whether the allocation of arbitration costs would affect the clause's enforceability. In addition, examinees are asked to draft an arbitration clause that is likely to be enforceable in court and that addresses the client's priorities. The File contains the instructional memorandum from the supervising attorney, a summary of the client interview, a memorandum summarizing Fields Hogs's litigation history, a copy of the law firm's standard commercial arbitration clause, and the Consumer Procedures of the National Arbitration Organization. The Library contains two cases discussing the standards for enforceable arbitration clauses.

In re Social Networking Inquiry (MPT-2)

Examinees' supervising partner is the chairman of the Franklin State Bar Association Professional Guidance Committee. The committee issues advisory opinions in response to inquiries from Franklin attorneys concerning the ethical propriety of contemplated actions under the Franklin Rules of Professional Conduct. The committee has received an inquiry from a Franklin attorney asking whether an investigation using the social networking pages (such as Facebook or MySpace) of a nonparty, unrepresented witness in a personal injury lawsuit would violate the Rules. The supervising partner has reviewed the matter and believes that the attorney's proposed course of conduct would be contrary to the Rules. Examinees' task is to prepare a memorandum analyzing the issue with the object of persuading the other committee members that the proposed course of conduct would violate the Rules. This is an issue of first impression in Franklin. Examinees must therefore discern the relevance of, and guidance to be derived from, the three differing applications of those Rules in other states and then apply those differing approaches to the proposed course of conduct. The File contains the instructional memorandum, the letter from the Franklin attorney making the inquiry to the committee, and notes of the committee meeting. The Library contains the applicable Rules of Professional Conduct (including commentary on the Rules) and two cases—one from Olympia and one from Columbia—bearing on the legal issues.

workshops, assigns grades based on an evaluation of the characteristics of the answer against a fixed standard—that is, the grading scale does not change, whatever the item being graded. This approach uses a six-point scale where, for example, a grade of six represents a well-above-average response and a grade of three represents a somewhat-below-average response. The grader will read the essay or MPT answer as a whole and assign a grade, much like a grade of A, B, or C would be given on a law school paper or exam.

An alternative method, the *analytical approach,* assigns grades based on an evaluation of the answer according to an item-driven grading scale. A new grading scale is created for each MPT item or essay question. The model answer is deconstructed, point values are assigned to each issue, and the answer is scored against that rubric. Points are assigned to the independent parts of the answer, and the grader sums the points to determine the grade, like adding up the number of questions answered correctly to get a numerical score.

Whichever method is utilized by a jurisdiction for grading the MPT, rank-ordering is the goal, just as it is when grading traditional essays. Each method should yield the same rank-ordering of the candidates. The scores achieved on the MPT, along with scores on state essays and any other written components like the MEE, are then scaled to the Multistate Bar Examination (MBE) and combined with MBE scaled scores to determine the total score.

ADDITIONAL ASSESSMENT OPPORTUNITIES PROVIDED BY THE MPT

In grading both essay and MPT answers, we are assessing the candidate's analytical skills and his or her ability to apply the law to a given set of facts and reach a reasoned conclusion. But if we grade the MPT with a view to assessing only analytical skills, we lose the value of the test instrument in measuring competence in several dimensions. Grading the MPT gives bar examiners the opportunity to assess many more skills than grading a traditional essay, and to do so in a way that draws meaningful distinctions among candidate answers, enabling a finer-grained rank-ordering of candidates' performances.

Among the differences between grading the MPT and grading a traditional essay is, first and foremost, that the MPT does not test a candidate's knowledge of the law. Candidates are given the law in the Library. While some cases, statutes, or regulations may be irrelevant, in whole or in part, to the problem, all the law the candidate needs to solve the problem is provided.

Although not testing specific knowledge of the law, the MPT gives us the opportunity to test a candidate's ability to reason by analogy. Can the candidate take the facts of a case provided in the Library, compare and contrast them with facts in the File, draw appropriate inferences, make cogent arguments or observations, and express a reasoned conclusion? Candidates who parrot back large passages from cases found in the Library without using the filtering processes of analysis and synthesis should be graded accordingly.

The candidate is required to master the File and the Library (typically totaling 12 to 15 pages in length), ascertain what is and is not relevant, and organize and present a cogent response to the task assigned. The traditional essay question, by comparison, spoon-feeds the candidate limited facts (generally all relevant) and requires recitation and application of general principles of law in response to focused queries. How the candidate determines

the relevant facts, applies the appropriate law, and produces a writing that is appropriately responsive to the assigned legal task are important MPT assessments that should factor into the grading of the MPT.

Finally, the MPT offers an opportunity to assess the candidate's understanding of the structure of the judicial system. In the MPT universe, all events take place in the fictional state of Franklin, in the fictional Fifteenth Circuit of the United States. Franklin has an intermediate appellate court (the Court of Appeal) and a Supreme Court and is bordered by the fictional states of Columbia and Olympia. The MPT tests a candidate's ability to recognize what precedent is controlling and what authority may be nonbinding but advisory and perhaps either useful in the analysis or such as to require that it be distinguished. For example, if the task is a persuasive one, the candidate may be required to draw distinctions between a case in the Library which appears to be adverse to the client's position and the facts in the File or to argue that the case is not controlling. Appreciating the applicability of the various legal authorities provided in the Library is a skill that can be demonstrated by the candidate's answer to the MPT item, and one on which the candidate should be graded.

Grading the MPT Versus Grading Traditional Essays: New Dog, New Tricks

Grading the MPT varies most from grading a traditional essay in its assessment of the candidate's performance of the task. For example, if the task includes preparation of a statement of facts, does the candidate include only relevant facts? Does the candidate state only the facts, without argument? Does the statement of facts take into account the purpose of the writing? For instance, does the candi-

date express the facts in an objective fashion for an objective piece, and place the facts in their best light without overstating them if the assignment is to prepare a persuasive writing?

Distinctions may be drawn as to how well the candidate performs the assigned task. First, does the candidate prepare a writing in the form required by the task? Whether the task is to prepare a letter, a brief, or a contract provision, the candidate must produce a document in the requested form.

The task itself gives grist to the grading mill. If the task is to prepare a brief, does the candidate organize the argument into points and include headings that are an application of the law to the facts? If the task is to draft a will provision and the File includes a specimen to follow, does the will provision drafted by the candidate follow form?

Finally, does the candidate follow other directions? If told not to prepare a statement of facts, not to be concerned about a particular issue, or to be sure to anticipate and address contrary views, does the candidate comply? Candidates are instructed not to go beyond the confines of the File and the Library. Failure to follow that direction should be reflected in grading.

An Opportunity to Assess Writing Skills

One criticism often leveled at new lawyers is that their writing does not reflect advocacy. If the MPT assigns a persuasive task, the candidate should be graded on whether the writing is appropriately persuasive. Persuasiveness is not demonstrated by the number of adjectives used or by pronouncing one's position as "clear." Grading an answer for its persuasiveness involves evaluating whether the candidate

presents arguments that are well reasoned and supported by the facts and applicable law.

The audience for the writing must be considered by the candidate in completing the task, and whether the writing is proper in tone, in focus, and in the language used is a valid discriminator in grading the MPT. A candidate should understand, for example, that an opinion letter to a client offers objective counsel and is not the format in which to argue the righteousness of the client's legal position.

Jurisdictions vary on how much or little the quality of the writing counts in grading traditional essays, but writing most assuredly should count in grading the MPT. In explaining the grading of the written component of its bar exam, the New York Board of Law Examiners advises candidates on its website as follows:

> The ability to effectively communicate is essential to competent legal practice. In grading, consideration is given to whether the answer is appropriately organized; whether the analysis is expressed with precision, clarity, logic and economy; whether relevant facts are cited and analyzed in support of a stated conclusion; whether appropriate legal terms are incorporated into the analysis; and whether overall the answer reflects an ability to communicate in an effective manner.

The effectiveness of the writing and quality of the analysis should not be overlooked in grading the MPT. When we grade the candidate on the quality of the product he or she produces, we are harnessing the power and a significant purpose of the MPT in the overall assessment of the candidate's competence.

CONCLUSION

Different components of the bar exam test different, albeit overlapping, aspects of a candidate's readiness for practice. The MPT is a test of skills, including the skills of organization of a legal task and written communication.

Bar examiners have been encouraged, and rightfully so, to increase the range of skills tested on the bar exam; adopting the MPT is one way in which jurisdictions have responded to that call. The MPT provides the opportunity to assess many of the skills that new lawyers need to practice law effectively in a way not available through other components of the bar exam. In grading the MPT, bar examiners should take full advantage of that opportunity. We may even identify who among our candidates will be good lawyers. 📖

NOTE

1. The New York State Board of Law Examiners, the New York State Bar Examination, http://www.nybarexam.org/TheBar/TheBar.htm (last visited Nov. 14, 2011).

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