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## Improving the Performance of the Performance Test: The Key to Meaningful Bar Exam Reform

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# IMPROVING THE PERFORMANCE OF THE PERFORMANCE TEST: THE KEY TO MEANINGFUL BAR EXAM REFORM

Ben Bratman\*

## I. INTRODUCTION

In an effort to ensure minimal attorney competence,<sup>1</sup> every state and every territory in the United States administers a bar examination.<sup>2</sup> The overwhelming majority of aspiring lawyers must take and pass the examination to earn the requisite state-issued license permitting them to practice law.<sup>3</sup> An examination with stakes that high is bound to weather a certain amount of criticism.

However, to write merely that the bar exam is the subject of criticism would be a colossal understatement. Critics have pilloried the exam, labeling it as “useless”<sup>4</sup> and “an unproductive waste of time.”<sup>5</sup> Moreover, numerous calls for

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\* Associate Professor of Legal Writing, University of Pittsburgh School of Law. I would like to thank James Baker and Benjamin Minegar, student research assistants who, over the course of two summers, provided invaluable assistance in locating, evaluating and collating countless sources of information related to bar examinations. The focus of this Article took shape in response to insightful suggestions offered by several of my colleagues at the University of Pittsburgh School of Law during an Emerging Ideas session in Fall 2012. I thank all of those colleagues and also express my appreciation to then Associate Dean for Research and Faculty Development, David Harris, for offering the sessions, which are great forums for testing out incipient ideas.

<sup>1</sup> Kellie R. Early, *The UBE: The Policies Behind the Portability*, B. EXAMINER, Sept. 2011, at 17, 17 (indicating that the bar exam “represents proof of minimum competence”); Rodney J. Uphoff, James J. Clark, & Edward C. Monahan, *Preparing the New Law Graduate to Practice Law: A View from the Trenches*, 65 U. CIN. L. REV. 381, 413 (1997) (referring to the bar exam as “a test designed to ascertain whether the graduate was minimally competent to practice”).

<sup>2</sup> *Comprehensive Guide to Bar Admission Requirements 2015*, NAT’L CONF. OF B. EXAMINERS at 25 (Feb. 2015), [http://www.ncbex.org/assets/media\\_files/Comp-Guide/CompGuide.pdf](http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf). Individual states, not the federal government, license and regulate lawyers. Frederic White, *A Uniform Bar Examination: An Idea Whose Time has Come in Essays on a Uniform Bar Exam*, B. EXAMINER, Feb. 2009, at 6, 6-7.

<sup>3</sup> There are only very limited exceptions to the general rule that every state requires passage of its bar examination as a prerequisite to licensure. The most prominent exception is the diploma privilege, currently offered only by Wisconsin. Graduates of either of the state’s two ABA-accredited law schools need not take the state’s bar exam (which is administered mostly to those graduating from out-of-state law schools) to establish competency, though they must meet the state’s separate character and fitness requirements. Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You’ll Like It*, 2000 WIS. L. REV. 645, 646-49 (2000). The Iowa Supreme Court recently considered and rejected adoption of a diploma privilege. *In re Proposed Amendments to Iowa’s Bar Admission Process*, at 2 (Iowa Sept. 5, 2014), available at [http://www.iowacourts.gov/wfdata/files/CourtRules/privilege/090514\\_Ord\\_re\\_Dip\\_Priv.pdf](http://www.iowacourts.gov/wfdata/files/CourtRules/privilege/090514_Ord_re_Dip_Priv.pdf).

<sup>4</sup> Mitchell H. Rubinstein, *Uniform Bar Examination in the Works?*, L. PROFESSOR BLOGS NETWORK (Oct. 12, 2009), <http://lawprofessors.typepad.com/adjunctprofs/2009/10/uniform-bar-exam-in-the-works-1.html>.

<sup>5</sup> Daniel Solove, *Bar None*, DE NOVO (Aug. 10, 2005, 12:22 AM), <http://www.blogdenovo.org/archives/001022.html>.

reform of the attorney licensing system place the exam on the chopping block.<sup>6</sup> Critics take the exam to task for assorted reasons,<sup>7</sup> but among the most prominent is the charge that the exam does not adequately evaluate various competencies central to the practice of law.<sup>8</sup> Instead, critics charge, the exam overemphasizes

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<sup>6</sup> See, e.g., *Society of American Law Teachers—SALT—Statement to the ABA Outcome Measures Committee, February 1, 2008*, AM. B. ASS'N, at 2-3, 5, [http://apps.americanbar.org/legaled/committees/subcomm/Outcome%20Measures\\_comments\\_SALT%20Feb%202008.pdf](http://apps.americanbar.org/legaled/committees/subcomm/Outcome%20Measures_comments_SALT%20Feb%202008.pdf) (last visited Jan. 23, 2015) (discussing various alternatives to the bar exam) [hereinafter *SALT Statement to the ABA*]; Kristin B. Glen, *In Defense of the PSABE, and Other "Alternative" Thoughts*, 20 GA. ST. U. L. REV. 1029, 1031-44 (2004) (supporting the Public Service Alternative to the Bar Examination ("PSABE"), Arizona's Community Legal Access Bar Alternative ("CLABA"), and University of New Hampshire's Daniel Webster Scholar Honors Program); Moran, *supra* note 3, at 648-52 (describing diploma privilege and supporting the idea that law schools can determine a candidate's competency for admission to the bar); Peggy Maisel, *An Alternative Model to United States Bar Examinations: The South African Community Service Experience in Licensing Attorneys*, 20 GA. ST. U. L. REV. 977, 978-88 (2004) (looking to South Africa's community service and practical skills focus as prerequisites to bar admission); Paul Maharg, John M. Law & Nigel Duncan, *Essays on Other Lawyers Licensing Processes and Alternatives to the Bar Examination*, B. EXAMINER, Nov. 2005, at 6, 9-20 (expressing the benefits of the Scottish skills-based course and apprenticeship system, the Canadian skills-based course and apprenticeship application process, and the English apprenticeship program); Daniel R. Hansen, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191, 1222-28 (1995) (describing the benefits of the Canadian skills-based course and clerkship program, the English multi-prong apprenticeship program, and Australia's diploma privilege system); Lawrence M. Grosberg, *Standardized Clients: A Possible Improvement for the Bar Exam*, 20 GA. ST. U. L. REV. 841, 848 (2004) (suggesting a crossover among a pro bono requirement, the performance test, and the PSABE).

<sup>7</sup> One important reason, though not the subject of this Article, is the exclusionary effect of the exam. See, e.g., *Society of American Law Teachers Statement on the Bar*, 52 J. LEGAL EDUC. 446, 450-52 (2002) (criticizing the bar exam on the grounds that it disproportionately excludes people of color from the legal profession) [hereinafter *SALT Statement on the Bar*]; Deborah J. Merritt, Lowell L. Hargens & Barbara F. Reskin, *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CIN. L. REV. 929, 929-30 (2001) (questioning whether the bar examination actually tests for competence as opposed to simply restricting the number of lawyers in the market); Lorenzo Trujillo, *The Relationship Between Law School and the Bar Exam: A Look at Assessment and Student Success*, 78 U. COLO. L. REV. 69, 77 (2007) (noting widespread criticism of the exclusionary effect of the bar exam on minority law students).

<sup>8</sup> See, e.g., *SALT Statement on the Bar*, *supra* note 7, at 446-47; *SALT Statement to the ABA*, *supra* note 6, at 1; Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363, 373-79 (2002); Kristin B. Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696, 1698 (2002); Eileen Kaufman, *Measuring Professional Competence: A Report from the AALS Committee on Bar Admissions and Lawyer Performance*, at 4, 7 (Apr. 2007) (on file with author); Steven Barkan, *Should Legal Research be Included on the Bar Exam? An Exploration of the Question*, 99 LAW LIBR. J. 403, 405-06 (2007) (lamenting an absence of legal research questions on the bar exam); Lawrence M. Grosberg, *Should We Test for Interpersonal Lawyering Skills?*, 2 CLINICAL L. REV. 349, 374 (1996); Sally Simpson & Toni Massaro, *Students with "CLAS": An Alternative to Traditional Bar Examinations*, 20 GA. ST. U. L. REV. 813, 823-24 & 837 (2004); BLUE RIBBON TASKFORCE, *Why Adopt the Diploma Privilege and Abolish the Bar Exam*, <http://www.iowabar.org/page=BRFacts>; Kristin B. Glen, *Thinking Out of the Bar Exam Box: A Proposal to "MacCrate" Entry to the Profession*, 23 PACE L. REV. 343, 355-81 (2003).

memorization of content.<sup>9</sup> The Multistate Bar Examination (MBE)—the multiple-choice examination administered as the anchor of the bar exam in forty-nine,<sup>10</sup> soon to be fifty, states<sup>11</sup>—requires examinees to call upon memorized knowledge of copious numbers of legal principles from seven different subject areas.<sup>12</sup> Essay examinations, also a part of the bar exam in all fifty states,<sup>13</sup> call for more content memorization as they cover additional substantive subjects beyond those tested on the MBE.<sup>14</sup>

In the face of what they perceive to be a fundamentally flawed exam, some critics propose abolishing the bar exam altogether.<sup>15</sup> Others suggest significant or radical changes to the exam.<sup>16</sup> Such proposals for sweeping overhauls of the exam or licensing system face very stiff headwinds. Like it or not, for the foreseeable future, the bar exam in largely its current format is here to stay. Bar examiners are inherently conservative—in fact, loath to implement change without very careful and lengthy research and vetting.<sup>17</sup> They

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<sup>9</sup> See, e.g., Curcio, *supra* note 8, at 374-75; Trujillo, *supra* note 7, at 78-84; Moran, *supra* note 3, at 650; Hansen, *supra* note 6, at 1210; Simpson & Massaro, *supra* note 8, at 823; Uphoff et al., *supra* note 1, at 414.

<sup>10</sup> *Comprehensive Guide*, *supra* note 2, at 25; *2013 Statistics*, B. EXAMINER, Mar. 2014, at 6, 31.

<sup>11</sup> *Bar Fight*, GREATER BATON ROUGE BUS. REP. (Mar. 8, 2011), <http://www.businessreport.com/article/bar-fight> (describing the Louisiana plan to phase in the Multistate Bar Examination by 2015); Scott T. Whittaker & Dona K. Renegar, *The Cause and Effect of Recent Changes to the Louisiana Bar Examination*, 61 LA. B.J. 90, 92 (2013) (same).

<sup>12</sup> The MBE tests Criminal Law and Procedure, Contracts, Constitutional Law, Federal Rules of Evidence, Torts, Real Property, and, effective February 2015, Federal Civil Procedure. *Overview of the MBE*, NAT'L CONF. OF B. EXAMINERS <http://www.ncbex.org/about-ncbe-exams/mbe/overview-of-the-mbe/> (last visited Jan. 23, 2015); Franklin R. Harrison, *Letter From the Chair*, B. EXAMINER, June 2013, at 2, 3. Critics have singled out the MBE specifically for the emphasis it places on memorization of content. See, e.g., Curcio, *supra* note 8, at 373-75; Trujillo, *supra* note 7, at 78.

<sup>13</sup> *Comprehensive Guide*, *supra* note 2, at 25-26.

<sup>14</sup> *Compare* MULTISTATE ESSAY EXAMINATION INFORMATION BOOKLET 5-16 (2014) (on file with author) [hereinafter 2014 MEE INFORMATION BOOKLET] *with* MULTISTATE BAR EXAMINATION INFORMATION BOOKLET 7-13 (2014) [hereinafter 2014 MBE INFORMATION BOOKLET].

<sup>15</sup> See, e.g., Uphoff et al., *supra* note 1, at 413; Jonathan Edelstein, *Count Me as an Abolitionist*, DE NOVO (May 25, 2005, 12:29 AM), <http://www.blogdenovo.org/archives/001034.html>; Daniel Solove, *Abolish the Bar Exam*, PRAWFSBLAWG (Aug. 10, 2005, 1:01 PM), [http://prawfsblawg.blogs.com/prawfsblawg/2005/05/abolish\\_the\\_bar.html](http://prawfsblawg.blogs.com/prawfsblawg/2005/05/abolish_the_bar.html). Critics have offered numerous alternatives to the bar exam as methods of ensuring minimal competence for beginning attorneys. See also sources cited *supra* note 6.

<sup>16</sup> See, e.g., Grosberg, *supra* note 8, at 361-62, 380-83 (supporting computerized skill assessments); Curcio, *supra* note 8, at 394-98, 411-14 (proposing an extended timed test either as a take-home or as a computerized test); Scott Fruehwald, *Do States Need to Change the Bar Exam*, LEGAL SKILLS PROF BLOG (Oct. 6, 2013), [http://lawprofessors.typepad.com/legal\\_skills/2013/10/do-states-need-to-change-the-bar-exam.html](http://lawprofessors.typepad.com/legal_skills/2013/10/do-states-need-to-change-the-bar-exam.html) (supporting testing of client counseling, filing documents, and negotiations in a clinical setting); Barkan, *supra* note 8, at 409-11 (promoting the addition of a legal research section to the bar exam).

<sup>17</sup> Gregory G. Murphy, *A Uniform Bar Exam: Let's Give It a Try* in *Essays on a Uniform Bar Examination*, B. EXAMINER, Feb. 2009, at 6, 41 (noting that bar examiners are generally conservative when it comes to changing the bar exam); see also Erica Moeser, *President's Page*, B. EXAMINER, May 2006, at 4, 5 (mentioning consideration of adding legal research to the bar

acknowledge the need for some evolution of the exam,<sup>18</sup> but the President of the National Conference of Bar Examiners (NCBE)<sup>19</sup> has invoked geological metaphors to describe how bar exams evolve, writing that any evolution of the exam will be “more glacial than volcanic.”<sup>20</sup>

This Article acknowledges the validity of criticisms that the bar exam inadequately evaluates attorney competencies and places undue emphasis on memorization. But it does not propose an overhaul or radical restructuring of the exam. Rather, it proposes improving and expanding the performance test, a frequently overlooked testing instrument used on most state bar exams that evaluates *only* attorney competencies *other than* substantive knowledge of law.<sup>21</sup> Amidst all the carping about the bar exam, there has been very little discussion of the performance test’s potential as a vehicle for meaningful bar exam reform.<sup>22</sup> Given that nearly twenty years have passed since the NCBE introduced the Multistate Performance Test (MPT),<sup>23</sup> the time for that discussion is now.

Stated in simple terms, the best way to address the bar exam’s shortcomings in evaluating critical attorney competencies is to decrease its focus on knowledge of law and instead “make it test skills.”<sup>24</sup> And the way to expand and improve skills testing is through the performance test. The performance test assigns a specific written lawyering task, to be completed by the examinee relying on a closed universe of provided factual and legal materials.<sup>25</sup> It seeks to

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examination as early as 2006); and Erica Moeser, *President’s Page*, B. EXAMINER, Sept. 2013, at 4, 4 (noting seven years later that legal research is on the agenda of the National Conference of Bar Examiners’ *long range* planning committee).

<sup>18</sup> Erica Moeser, *President’s Page*, B. EXAMINER, Dec. 2012, at 4, 4.

<sup>19</sup> The NCBE is a non-profit organization dedicated primarily to researching, developing and maintaining testing instruments in the field of attorney licensing. Erica Moeser, *The President’s Page*, B. EXAMINER, Aug. 2006, at 4, 4-5. Most of NCBE’s revenue comes from the sale of its four tests (MBE, Multistate Essay Examination (MEE), Multistate Performance Test (MPT), and Multistate Professional Responsibility Examination (MPRE)) to subscribing jurisdictions. *Id.* The NCBE has also been the driving force behind the growing Uniform Bar Exam (UBE) initiative. *See* Early, *supra* note 1, at 18-20.

<sup>20</sup> Erica Moeser, *President’s Page*, B. EXAMINER, Mar. 2012, at 4, 5.

<sup>21</sup> MULTISTATE PERFORMANCE TEST INFORMATION BOOKLET 4 (2014) (on file with author) [hereinafter 2014 MPT INFORMATION BOOKLET]. As of June 2014, a total of thirty-nine states and the District of Columbia administer one or more performance test questions as part of their bar exams. *Comprehensive Guide*, *supra* note 2, at 25.

<sup>22</sup> Research reveals few other published articles specifically calling for reform or expansion of the performance test. However, many of those calling for more attention to skills on the exam recognize that the performance test is a useful vehicle through which to achieve that result. For example, in a Point/Counterpoint feature in the *Colorado Lawyer*, two practitioners disagreed on whether the bar exam was too easy or too hard, but they agreed with each other that the exam should expand its use of the performance test. Compare James S. Hardy, *Lowering the Bar: Why We Should Test Skills, Not Abstracts*, 38 COLO. LAW. 93, 97-98 (2009) with Jason B. Wesoky, *Raising the Bar: Eliminate the Guesswork To Measure the Substance*, 38 COLO. LAW. 93, 96-97 (2009).

<sup>23</sup> Judith Gundersen, *Happy Birthday, MPT!*, B. EXAMINER, Nov. 2007, at 18, 20 (indicating that the MPT was first offered to jurisdictions in 1997).

<sup>24</sup> Hardy, *supra* note 22 at 97.

<sup>25</sup> Gundersen, *supra* note 23, at 19.

mimic as closely as possible a real-world assignment to a beginning lawyer, albeit within the constraints of the testing environment and without the need for legal research.<sup>26</sup> The NCBE and state bar examiners should inventory the skills covered by performance tests administered to date, and identify and implement feasible reforms and improvements. By so doing, they can ratchet up the evaluation of attorney competencies that newly licensed lawyers need to possess, testing more of them and as a larger proportion of the exam.<sup>27</sup> At the same time, they can also decrease the premium that the current exam places on rote memorization of law.

The performance test is an appropriate focus of bar exam reform for another very important reason: it is inextricably intertwined with ongoing and laudable reforms toward more skills training in legal education. The test is designed in part to evaluate competencies identified as fundamental lawyering skills by the American Bar Association's landmark 1992 MacCrate Report.<sup>28</sup> The MacCrate Report called on law schools to enhance training in those fundamental skills.<sup>29</sup> Given the importance of a continuum from law school through the licensing process, the Report also encouraged state bar admitting authorities to adjust the bar exam to test at least some of the fundamental skills.<sup>30</sup> Law schools responded through increased curricular attention to legal analysis, reasoning, writing, research and other skills,<sup>31</sup> and bar examiners responded by gradually implementing the performance test.<sup>32</sup>

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<sup>26</sup> The possibility of adding legal research to the bar exam is discussed in Section III-B herein.

<sup>27</sup> Shifting the focus of the licensing process away from substantive law knowledge and more toward practical skills is not an unprecedented or untested idea. It has been going on in Canada, for example, for several decades. See John M. Law, *Canadian Bar Admissions*, B. EXAMINER, Nov. 2005, at 14, 15-16 (discussing the shift in the various provinces' bar admissions programs over the previous twenty years and describing Ontario's "overhaul" of its bar admission program to implement "skills-based licensing"); Alan Treleaven, *Moving Toward National Bar Admission Standards in Canada*, B. EXAMINER, Sept. 2014, at 17, 23 (identifying skills as the "highest-priority category of competencies to be assessed" in planned examinations for Canada's pending National Admissions Standards Project). Unlike the United States, Canada's law licensing system includes a required period of articling and formal bar admissions training. Law, B. EXAMINER, Nov. 2005, at 14. However, just as Canada's system has shifted its focus more toward skills within its own construct, the American system can shift its focus more toward skills within its more bar exam-centered construct.

<sup>28</sup> 2014 MPT INFORMATION BOOKLET, *supra* note 21, at 6-7 (citing AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, LEGAL EDUC. AND PROF. DEV. — AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 138-41 (1992) [hereinafter MACCRATE REPORT]).

<sup>29</sup> MACCRATE REPORT, *supra* note 28 at 128, 233-41.

<sup>30</sup> *Id.* at 260-68.

<sup>31</sup> Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109, 123, 127-143 (2001) (describing the changes in the New England School of Law specifically and the legal field generally after the MacCrate Report); Margaret M. Barry, John C. Dubin & Peter A. Joy, *Clinical Education for this Millenium: the Third Wave*, 7 CLINICAL L. REV. 1, 20 (2000) (explaining how law schools followed American Bar Association clinical requirements imposed as a result of the MacCrate Report).

<sup>32</sup> Gundersen, *supra* note 23. While performance tests had been part of the bar exam in a small

Over twenty years later, legal education continues to expand its clinical and other skills-related offerings in response to more recent MacCrate-inspired calls for reform<sup>33</sup> and changes in the legal profession.<sup>34</sup> In order to promote continued advances in the teaching of practice competencies in law school, the ABA's Task Force on the Future of Legal Education wisely recommends that bar examiners "reduce the number of doctrinal subjects tested on bar examinations and increase testing of competencies and skills."<sup>35</sup> The performance test is the best vehicle through which to do just that.

The performance test is also ripe for growth and change, especially given strong empirical evidence that today's newly licensed lawyers need to possess a variety of skill sets that the test has not been evaluating.<sup>36</sup> While a growing number of U.S. jurisdictions have adopted the performance test as part of their bar exams,<sup>37</sup> the nature of the performance test itself has never evolved or changed.<sup>38</sup> While examiners have added substantive subjects to the MBE and essay examinations,<sup>39</sup> the performance test has remained stagnant. It tests the same limited number of competencies that it has always tested and in the exact same format.<sup>40</sup> Moreover, the performance test remains the smallest part of the

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number of states for several years, the NCBE did not begin distributing its own performance test product to adopting jurisdictions until 1997, five years after the MacCrate Report was published. *Id.*

<sup>33</sup> In 2007, both the Carnegie Foundation for the Advancement of Teaching and the Clinical Legal Education Association issued lengthy reports evaluating the state of legal education, proposing reforms or setting forth best practices. See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 3 (1st ed. 2007) [hereinafter CARNEGIE REPORT] and ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (1st ed. 2007) [hereinafter CLEA REPORT]. More recently, in January 2014, the American Bar Association's Task Force on the Future of Legal Education issued its Final Report and Recommendation, which, among other things, identified as a guiding theme that "law schools exist to develop *competencies* relating to the delivery of legal and related services." Jay Conison, *The Report and Recommendations of the ABA Task Force on the Future of Legal Education: Its Significance for Bar Admissions and Regulation of Entry into the Legal Profession*, B. EXAMINER, Dec. 2014, at 12, 15 (emphasis added).

<sup>34</sup> See Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing*, 69 MO. L. REV. 299, 301 (2004) (expressing how legal education and bar examinations need to adapt to an expanding legal economy and changes in technology).

<sup>35</sup> Conison, *supra* note 33, at 16.

<sup>36</sup> See *infra* notes 139-228 accompanying discussion of NCBE's Job Analysis Survey.

<sup>37</sup> See, e.g., CONN. BAR EXAMINING COMM. REGULAR MEETING (July 12, 2013), available at, [https://www.jud.ct.gov/Committees/CBEC/CBEC\\_min\\_071213.pdf](https://www.jud.ct.gov/Committees/CBEC/CBEC_min_071213.pdf) (describing Connecticut's adoption of the MPT for the February 2014 bar examination); Press Release, Wash. State Bar Ass'n, Washington Adopts the Uniform Bar Exam: Uniform Bar Exam to Be Used Beginning July 2013 (Feb. 1, 2011), [http://www.wsba.org/~media/Files/News\\_Events/News/Press%20releases/bar%20exam%202011.ashx](http://www.wsba.org/~media/Files/News_Events/News/Press%20releases/bar%20exam%202011.ashx).

<sup>38</sup> The NCBE's summary of the purpose and scope of the MPT is identical today to what it was in 1997 when the MPT was first introduced. Compare Diane K. Minnich, *Performance Testing—A Better Bar Exam?*, 40 ADVOC. 8 (May 1997) (quoting NCBE's description of MPT and tested skills from 1997) with 2014 MPT INFORMATION BOOKLET, *supra* note 21, at 4-6.

<sup>39</sup> See *infra* discussion accompanying notes 65-66 and 82-84.

<sup>40</sup> See *infra* Section III-A.

exam and is accorded the least weight in scoring.<sup>41</sup> It is the ugly step-child of the bar exam, but it should not be and need not be.

Section II of this Article takes a close look at bar examinations in the United States, providing context on various levels for the Article's subsequent proposals for reform of the performance test. It reviews in depth the MBE, the essay examination, and the performance test, looking in each case at the content of the testing instrument, its psychometric properties, and what knowledge or skills it purports to evaluate. Each of these three testing instruments is designed to evaluate various competencies, but the performance test encompasses several that the essay examination and the MBE do not and cannot address.

Section III delves more deeply into the performance test, revealing it as a stagnant component of the exam that has not fulfilled its potential. Actually administered performance tests over the last ten years have rarely evaluated examinees on execution of several competencies that the performance test claims to test. Moreover, there is considerable and current empirical evidence that newly licensed lawyers are expected to perform tasks calling for application of these competencies. That evidence, coming in the form of the results of an NCBE-commissioned job analysis survey, provides a basis for expanding the performance test to fulfill its existing scope. It also provides a basis for expanding the performance test to test on additional lawyering skills not currently within its defined scope. The most prominent obstacle to expansion of the performance test would seem to be the probable perception among some bar examiners that law schools are not teaching the relevant competencies that the performance test might expand to cover. However, bar examiners can and should take the initiative to review and reform the performance test regardless of gaps or inconsistencies in skills coverage in legal education. In so doing, bar examiners could be agents of change for both the exam itself and, in turn, legal education.

The final component of the Article, Section IV, will shift from the content of the performance test itself to its relative significance on the bar exam as a whole. Section IV argues for adoption of the performance test by more jurisdictions, the administration of more performance tests on each bar exam, and a greater scoring weight accorded to the performance test. All of these steps would be important adjuncts to qualitative improvements to the test discussed in Section III. The performance test has secured a place within the NCBE's growing Uniform Bar Examination (UBE) initiative,<sup>42</sup> but regrettably as the least

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<sup>41</sup> *Comprehensive Guide*, *supra* note 2, at 29-30; *see also, infra*, discussion accompanying notes 117-21 and 299-305.

<sup>42</sup> The UBE is centered around a standardized bar exam consisting of a designated number of questions from each of the NCBE's three tests (the MBE, MEE and MPT) with each test weighted at a designated percentage of the overall score. Early, *supra* note 1 at 17. The UBE's great advantage to applicants is score portability. *Id.* Each UBE jurisdiction agrees to admit any applicant who exceeded that jurisdiction's minimum passing score on the UBE, no matter where the applicant took the exam. *Id.* Therefore, UBE takers who exceed the highest passing score among all the UBE jurisdictions could apply and be admitted to any other UBE jurisdiction without taking the bar exam again. *Id.* However, UBE jurisdictions may opt to impose a supplemental requirement



weighted of the three testing instruments.<sup>43</sup> To be sure, psychometric concerns related to testing reliability require the MBE to count for more in scoring,<sup>44</sup> but the same cannot necessarily be said for the essay examination.<sup>45</sup> Overall, there are ways to tweak the balance to make the performance test a greater and more valuable presence on the bar exam.

## II. THE BAR EXAM LANDSCAPE

Most bar exams in the United States include three testing instruments: the MBE, an essay examination, and a performance test. A closer look at the MBE and essay examinations, the two most prominent and heavily weighted testing instruments, reveals that, to some inherent extent, both test for memory.<sup>46</sup> But both are also firmly entrenched components of the exam, and in the case of the MBE, for understandable psychometric reasons. A closer look at the performance test confirms its status as the appropriate venue for the growth and reform needed to effectively evaluate the expansive and evolving array of competencies that today's newly licensed lawyer should possess.

### A. The MBE

In fifty-four of fifty-six United States jurisdictions, the anchor of the bar examination is the MBE,<sup>47</sup> a 200-question, six-hour multiple-choice test produced and distributed to jurisdictions by the NCBE.<sup>48</sup> The subjects tested on the MBE include Constitutional Law, Contracts (including UCC, Article II), Criminal Law and Procedure, Federal Rules of Evidence, Real Property, Torts and, effective 2015, Federal Civil Procedure.<sup>49</sup> A small minority of states administer, in addition to the MBE, their own multiple-choice questions on local law.<sup>50</sup> Otherwise, the multiple-choice portion of the bar examination is standardized through the use of the MBE, which tests on federal law and, in the case of state common law subjects, mainly majority rules.<sup>51</sup>

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(e.g., a local law course or test). *Id.* As of February 2015, fourteen states have joined the UBE. *Comprehensive Guide*, *supra* note 2, at 32.

<sup>43</sup> *Comprehensive Guide*, *supra* note 2, at 29-30.

<sup>44</sup> Susan M. Case, *The Testing Column: Quality Control for Developing and Grading Written Bar Exam Components*, B. EXAMINER, June 2013, at 34, 36.

<sup>45</sup> See *infra* discussion accompanying notes 290-91 and 299-304.

<sup>46</sup> The Code of Recommended Standards of Bar Examiners states that "[t]he examination should not be designed primarily to test for . . . memory." *Comprehensive Guide*, *supra* note 2, at ix. Regardless of whether the MBE and essay questions are *designed* to test for memory, as discussed in Section II-A and II-B, these testing instruments inherently do test for memory.

<sup>47</sup> *Comprehensive Guide*, *supra* note 2, at 25. Louisiana will become the fiftieth state and the fifty-fifth jurisdiction in 2015. *Bar Fight*, *supra* note 11.

<sup>48</sup> Mark A. Albanese, *The Testing Column: Differences in Subject Area Subscores on the MBE and Other Illusions*, B. EXAMINER, June 2013, at 26, 26-28.

<sup>49</sup> *Overview of the MBE*, *supra* note 12.

<sup>50</sup> *Comprehensive Guide*, *supra* note 2, at 26.

<sup>51</sup> Max A. Pock, Comment, *The Case Against the Objective Multistate Bar Examination*, 25 J.

The MBE is accurately described as an anchor of the bar exam in large measure because of its psychometric value. In simple terms, testing theory emphasizes two critical components for any examination seeking to measure competence: reliability and validity.<sup>52</sup> Reliability is the extent to which a given version of the exam produces an accurate and representative result, i.e. that the rank order of the examinees would remain largely stable over replications of the exam with different questions.<sup>53</sup> The more questions that a single testing instrument can ask, the more reliable the testing instrument.<sup>54</sup> Less subjectivity in grading and less variability among multiple graders also produces a more reliable testing instrument.<sup>55</sup> The multiple-choice testing format allows for the MBE to include 200 questions in a single day of testing and eliminates grader subjectivity and variability entirely. It thereby also makes the MBE an enormously reliable examination, and the NCBE vigorously defends the MBE as a strong testing instrument on this ground.<sup>56</sup>

Validity is the extent to which the exam tests on a domain of knowledge and skills that are relevant to the field for which competence is being evaluated.<sup>57</sup> The validity of the MBE can be and has been the subject of some debate.<sup>58</sup> The MBE purports to test for substantive knowledge of law, or what examiners term “fundamental legal principles.”<sup>59</sup> Given that the bar exam is a closed-book exam administered at a single point in time and not on a repeated basis, it is arguably more accurate to say that MBE is testing memory as much as or more so than knowledge.<sup>60</sup> In any event, it is fair to say that every MBE question tasks the applicant’s ability to recall any of a vast array of legal principles that in most cases he or she studied in a commercial bar preparation course.<sup>61</sup>

To be sure, the MBE does not test *exclusively* for substantive knowledge or memory of law. Each MBE question provides a fact pattern, followed by a specific call of the question.<sup>62</sup> Often, the flaw in an incorrect answer option is that it is expressly premised on facts inconsistent with those provided in the

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LEGAL EDUC. 66, 67 (1973) (explaining that the MBE tests on “‘majority’ rules, ‘traditional’ rules, and ‘trends’” in legal rules).

<sup>52</sup> Susan M. Case, *The Testing Column: What Everyone Needs to Know About Testing, Whether They Like it or Not*, B. EXAMINER, June 2012, at 29, 29-31.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*; see also Susan M. Case, *The Testing Column, Common Goals with Increasingly Similar Outcomes*, B. EXAMINER, Mar. 2011, at 53, 53.

<sup>57</sup> Case, *supra* note 52, at 30.

<sup>58</sup> Curcio, *supra* note 8, at 371, 374-77; Glen, *supra* note 8, at 1706.

<sup>59</sup> *Comprehensive Guide*, *supra* note 2, at ix.

<sup>60</sup> Curcio, *supra* note 8, at 374-75.

<sup>61</sup> Sonia B. Green, Maureen S. Kordesh & Julie M. Spanbauer, *Sailing Against the Wind: How a Pre-Admission Program can Prepare At-Risk Students for Success in the Journey Through Law School and Beyond*, 39 U. MEM. L. REV. 307, 333-35 (2009) (indicating that most students surveyed took a commercial bar preparation course like BARBRI).

<sup>62</sup> *MBE Sample Test Questions*, NAT’L CONF. OF B. EXAMINERS, [http://www.ncbex.org/assets/media\\_files/MBE/MBE-Sample-Test-Questions.pdf](http://www.ncbex.org/assets/media_files/MBE/MBE-Sample-Test-Questions.pdf) (last visited Jan. 24, 2015) (on file with author).

question.<sup>63</sup> Hence, the MBE is inherently a means for evaluating reading comprehension. In addition, MBE questions require examinees to exhibit fundamental legal reasoning skills. With each question examinees must identify and analyze a legal issue arising from a set of facts, applying the relevant law to those facts to reach a conclusion—in this case a decision as to which of four answers is the best. However, in order to make an informed selection of one of the four possible answers, an examinee has to determine the applicable legal principle, *drawing it from memory*.

The MBE was first offered in 1972 by eleven states, and at that time it tested on five of the current seven subjects.<sup>64</sup> The MBE has since added two subjects: Constitutional Law in 1976<sup>65</sup> and, effective February 2015, Federal Civil Procedure.<sup>66</sup>

Because of the MBE's psychometric qualities, the NCBE recommends to jurisdictions that it be weighted at 50% of the overall score.<sup>67</sup> States adopting the UBE are required to set the MBE's weight at 50%.<sup>68</sup> Several non-UBE jurisdictions do not follow the NCBE's guidance and instead accord the written questions (essay and performance test questions combined) greater weight than the MBE in scoring, in some instances relegating the MBE score's weight to as little as one-third of the overall score.<sup>69</sup>

## B. The Essay Examination

Every jurisdiction in the United States administers essay questions on its bar exam.<sup>70</sup> More than half of them purchase and administer the NCBE's Multistate Essay Examination (MEE), which includes six thirty-minute questions.<sup>71</sup> The subjects testable on the MEE include all MBE subjects as well as Business Associations, Conflict of Laws, Family Law, Trusts and Estates, and selected articles from the Uniform Commercial Code.<sup>72</sup> In jurisdictions that write and administer their own essay questions, the essay examination can comprise as many as sixteen questions.<sup>73</sup> The list of tested subjects in each state can vary

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<sup>63</sup> KIMM WALTON & STEVE EMANUEL, STRATEGIES & TACTICS FOR THE MBE (MULTISTATE BAR EXAM) xxx (5th ed. 2013).

<sup>64</sup> David R. Boyd, *A Milestone Birthday for the MBE*, B. EXAMINER, Sept. 2012, at 25, 26.

<sup>65</sup> Joe E. Covington, *The Multistate Bar Examination – 1976*, 45 B. EXAMINER 70, 71 (1976).

<sup>66</sup> Memorandum from Erica Moeser, President Nat'l Conference of Bar Exam'rs, on Changes to the Multistate Bar Examination to Law Sch. Deans (Feb. 21, 2013), available at <http://www.dcbarexam.com/Civil-Procedure-added-to-BLE.pdf>.

<sup>67</sup> Case, *supra* note 56, at 54.

<sup>68</sup> Early, *supra* note 1, at 19.

<sup>69</sup> *Comprehensive Guide*, *supra* note 2, at 29-30 (showing that Maryland, Nevada, and Ohio weight the MBE at one-third of the overall score).

<sup>70</sup> *Id.* at 25-26.

<sup>71</sup> *Id.* at 25.

<sup>72</sup> 2014 MEE INFORMATION BOOKLET, *supra* note 14, at 4.

<sup>73</sup> *Comprehensive Guide*, *supra* note 2, at 26 (showing that Kansas administers sixteen questions).

considerably, and many states test on uniquely local law subjects.<sup>74</sup> The time allotted for each question in non-MEE states varies from state to state as well.<sup>75</sup>

Bar exams administer far fewer essay questions than MBE questions. Essay questions introduce grading subjectivity and, in many larger jurisdictions needing multiple graders, potentially significant variability among graders.<sup>76</sup> These factors reduce the reliability of essay questions.<sup>77</sup> As for the content of the test and the competencies it seeks to evaluate, essay examinations suffer from the same weakness that the MBE does: to answer an essay question effectively, an examinee must determine the applicable legal principles, *drawing them from memory*.

To be fair, essay questions, like MBE questions, are not solely tests of substantive knowledge or memory of law. They are also tests of reading comprehension and fundamental legal reasoning. By requiring written answers, essay questions also challenge an examinee's ability to organize material into a coherent answer, though NCBE grading guidelines and those from individual jurisdictions do not indicate that structure per se is to be evaluated or scored.<sup>78</sup> Unlike performance test questions, MEE questions do not place the examinee in a particular role or ask the examinee to write a specific type of document; rather,

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<sup>74</sup> Gabriel S. Galanda, *Indian Law on the Bar Exam: No Family Left Behind*, INDIAN L., Spring 2009, at 10-11, available at, <http://www.wsba.org/~media/Files/Legal%20Community/Sections/Indian%20Law/Indian%20Newsletters/Indian%20Law%20Spring%202009%20Vol%202017%20No%20%201.ashx> (noting that New Mexico, Washington, and South Dakota test on Indian Law for the bar examination); *Appendix A: Texas Bar Examination Subjects*, TEX. BOARD OF L. EXAMINERS, <http://www.ble.state.tx.us/Rules/NewRules/appendixA.pdf> (last visited Jan. 24, 2015) (indicating that oil and gas law is tested on the Texas bar examination).

<sup>75</sup> *Description and Grading of the California Bar Examination – General Bar Examination and Attorney's Examination*, THE ST. B. OF CALIF., [http://admissions.calbar.ca.gov/Portals/4/documents/gbx/BXDescriptGrade\\_R.pdf](http://admissions.calbar.ca.gov/Portals/4/documents/gbx/BXDescriptGrade_R.pdf) (last visited Jan. 6, 2015) (granting one hour for essay questions on the California bar examination); *A Message from the Georgia Board of Bar Examiners on Preparing for the Georgia Bar Examination*, GA. OFF. OF B. ADMISSIONS (Sept. 2006), <https://www.gabaradmissions.org/message-on-preparing-for-the-ga-bar-exam> (granting forty-five minutes per essay question on the Georgia bar examination); *Kansas Board of Law Examiners: Subjects Tested and Minimum Passing Score*, KAN. CTS., <http://www.kscourts.org/Appellate-Clerk/Board-of-Law-Examiners/Subjects-Tested.asp> (last visited Jan. 24, 2015) (giving twenty-two and a half minutes per essay question on the Kansas bar examination).

<sup>76</sup> The individual jurisdictions grade examinees' essay answers. Judith A. Gundersen, *The MEE Marks a Major Milestone*, B. EXAMINER, Dec. 2013, at 17, 18. Those jurisdictions using the MEE are furnished grading guidelines by the NCBE. *Id.* The NCBE also conducts training sessions for graders from subscribing jurisdictions. *Id.*

<sup>77</sup> Case, *supra* note 44, at 36.

<sup>78</sup> See, e.g., *February 2009 MEE Questions and Analyses*, NAT'L CONF. OF B. EXAMINERS, at iv, 15-17, [http://www.ncbex.org/assets/media\\_files/MEE/Feb-MEE2009.pdf](http://www.ncbex.org/assets/media_files/MEE/Feb-MEE2009.pdf) (last visited Jan. 24, 2015) (on file with author); *Bar Exam Test and Topics Tested*, PA. BOARD OF L. EXAMINERS, at 14, [http://www.pabarexam.org/bar\\_exam\\_information/testsubjects.htm](http://www.pabarexam.org/bar_exam_information/testsubjects.htm) (last visited Jan. 13, 2015) (providing that the value of an essay answer depends primarily on "the recognition of issues and the quality of the discussion that evidences an ability to apply the law to the facts presented, and to reason in a logical manner in arriving at a conclusion").

the questions merely present a fact pattern followed by three or four specific questions.<sup>79</sup>

Essay questions have been a part of bar exams for a very long time.<sup>80</sup> Essay questions are a long-standing and entrenched testing format in law schools as well.<sup>81</sup> In recent years, the NCBE has expanded the subjects tested on the MEE, adding all the MBE subjects in July 2007,<sup>82</sup> though eliminating certain articles of the UCC in 2014.<sup>83</sup> All jurisdictions provide examinees with a list of several subjects beyond those tested on the MBE that can be tested on their essay questions, and in many states that list is rather long.<sup>84</sup>

The extent to which essay questions exacerbate the focus on substantive law knowledge and memorization is even greater in states that require examinees to answer according to local law. It is possible, for example, that the MBE might present a Constitutional Law question on a subject about which the United States Constitution provides X, whereas the state-law essay examination from the day before presented a question implicating the same subject about which that state's constitution provides Y.<sup>85</sup> Whether state bar exams should test on knowledge of that state's law is also a subject that can be debated,<sup>86</sup> but in the wake of the UBE, which requires usage of the national MEE as an essay examination, several

<sup>79</sup> 2014 MEE INFORMATION BOOKLET, *supra* note 14, at 17-31.

<sup>80</sup> CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 198 (1986) (mentioning that essay questions first appeared on the 1855 Massachusetts bar exam and slowly spread to other states in the following decades).

<sup>81</sup> Steve Sheppard, *An Informal History of How Law Schools Evaluate Students with a Predictable Emphasis on Law School Final Exams*, 65 UMKC L. REV. 657, 665-71 (discussing how essay examinations have been used in law school since the 1820s and have been consistently used since the 1870s).

<sup>82</sup> Gundersen, *supra* note 76, at 17, 19.

<sup>83</sup> Effective with the February 2015 bar exam, Negotiable Instruments (Uniform Commercial Code Article 3 and the excerpts of Article 4, Bank Collections) will no longer be tested on the MEE. *The Multistate Essay Examination, News – February 2014*, NAT'L CONF. OF B. EXAMINERS, <http://www.ncbe.org/home/multistate-essay-examination-news/> (last visited Jan. 24, 2015).

<sup>84</sup> See *Rules Governing Admission to the Mississippi Bar*, ST. OF MISS. JUDICIARY, at 29-30 (Aug. 23, 2011), [http://courts.ms.gov/rules/msrulesofcourt/rules\\_admission\\_msbar.pdf](http://courts.ms.gov/rules/msrulesofcourt/rules_admission_msbar.pdf) (Mississippi also tests administrative law, federal tax, professionalism, bankruptcy, and state constitutional law, none of which appears on the MBE); *Overview of the Indiana Bar Examination*, COURTS.IN.GOV, <http://www.in.gov/judiciary/ble/2375.htm> (last visited Jan. 24, 2015) (Indiana also tests administrative law, federal and state tax, and state constitutional law); *Bar Exam Information*, MASS. CT. SYS., <http://www.mass.gov/courts/court-info/sjc/attorneys-bar-applicants/bbe/bar-exam-info/> (last visited Jan. 24, 2015) (Massachusetts also tests federal jurisdiction, professionalism, and the entire Uniform Commercial Code).

<sup>85</sup> See Hardy, *supra* note 22, at 94 (providing a similar example).

<sup>86</sup> Intuitively, it might make sense for states to do so, but some have criticized the practice. See Dale Whitman, *Thinking About Bar Admissions*, ASS'N OF AM. L. SCH. NEWSLETTER (Aug. 2002), <http://aalsfar.com/presidentsmessages/prmaug02.html>; Ben Bratman, *Legal Knowledge: What's Relevant, What's Not? Why the Pennsylvania Bar Exam Should Focus on Federal Law, "Fundamental Legal Principles" and Legal Analysis-And Why it Should Stop Testing on Pennsylvania Law*, PA. LAW., Mar./Apr. 2005, at 24, 24-28.

states have decided to ensure local law knowledge through means other than the bar exam.<sup>87</sup>

The NCBE recommends that jurisdictions weigh the essay examination at 30% of the overall score, and jurisdictions participating in the UBE are required to do so.<sup>88</sup> As with the NCBE's recommendation on scoring weight for the MBE, several non-UBE jurisdictions do not follow the recommendation, placing greater weight on essay questions than on the MBE.<sup>89</sup>

### C. The Performance Test

In a significant minority of states, the MBE and an essay examination comprise the entirety of the bar examination.<sup>90</sup> However, more than three-quarters of U.S. jurisdictions administer a third testing instrument: the performance test.<sup>91</sup> Unlike the MBE or a bar exam essay question, the performance test furnishes the legal authority to be used by the examinee and does not in any way test the examinee's substantive knowledge of law.<sup>92</sup> Rather, the performance test evaluates only lawyering skills. The examinee is given a specific written lawyering task, to be completed relying on only the factual and legal materials provided.<sup>93</sup>

In 1997, the NCBE issued the first set of MPT questions for purchase and use by jurisdictions.<sup>94</sup> The introduction of this new national testing instrument marked the culmination of sixteen years of studying the efficacy of performance testing, which included an extensive trial administration of performance tests in multiple states on the July 1993 bar exam.<sup>95</sup> Performance tests had been in use in a few states since as early as 1981,<sup>96</sup> but the NCBE's introduction of the MPT raised the prospect of adoption by most states. Indeed, all but two states that administer a performance test on their bar exams use the MPT.<sup>97</sup>

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<sup>87</sup> Cindy L. Martin, *Local Law Distinctions in the Era of the Uniform Bar Examination: The Missouri Experience (You Can Have Your Cake and Eat it Too)*, B. EXAMINER, Sept. 2011, at 7, 7 (describing in depth Missouri's decision to adopt the UBE and, instead of supplemental local law essay questions on the bar exam, a separate required online course and multiple-choice test on core components of Missouri law); see also *Comprehensive Guide*, supra note 2, at 32-33 (collecting information on supplementary jurisdiction-specific requirements for all UBE jurisdictions).

<sup>88</sup> 2013 Statistics, supra note 10, at 38; Early, supra note 1, at 19.

<sup>89</sup> *Comprehensive Guide*, supra note 2, at 29-30.

<sup>90</sup> *Id.* at 25 (showing eleven states use the MBE and some essay examination, but not the MPT).

<sup>91</sup> *Id.*

<sup>92</sup> 2014 MPT INFORMATION BOOKLET, supra note 21, at 4.

<sup>93</sup> *Id.*

<sup>94</sup> Gundersen, supra note 23, at 20.

<sup>95</sup> Francis D. Morrisey & Jane Peterson Smith, *Performance Test Research Conducted*, SYLLABUS, Summer 1994, at 4, 4-5 (on file with author).

<sup>96</sup> Gundersen, supra note 23, at 23.

<sup>97</sup> Pennsylvania and California write their own performance test questions, electing not to use the NCBE's MPT questions. *Comprehensive Guide*, supra note 2, at 26.

Performance testing on bar exams garnered attention initially as a response to criticism that bar examinations (then using only essay questions and the MBE) did not test enough of the skills and abilities relevant to the practice of law.<sup>98</sup> Early studies of the efficacy of performance testing referred most prominently to the criticism that essay and MBE questions provide the facts merely in narrative form and then ask the examinee to resolve a question under those facts.<sup>99</sup>

The performance test gained national attention and became a greater priority for the NCBE after the ABA Task Force on Law Schools and the Profession issued the landmark MacCrate Report in 1992.<sup>100</sup> After significant study of “the range and complexity of lawyers’ work,”<sup>101</sup> the task force produced a Statement of Fundamental Lawyering Skills and Professional Values.<sup>102</sup> The Report encouraged law schools to use the Statement as a guideline for curricular innovation designed to enhance training in skills.<sup>103</sup> Though the Report cautioned in general terms that the Statement should not be used as a source for bar examinations,<sup>104</sup> it also encouraged bar examiners to try to measure at least some of the fundamental skills from the Statement in order to build a smoother continuum from legal education into law practice.<sup>105</sup> The NCBE responded by prioritizing its performance test research and ultimately producing the MPT as a test intended to evaluate six of the ten lawyering skills appearing in the Report: problem solving, legal analysis and reasoning, factual analysis, communication, organization and management of a legal task, and recognizing and resolving ethical dilemmas.<sup>106</sup>

Each performance test question is a multi-page packet that begins with an assignment memo, sometimes referred to as a task memo.<sup>107</sup> The task memo is presented as an actual memo, through which the examiner takes on the role of the sender—usually a senior attorney or a judge—and the examinee takes on the role of the recipient—usually a junior attorney or a law clerk.<sup>108</sup> The memo introduces the examinee to a pending scenario (either affecting a client or arising in a case before a judge) and instructs the examinee to write a specified document to a specified audience, addressing one or more legal issues arising from the

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<sup>98</sup> Stephen P. Klein, RELATIONSHIP OF BAR EXAMINATIONS TO PERFORMANCE TESTS OF LAWYERING SKILLS 1-2 (1983).

<sup>99</sup> *Id.*

<sup>100</sup> Gundersen, *supra* note 23, at 20.

<sup>101</sup> MACCRATE REPORT, *supra* note 28, at 123.

<sup>102</sup> *Id.* at 138-41.

<sup>103</sup> *Id.* at 128.

<sup>104</sup> *Id.* at 132.

<sup>105</sup> *Id.* at 284.

<sup>106</sup> Gundersen, *supra* note 23, at 18.

<sup>107</sup> 2014 MPT INFORMATION BOOKLET, *supra* note 21, at 4.

<sup>108</sup> *See infra* discussion of examples accompanying notes 149-62.

scenario.<sup>109</sup> Information booklets describing the performance test state that applicants could be asked to write 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, or a closing argument.<sup>110</sup>

In addition to a task memo instructing examinees what to write about in the specified document, performance tests frequently include a separate memo instructing the examinee how to format and frame the document.<sup>111</sup> Depending on what type of document is being assigned, the format memo might describe, among other things, what sections should or should not be included, what headings and subheadings should or should not be included, and how authority should be cited.<sup>112</sup> Jurisdictions using the performance test generally allot a small but significant number of points to the category of following instructions, including instructions as to format and structure.<sup>113</sup>

Following the task memo, the test packet includes two sections—a File containing source documents (e.g., transcripts of a hearing, deposition or interview; correspondence; contracts; police reports; medical records) from which the examinee is to cull the legally relevant facts, and a Library containing legal authorities, usually a combination of statutes and cases.<sup>114</sup> The File and Library contain the only facts and legal authorities that the examinee should consider and rely upon in completing the assignment.<sup>115</sup>

One performance test question is allotted ninety minutes, except in California where performance tests are much more substantial and each question is allotted three hours.<sup>116</sup> The NCBE distributes only two performance test questions per examination, recommending to jurisdictions that they administer both of them and weigh the score on the performance tests at 20% of the overall

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<sup>109</sup> *Id.*

<sup>110</sup> 2014 MPT INFORMATION BOOKLET, *supra* note 21, at 4.

<sup>111</sup> See, e.g., *July 2014 Pennsylvania Bar Examination: Essay Questions and Examiner's Analysis and Performance Test*, PA. BOARD OF L. EXAMINERS, at 52, <http://www.pabarexam.org/pdf/qa/qa714.pdf> (last visited Jan. 24, 2015) (on file with author) [hereinafter *July 2014 Pennsylvania Bar Examination*]; *February 2013 MPTs and Point Sheets*, NAT'L CONF. OF B. EXAMINERS at 4, 22, [http://www.ncbex.org/assets/media\\_files/MPT/MPT-Point-Sheets/February-2013-MPT-and-Point-Sheets.pdf](http://www.ncbex.org/assets/media_files/MPT/MPT-Point-Sheets/February-2013-MPT-and-Point-Sheets.pdf) (last visited Jan. 6, 2015) (on file with author).

<sup>112</sup> *Id.*

<sup>113</sup> See, e.g., *July 2014 Pennsylvania Bar Examination*, *supra* note 111, at 66. The MPT grading guidelines give jurisdictions discretion in deciding how many points to allot to the categories of format and following instructions. *February 2013 MPTs and Point Sheets*, *supra* note 111, at 41.

<sup>114</sup> 2014 MPT INFORMATION BOOKLET, *supra* note 21, at 5.

<sup>115</sup> *Id.*

<sup>116</sup> *Description and Grading of the California Bar Examination*, *supra* note 75, at 1.



score.<sup>117</sup> Several jurisdictions comply with these recommendations, including all who participate in the UBE, as they are required to do so.<sup>118</sup> However, several non-UBE jurisdictions administer only one performance test question,<sup>119</sup> and several accord a much lower percentage weight to the performance test score, some below 10%.<sup>120</sup> Only four jurisdictions accord a weight greater than 20%: California, District of Columbia, Georgia, and Oregon.<sup>121</sup>

For the purposes of calculating an overall score and scaling, jurisdictions lump the performance test in with the essay examination to create a single score for the written component of the exam.<sup>122</sup> That written component score is then scaled to the MBE.<sup>123</sup> In most jurisdictions, the written component scaled score and the MBE scaled score are then combined and weighted to produce a single overall score, which standing alone determines if the applicant has passed the exam.<sup>124</sup>

Given the comparatively small number of performance test questions administered on any given bar exam, the performance test has relatively low psychometric reliability.<sup>125</sup> But, given its scope and format, the performance test compensates for lower reliability with higher validity.<sup>126</sup> Though the performance test and the other two testing instruments—the MBE and essay questions—overlap to a certain extent in the skills they are evaluating, the performance test

<sup>117</sup> 2013 Statistics, *supra* note 10, at 40.

<sup>118</sup> Early, *supra* note 1, at 19.

<sup>119</sup> Ten states and two territories use only one performance test (Guam, *available at* <http://www.guamcourts.org/BrdLawExam/subjects.html>; Illinois, *available at* <https://www.ilbaradmissions.org/scoring-memo-feb-2014>; Maine, *available at*, <http://barexam.info/state-bar-info/maine-bar-exam/>; Maryland, *available at* <http://mdcourts.gov/ble/pdfs/gbtips.pdf>; Mississippi, *available at* <http://courts.ms.gov/baradmissions/2014barexamschedulejuly.pdf>; Nevada, *available at* [https://www.nvbar.org/sites/default/files/Feb\\_2012\\_Exam\\_Schedule.pdf](https://www.nvbar.org/sites/default/files/Feb_2012_Exam_Schedule.pdf); New York, *available at* <http://www.nybarexam.org/TheBar/TheBar.htm#mpt>; Palau, *available at* <http://www.palausupremecourt.net/upload/P1408/1213110553935.pdf>; Rhode Island, *available at* [http://www.courts.ri.gov/PDF/July\\_2014\\_Bar\\_Exam\\_Information.pdf](http://www.courts.ri.gov/PDF/July_2014_Bar_Exam_Information.pdf); Tennessee, *available at* <http://www.state.tn.us/lawexaminers/docs/Feb%202014%20Essay%20Questions.pdf>; Texas, *available at* [http://www.ble.state.tx.us/ExaminationInfoPage/Grading%20Explanation%20as%20of%201-11-08\\_pdf.pdf](http://www.ble.state.tx.us/ExaminationInfoPage/Grading%20Explanation%20as%20of%201-11-08_pdf.pdf); Wisconsin, *available at* <http://barexam.info/state-bar-info/wisconsin-bar-exam/>).

<sup>120</sup> *Comprehensive Guide*, *supra* note 2, at 29-30 (indicating that twelve states weigh the MPT below 20%, with Illinois, New York, Texas (all 10%), Maine and Rhode Island (9%), and Maryland (8.7%) being the lowest).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* Only three states do not follow the NCBE's recommendation of scaling the written component score to the MBE score. *Id.*

<sup>124</sup> *Id.* (stating that a minority of jurisdictions require independent passing scores on the MBE and written sections).

<sup>125</sup> Stephen P. Klein, *The Costs and Benefits of Performance Testing on the Bar Examination*, B. EXAMINER, Aug. 1996, at 13, 13-15 ("All other things being equal, the larger the number of questions; i.e. the larger the sample, the higher the reliability.").

<sup>126</sup> *Id.* at 15-16 (defending the use of performance tests as a tool for achieving test validity and commenting, "If score reliability was the only criterion of test quality that had to be satisfied, the bar exam would consist of entirely multiple-choice questions.").

distinguishes itself in four important ways: (1) performance tests call on examinees to cull through actual source documents to gather the facts and to determine which facts matter and which facts do not; (2) performance tests call on examinees to read and interpret legal authority, both statutes and cases; (3) performance tests call on examinees to write a real-world document, bearing in mind the assigned audience, and to comply with express and often detailed instructions as to both format and content;<sup>127</sup> and (4) by not testing on substantive knowledge of law, performance tests do not feed into the frenzy of rote memorization of legal principles that is imperative for success on the other testing vehicles.

### III. A GOOD THING GONE STAGNANT—RE-EVALUATING AND IMPROVING THE SCOPE OF THE PERFORMANCE TEST

Fifteen years after the MacCrate Report, two new reports once again critically assessed legal education and called for reform based on the changing state of the legal profession.<sup>128</sup> Though those 2007 reports did not explicitly call on bar examiners to respond as MacCrate did, their messages had and have considerable relevance to bar exams.<sup>129</sup> In the ensuing years, market-based and other forces have continued to effect change in the legal profession, demanding the attention of both legal educators and bar examiners.<sup>130</sup>

Just as in the 1990s in the wake of MacCrate, the most sensible place to look in a quest for appropriate bar exam reform today is the performance test. There is a growing demand in the legal marketplace for practice-ready lawyers, and the numerous skill sets crucial to success in the legal profession continue to evolve.<sup>131</sup> The best way for examining authorities to ensure that newly licensed lawyers are practice-ready is to test as many essential competencies as is feasible and on as large a portion of the exam as is feasible.<sup>132</sup> Professor Judith Wegner, the only law professor among the Carnegie Report's authors, has espoused a similar view.<sup>133</sup> She has written that the Report should challenge bar examiners to

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<sup>127</sup> Tim Wong, *Three Perspectives on the MPT in Happy Birthday, MPT!*, B. EXAMINER, Nov. 2007, at 22, 22, 24.

<sup>128</sup> CLEA REPORT and CARNEGIE REPORT, *supra* note 33.

<sup>129</sup> Judith Welch Wegner, *The Carnegie Foundation's Educating Lawyers: Four Questions for Bar Examiners*, B. EXAMINER, June 2011, at 11, 11 (law professor who was co-author of Carnegie Report recommending several steps bar examiners should consider in response to the findings and recommendations in the Report). The CLEA Best Practices Report has already played a role in shaping proposals for reform of the New York Bar Exam. Mary A. Lynch & Kim Diana Connolly, *Is It Time for Real Reform?* N.Y. ST. B.J., Sept. 2013, at 31, 33 (discussing the recommendation of the Committee on Legal Education and Admission to the Bar that the New York Board of Law Examiners should adopt "criteria-referenced assessment" recommended in the CLEA Report).

<sup>130</sup> Ribstein, *supra* note 34, at 301.

<sup>131</sup> Robert J. Rhee, *On Legal Education and Reform: One View Formed from Diverse Perspectives*, 70 MD. L. REV. 310, 310-11 (2011).

<sup>132</sup> Hardy, *supra* note 22, at 97-98.

<sup>133</sup> Wegner, *supra* note 129, at 22.

consider a different balance between testing of content knowledge and “think[ing] like a lawyer,” on the one hand, and testing of competencies related to professional skills and professional identity and values, on the other.<sup>134</sup> The performance test remains the only existing testing instrument that can meaningfully advance such a change in balance.

As the performance test moves closer to its twentieth anniversary, the time has arrived for the NCBE and bar examiners around the country to conduct a careful inventory of how well the performance test has been evaluating the six MacCrate skills that it purports to cover. Such an inventory would unfortunately reveal the limited scope of the test’s MacCrate skills coverage to date.<sup>135</sup> But it would also open the door to identifying the various ways in which the performance test could expand that scope—certainly within the original six categories and possibly beyond them.<sup>136</sup> In essence, the performance test has fallen stagnant in pursuing the MacCrate-inspired mission that undergirds the test’s very existence. That is a problem that needs specific attention, particularly in light of the continuing importance and growth of skills-oriented courses and programming in legal education.<sup>137</sup> Indeed, expanded skills testing on the bar exam would be both an important response to changes and innovations in legal education and an important incentive in return for legal education to continue changing and innovating.

The bar examining community is keenly aware of changes in the legal profession and the resulting pressures to accommodate those changes with adjustments to the exam.<sup>138</sup> As part of an ongoing exam content validity study, the NCBE recently commissioned an extensive Job Analysis Survey to determine the job activities of newly licensed lawyers in the United States today.<sup>139</sup> The

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<sup>134</sup> *Id.* To be sure, professional identity and values, separate from specified skills, might be difficult attributes to evaluate in an examination. Suzanne Darrow-Kleinhaus, *A Response to the Society of American Law Teachers Statement on the Bar Exam*, 54 J. LEGAL EDUC. 442, 455-56 (2004).

<sup>135</sup> See *infra* Section III-A.

<sup>136</sup> See *infra* Sections III-A and III-B.

<sup>137</sup> The interplay between reform in legal education and reform in bar examinations will be discussed in Section III-C herein.

<sup>138</sup> See, e.g., Moeser, Sept. 2013, *supra* note 17, at 5; Erica Moeser, *President’s Page*, B. EXAMINER, Mar 2013, at 4, 5.

<sup>139</sup> STEVEN S. NETTLES & JAMES HELLRUNG, A STUDY OF THE NEWLY LICENSED LAWYER, 1-2 (2012) [hereinafter JOB ANALYSIS SURVEY], available at [http://www.ncbex.org/assets/media\\_files/Research/AMP-Final-2012-NCBE-Newly-Licensed-Lawyer-JAR.pdf](http://www.ncbex.org/assets/media_files/Research/AMP-Final-2012-NCBE-Newly-Licensed-Lawyer-JAR.pdf). The survey was distributed to a random sampling of lawyers licensed for not more than three years. *Id.* at 8. It listed numerous knowledge domains (e.g., “Rules of Evidence”), skills and abilities (e.g., “Written communication” or “Fact gathering and evaluation”) and tasks (e.g., “Draft engagement letter”). *Id.* at 7. For each listed domain, skill or task, respondents were asked to rank the significance of the entry to their performance as a newly licensed lawyer, using a scale of four (“Extremely significant”) to one (“Minimally significant”). *Id.* at 7. For each entry, respondents were also asked if they use or perform the domain, skill or task. See *Id.* at 7-8. The survey was sent to nearly 21,000 newly licensed lawyers, 1,669 of whom provided valid responses. *Id.* at 2. The domains, skills and tasks included in the survey were identified based on input from experienced lawyers and judges and a review of job logs from newly licensed lawyers. *Id.* at 4.

new lawyers who were surveyed rated twenty-five different skills or abilities as more significant to their work than knowledge of any substantive or procedural field of law.<sup>140</sup> Unfortunately, however, the only change to the bar exam implemented during the content validity study so far has been the addition of another subject to the MBE, Civil Procedure.<sup>141</sup>

The broader goal to be achieved by tending to the performance test is to shift the balance between testing for content knowledge and testing for professional skills. It is dubious at best to expand coverage of content knowledge when the balance is already heavily tilted in its favor. In this respect, the addition of Civil Procedure to the MBE is particularly unfortunate. It is true that respondents to the Job Analysis Survey rated Rules of Civil Procedure as the knowledge domain of greatest significance in their jobs.<sup>142</sup> It is also true that knowledge of a specific subject matter is not unimportant. But numerous other competencies play a far more important role in the duties of today's newly licensed lawyer.<sup>143</sup> Moreover, expansion of tested doctrinal subjects mainly enhances the premium placed on memorization of law for the limited purpose of the exam. It also perpetuates the expensive and unfortunate dynamic whereby applicants are all but compelled to take a commercial course to bone up on an array of law subjects that they studied in law school many months or years earlier, and in many cases only partially (as law schools do not necessarily cover subjects to the same scope that bar examiners test them), or in some cases not at all (for example, local law subjects or subjects covered in elective courses).

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<sup>140</sup> See JOB ANALYSIS SURVEY, *supra* note 139, at 282-85 (reporting that respondents gave Rules of Civil Procedure an average significance rating of 3.08, the highest among eighty-six knowledge domains, but gave twenty-five of thirty-six listed skills and abilities a significance rating higher than 3.08).

<sup>141</sup> It is interesting and disappointing that the NCBE chose to add Civil Procedure to the MBE before completion of its Jobs Analysis Survey and before completion of its still ongoing content validity study. Compare Rebecca S. Thiem, *Letter from the Chair*, B. EXAMINER, Dec. 2011, at 2, 3 (indicating that by November 2011, Civil Procedure multiple-choice questions were being finalized for use on bar examinations) with JOB ANALYSIS SURVEY, *supra* note 139, at 1 (showing a release date of July 2012) and Gundersen, *supra* note 76, at 21 (mentioning that the Content Validity Study is ongoing as of late 2013).

<sup>142</sup> JOB ANALYSIS SURVEY, *supra* note 139, at 282. However, there are other means of ensuring knowledge of a certain doctrinal subject besides adding it to the multiple-choice portion of the licensing exam—e.g., requiring attendance at an instructional program or bridge-the-gap program. In any event, most newly licensed lawyers will need to learn the state rules of civil procedure as well as local rules, neither of which will be tested on the MBE, which tests only the Federal Rules of Civil Procedure. *MBE Subject Matter Outline*, NAT'L CONF. OF B. EXAMINERS, [http://www.ncbex.org/assets/media\\_files/MBE/MBE-Subject-Matter-Outline.pdf](http://www.ncbex.org/assets/media_files/MBE/MBE-Subject-Matter-Outline.pdf) (last visited Jan. 24, 2015).

<sup>143</sup> Among the twenty-five different skills or abilities that the surveyed lawyers deemed more significant than knowledge of Rules of Civil Procedure (significance rating of 3.08) were "Written communication" (3.77), "Paying attention to details," (3.67), "Knowing when to go back and ask questions" (3.46), "Organizational skills (3.46), "Answering questions succinctly" (3.3), "Electronic researching" (3.26), and "Fact gathering and evaluation." (3.22). JOB ANALYSIS SURVEY, *supra* note 139, at 282, 285.

To be sure, bar examiners are apparently considering some expansion of skills testing, mainly the idea of creating a test of legal research skills.<sup>144</sup> However, in the many articles NCBE officials have written in the *Bar Examiner* concerning the content validity study and possible bar exam reform, there has been no mention of improving or expanding the performance test, or even studying the feasibility of changes to the performance test.<sup>145</sup>

### A. Evaluating The Six MacCrate Skills

Under the heading “Skills Tested,” the MPT Information Booklet published by the NCBE lists six of the ten skill categories from MacCrate’s Statement of Fundamental Lawyering Skills: (1) Problem Solving, (2) Legal Analysis and Reasoning, (3) Factual Analysis, (4) Communication, (5) Organization and Management of a Legal Task, and (6) Recognizing and Resolving Ethical Dilemmas.<sup>146</sup> The NCBE includes enumerated lists of specific skill sets underneath each of the six skill categories, just as the MacCrate Statement did, often tracking the MacCrate language verbatim.<sup>147</sup>

However, to a significant extent, the NCBE’s list has turned out in practice to be only aspirational. A review of MPT questions from 2005 to 2014<sup>148</sup> (the “sample period”) reveals that many of the listed skills have not in fact been tested, and others are not being sufficiently emphasized in test content or scoring. The ten-year sampling of MPT questions also reveals that the test has

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<sup>144</sup> Testing legal research has been a pending initiative with the NCBE since at least 2006. Moeser, May 2006, *supra* note 17, at 5. However, as of yet, no testing instrument has been produced. Expanding the bar exam to test legal research skills will be addressed in more detail in Section III-B.

<sup>145</sup> In a 2007 article marking the tenth anniversary of the MPT, the NCBE’s Deputy Director of Testing closed with a short section entitled “The Future of the MPT.” Gundersen, *supra* note 23, at 23. The section referred only to continuing “to provide a valid and reliable testing instrument” and integrating the MPT into the then fledgling UBE initiative. *Id.*

<sup>146</sup> 2014 MPT INFORMATION BOOKLET, *supra* note 21, at 6-7; MACCRATE REPORT, *supra* note 28, at 135.

<sup>147</sup> Compare *id.* with MACCRATE REPORT, *supra* note 28, at 138-40.

<sup>148</sup> The NCBE makes publicly available the MPT questions and grading point sheets for questions administered over five but fewer than ten years ago. For more recent MPT questions, the NCBE makes publicly available only a summary of the question, though full questions and grading point sheets are available for purchase. At the time this Article was written, full questions and grading point sheets were available from tests administered July 2004 through February 2009, and summaries were available for test items administered February 2010 through February 2014. (In almost all jurisdictions, the bar exam is administered twice per year in February and July.) This Article’s sampling of questions from the July 2005 to February 2014 exam administrations encompasses thirty-six MPT questions and one half of the MPT’s eighteen year history. July 2005 is a practically useful starting point for an additional reason. Beginning with that exam administration, the NCBE reduced the number of MPT questions it produced and furnished to jurisdictions for each exam from three to two. Compare NAT’L CONFERENCE OF BAR EXAM’RS, FEBRUARY 2005 MPTs AND POINT SHEETS i-ii, (2005) (on file with author) with NAT’L CONFERENCE OF BAR EXAM’RS, JULY 2005 MPTs AND POINT SHEETS i (2006) (on file with author).

not assigned examinees to draft categories of documents that it lists as among those examinees can be assigned. These include a will, a counseling plan, a discovery plan, and a witness examination plan.

Most MPT questions to date—and frequently both questions on any given exam—ultimately revolve around identifying and addressing arguments on one or more legal issues, either in a document designed for persuasion (usually a brief to a court), or in a document designed for objective, candid analysis (usually an interoffice memo or client letter). The February 2009 and July 2012 questions provide four examples of the typical MPT:

Question number one from February 2009 assigned examinees to the role of counsel for a law firm that was defending a client in a breach of contract suit.<sup>149</sup> Examinees were instructed to draft an objective memorandum to a supervising attorney regarding the law firm's client's allegations (detailed in a Motion for Disqualification in the File) that the firm violated the Rules of Professional Conduct (furnished along with two cases in the Library).<sup>150</sup> Question number two assigned examinees to the role of counsel for a defendant whose drivers license had been suspended by the Department of Motor Vehicles.<sup>151</sup> Examinees were instructed to draft a persuasive memo to the agency arguing the legal insufficiency of its decision to suspend.<sup>152</sup> The factual support for the agency's suspension decision appeared in the File in the form of an administrative hearing transcript and a traffic incident report.<sup>153</sup> The Library contained various statutory provisions and three cases.<sup>154</sup>

Question number one from the July 2012 MPT assigned examinees to the role of law clerk to a state court judge in a homicide case about to go to trial.<sup>155</sup> The defendant filed a motion to exclude certain statements on hearsay and Constitutional grounds, and the motion appears in the File along with the police report and the 911-call transcript.<sup>156</sup> Examinees were instructed to draft a bench memorandum to the judge evaluating the admissibility of the challenged statements.<sup>157</sup> The Library contained excerpts from the Rules of Evidence and two cases.<sup>158</sup> Question number two assigned examinees to the role of counsel for a homeowner in a lawsuit against a construction company that was using a lot

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<sup>149</sup> *February 2009 MPTs and Point Sheets*, NAT'L CONF. OF B. EXAMINERS at 3, [http://www.ncbex.org/assets/media\\_files/MPT/MPT-Point-Sheets/Feb09MPT.pdf](http://www.ncbex.org/assets/media_files/MPT/MPT-Point-Sheets/Feb09MPT.pdf) (last visited Jan. 24, 2015) (on file with author).

<sup>150</sup> *Id.* at 15-20.

<sup>151</sup> *Id.* at 23.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 24-28.

<sup>154</sup> *Id.* at 31-40.

<sup>155</sup> *July 2012 MPTs and Point Sheets*, BYU L., at 3, [http://www.law2.byu.edu/page/categories/student\\_resources/bar\\_prep/2013/July%202012%20MPT%20and%20Point%20Sheets.pdf](http://www.law2.byu.edu/page/categories/student_resources/bar_prep/2013/July%202012%20MPT%20and%20Point%20Sheets.pdf) (last visited Jan. 24, 2015) (on file with author).

<sup>156</sup> *Id.* at 5-7.

<sup>157</sup> *Id.* at 4.

<sup>158</sup> *Id.* at 11-16.

adjacent to the homeowner's property to store piles of dirt for future projects.<sup>159</sup> Because of adverse effects on the homeowner's property, the homeowner intends to file a motion for preliminary injunction against the construction company in prelude to a nuisance cause of action.<sup>160</sup> Examinees were instructed to draft the brief in support of the motion.<sup>161</sup> The File contained two affidavits and an article about the dirt pile from the local newspaper; the Library contained two cases: one on the tort of nuisance and one on the standards for preliminary injunctions.<sup>162</sup>

Through these and similar questions, the performance test does a good job of evaluating the second of the six listed skills: Legal Analysis and Reasoning. But so do essay questions. The panel of experts who assessed the pilot administration of the performance test in 1993 specifically recommended de-emphasizing legal analysis in favor of other skills not covered by essay questions or the MBE.<sup>163</sup> Of course, to a far greater extent than essay questions, MPT questions do call on examinees to engage in the third skill, Factual Analysis; the fourth skill, Communication; and the fifth skill, Organization and Management of a Legal Task. However, as detailed below, the MPT has not tested or sufficiently emphasized many critical aspects of each of these skill sets. Moreover, the MPT has not adequately incorporated the first skill, Problem Solving, or the sixth skill, Recognizing and Resolving Ethical Dilemmas, which in reality is not suited to the performance test at all.

The five categories other than Legal Analysis are discussed below. With each category, the discussion focuses first on the extent to which performance test questions during the sample period have evaluated the relevant skill sets. Within each category, there are gaps, some larger than others. The focus then shifts to proposals for how performance test questions might expand to fill those gaps, albeit in some circumstances probably only after careful study. Throughout, the Job Analysis Survey provides relevant empirical evidence in support of such expansion. This beginning review of the test's coverage of the MacCrate categories is one important step toward the worthy goal of more comprehensively evaluating lawyer competencies on the bar exam.<sup>164</sup>

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<sup>159</sup> *Id.* at 19.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 19-20.

<sup>162</sup> *Id.* at 21-24, 27-30.

<sup>163</sup> NAT'L CONF. OF B. EXAM'RS, RESULTS OF RESEARCH ON THE NCBE PERFORMANCE TEST PILOT ADMINISTRATION, at 30, 50 (Apr. 1994) [hereinafter RESULTS OF RESEARCH].

<sup>164</sup> In order to implement some of the expanded coverage proposed for each of the MacCrate categories, it will probably be necessary for examiners to expand the role the performance test plays on the bar exam as a whole—i.e. more performance tests, more exam time for performance tests, and a greater scoring weight placed on the performance test. Such quantitative adjustments are addressed in Section IV.

1. **Problem Solving.** *The examinee 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; and*
- E. *keep the planning process open to new information and new ideas.*<sup>165</sup>

In a general manner of speaking, almost all lawyering is problem solving. Clients come to lawyers with problems, and the lawyers seek to solve them.<sup>166</sup> However, given its presence as a unique skill in the NCBE's MacCrate-inspired list, problem solving must have qualities that are distinct from legal analysis, factual analysis, and the other skill categories. None of the four typical MPT questions detailed above could be said to significantly test problem solving apart from factual analysis and legal analysis. To be sure, assessing the validity of various legal arguments and proceeding with one of them and not another might technically be characterized as "develop[ing] and evaluat[ing] strategies for solving a problem," but the task force that authored the MacCrate Report would surely bristle at such a constrained approach to testing the problem-solving skill set.<sup>167</sup>

From the advent of the performance test, the skill set of problem solving has been a challenging one to address in a controlled testing format.<sup>168</sup> Nonetheless, and to its credit, the NCBE has tried. Several MPT questions during the sample period do indeed show some limited success at testing examinees on their ability to develop, evaluate, and implement strategies to solve a client's problem. In these questions, the examiners have presented a scenario implicating not just legal analysis but also the drafting and revising of contracts or related documents for clients based on their priorities. Two examples come from the February 2008 and July 2011 bar examinations. One of the two MPT questions in February 2008 involved a client who was about to open his business venture, an outdoor skateboarding park, and who presented a draft of a liability waiver form that he intended to ask patrons to sign.<sup>169</sup> Examinees were assigned

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<sup>165</sup> 2014 MPT INFORMATION BOOKLET, *supra* note 21, at 6.

<sup>166</sup> The MacCrate Report acknowledged the wide ranging scope of "problem solving" as a skill set: "The term 'problem' is conceived as including the entire range of situations in which a lawyer's assistance is sought in avoiding or resolving difficulties, realizing opportunities, or accomplishing objectives . . ." MACCRATE REPORT, *supra* note 28, at 141 n.1.

<sup>167</sup> "[A] 'problem' cannot be defined solely in terms of legal constructs: It must take into account a wide range of fact-specific variables as well as the client's goals, attitudes, and feelings." *Id.*

<sup>168</sup> RESULTS OF RESEARCH, *supra* note 163, at 36 (discussing the conclusion of the panel of experts that all performance tests used in the 1993 pilot administration tested problem solving to only a limited degree and did a stronger job of testing legal analysis and factual analysis).

<sup>169</sup> February 2008 MPTs and Point Sheets, NAT'L CONF. OF B. EXAMINERS, at 1, <http://www.ncbex>



not just to analyze whether the draft waiver form would protect the client's business from liability for injuries occurring at the park, but also to suggest specific revisions to the form and determine if even the revised waiver form could be enforceable against a minor.<sup>170</sup> Similarly, one of the two MPT questions in July 2011 involved a client company frustrated by expenses incurred in several previous lawsuits and seeking to increase its use of arbitration.<sup>171</sup> Applicants were assigned not just to analyze whether a proposed arbitration clause (a standard commercial arbitration clause in the law firm's files) would be enforceable but also to draft a clause that would be legally enforceable and would address the client's priorities.<sup>172</sup>

However, the MPT questions implicating problem-solving skills are few and far between. On most exam administrations during the sample period, both of the two MPT questions have been of the more conventional and typical variety emphasizing legal analysis skills. As lawyers are, at their core, problem solvers, it makes sense for bar examiners to consider the possibility of including one problem solving focused performance test on *every* exam administration.

As for the kinds of problem-solving skills being tested, there is room for expansion. MPT questions in the sample period do not seem to implicate what experts call "front-end problem solving."<sup>173</sup> Existing efforts at testing problem solving seem to focus more on implementing a solution to an already identified specific problem. For example, on the February 2008 question, the problem for the client was the need to create an enforceable waiver form to reduce or eliminate the risk of liability for injuries, and the solution was, in essence, to create it.<sup>174</sup> Front-end problem solving would involve "isolating and defining a problem or developing and evaluating alternative courses of action."<sup>175</sup>

Testing limitations might make it difficult to evaluate front-end problem solving, but it is not clear that examiners have recently or ever evaluated the feasibility of doing so. It seems plausible that a performance test could, for example, present a client seeking to start a business but having no idea what legal form the business should take. The File could convey the client's priorities, goals, and concerns; the Library could present statutes defining the various forms

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.org/assets/media\_files/MPT/MPT-Point-Sheets/Feb.08-MPTPS051508.pdf (last visited Jan. 24, 2015) (on file with author). The File included a transcript of a client interview, the draft liability waiver form, and a newspaper article on the rise in skateboarding-related injuries. *Id.* at 2-6. The Library contained cases on the enforceability of waiver forms generally and a second case and a set of statutes concerning contracts involving minors. *Id.* at 9-16.

<sup>170</sup> *Id.* at 1.

<sup>171</sup> *Preparing for the MPT, July 2011 (MPT-1)*, NAT'L CONF. OF B. EXAMINERS, <http://www.ncbex.org/about-ncbe-exams/mpt/preparing-for-the-mpt/> (last visited Jan. 24, 2015) (on file with author). "The File contain[ed] . . . a summary of the client interview, a memorandum summarizing [the client'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 contain[ed] two cases discussing the standards for enforceable arbitration clauses." *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> RESULTS OF RESEARCH, *supra* note 163, at 51.

<sup>174</sup> *February 2008 MPTs and Point Sheets*, *supra* note 169, at 1.

<sup>175</sup> RESULTS OF RESEARCH, *supra* note 163, at 51.

(corporation, partnership, limited liability company, etc.) and cases illustrating their attributes, advantages, and risks. The assignment could be to choose the best option for the client and to support the choice by explaining, in light of the client's priorities, the advantages of the chosen form and the disadvantages of the rejected ones.

Similarly but more in a litigation framework, consider the facts of the previously referenced July 2012 MPT question number two.<sup>176</sup> In that question, the client was a homeowner concerned about the effects on his property of a pile of dirt sitting on a neighboring lot.<sup>177</sup> The actual question was targeted, calling on examinees to write a brief in support of a motion for preliminary injunction premised on a tort claim of nuisance.<sup>178</sup> To focus more on problem solving, a fact scenario of this nature could be structured to raise the possibility of several courses of action. Indeed, even if limited to just litigation options, those options could be (a) a cause of action for damages, or a motion for preliminary injunction, or both; and (b) one cause of action for damages, or another, or both? The File could present not just the underlying facts facing the client but also information on the client's priorities. The advantages and disadvantages of the various options could be premised not just on their legal strength but also on how well they serve the client's priorities.

The empirically established importance of the various skill sets related to problem solving augurs in favor of enhancing and expanding the performance test's coverage of this critical skill category. After extensive empirical study of predictors for successful lawyering, including interviews of not just lawyers but also clients, UC Berkeley professors Marjorie Shultz and Sheldon Zedeck ultimately identified twenty-six "effectiveness factors" for lawyers, and included among them were problem solving, practical judgment, and creativity/innovation.<sup>179</sup> Moreover, 96% of newly licensed lawyers responding to the Job Analysis Survey indicated that they perform "planning and strategizing" generally, and 87% indicated that they "develop strategy for client matter[s]."<sup>180</sup> They rated both skills as being very significant.<sup>181</sup> Other highly rated skill sets

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<sup>176</sup> July 2012 MPTs and Point Sheets, *supra* note 155; *see also, supra*, discussion accompanying notes 155-162.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> MARJORIE M. SHULTZ & SHELDON ZEDECK, PREDICTING LAWYER EFFECTIVENESS: A NEW ASSESSMENT FOR USE IN LAW SCHOOL ADMISSION DECISIONS 26-27 (2009) [hereinafter SHULTZ & ZEDECK]. Shultz and Zedeck focused their study on identifying a better means than the LSAT for evaluating applicants to law school. For a summary of various empirical studies on the competencies necessary for the practice of law, see Neil Hamilton, *Empirical Research on the Core Competencies Needed to Practice Law: What do Clients, New Lawyers, and Legal Employers Tell Us?*, B. EXAMINER, Sept. 2014, at 6.

<sup>180</sup> JOB ANALYSIS SURVEY, *supra* note 139, at 274, 285 (reporting that 4.07% of respondents indicated that they are not called upon to perform the skill of "Planning and strategizing," and 13.36% of respondents indicated that they are not called upon to perform the skill of "Develop strategy for client matter").

<sup>181</sup> *Id.* (showing a ranking of 3.13 out of 4 for each one). "Develop strategy for client matter" was

relevant to problem solving and planning for clients included decisiveness, judgment, creativity, and information integrating.<sup>182</sup>

Bar examiners should also consider the implications of the very high rating that survey respondents gave to the skill of “Knowing when to go back and ask questions.”<sup>183</sup> The MacCrate Report itself commented that “effective use of the skill of problem solving (as well as other lawyering skills) requires a realistic view of one’s own abilities and limitations.”<sup>184</sup> Conceivably, performance test questions could be set up such that the best course of action is for the applicant to return to the assigning attorney with some follow-up questions on strategy. The panel of experts consulted on the 1993 pilot administration of the performance test suggested that performance tests be used to test for “knowing one’s limits and acknowledging other actions needed.”<sup>185</sup> While it is not immediately clear if this is feasible, as with many other reforms proposed herein, the matter deserves careful study.

3. *Factual Analysis*<sup>186</sup>: *The examinee should demonstrate the ability to analyze and use facts and to plan and direct factual investigation. Factual analysis included 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; and*
- F. *evaluate the information that has been gathered.*<sup>187</sup>

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rated considerably higher than negotiating skills and multiple writing tasks, including drafting demand letters, opinion letters, and case summaries. *Id.* at 274.

<sup>182</sup> JOB ANALYSIS SURVEY, *supra* note 139, at 285. The MacCrate Report emphasized the importance of creativity and judgment to the skill of problem solving. MACCRATE REPORT, *supra* note 28, at 150.

<sup>183</sup> JOB ANALYSIS SURVEY, *supra* note 139, at 285 (reporting that only 1.07% of respondents do not employ the skill, and that respondents on average rated the skill a 3.46, tied for tenth among thirty-six general skills). Nearly as many—97%—of respondents indicated that they have to employ the skill of “consciousness of personal and professional limitations,” and respondents rated the skill a 3.15, twenty-third among thirty-six general skills.

<sup>184</sup> MACCRATE REPORT, *supra* note 28, at 151.

<sup>185</sup> RESULTS OF RESEARCH, *supra* note 163, at 30.

<sup>186</sup> The MacCrate Report called this category “Factual Investigation,” not “Factual Analysis.” MACCRATE REPORT, *supra* note 28, at 138-40. In conjunction with adopting “analysis” in lieu of “investigation,” the NCBE also added one additional specific skill set underneath the category: “identify relevant facts within a given set of factual materials.” 2014 MPT INFORMATION BOOKLET, *supra* note 21, at 6. However, the NCBE did not mean to omit the importance of factual investigation or fact gathering, as it refers to “plan and direct factual investigation” in its own description of the category and it retained most of the other specific skill sets from the MacCrate list, all of which concern investigation and gathering of facts. *Id.*

<sup>187</sup> 2014 MPT INFORMATION BOOKLET, *supra* note 21, at 6.

In a 1983 study of performance testing supported by the NCBE, a testing expert wrote as follows:

[A] typical bar exam question provides all the facts that are material to a case and then asks the applicant to determine how the case should be resolved. The exam does not assess whether the applicant knew what questions to ask in order to obtain these facts. This is comparable to measuring a physician's diagnostic ability on the basis of his/her skill in interpreting test results without ever assessing the physician's judgment in knowing which diagnostic tests to order.<sup>188</sup>

Ten years later, the panel of experts consulted on the 1993 pilot administration of the performance test emphasized the importance of using the new testing instrument to test factual analysis as distinct from legal analysis.<sup>189</sup> But performance tests over the sample period have emphasized factual analysis in only one limited way and have not adequately addressed the deficiency identified by the NCBE's testing expert. Because the source materials in the File of a performance test typically include both the relevant facts and some irrelevant facts,<sup>190</sup> the performance test does a good job of testing an examinee's ability to identify relevant facts within a given set of materials. However, throughout the sample period, MPT questions have not expressly assigned the examinee to determine the need for further fact gathering or to plan and explain in writing the means by which missing facts should be gathered.<sup>191</sup> Assigning a task in this vein on a performance test would directly implicate the remaining skill sets encompassed by the Factual Analysis category and might also cover skill sets encompassed by the Problem Solving category. It would also open the door to assigning applicants to draft types of documents that the MPT claims to encompass but has never assigned: a discovery plan or a witness examination plan.<sup>192</sup>

Within the existing construct of the performance test, it is certainly feasible to provide only some of the relevant facts within the source materials. In a litigation based problem, the primary means for securing the missing facts could be through discovery, in which case the Library might contain discovery-related Federal Rules of Civil Procedure and perhaps a case.<sup>193</sup> The applicant

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<sup>188</sup> Klein, *supra* note 98, at 1.

<sup>189</sup> RESULTS OF RESEARCH, *supra* note 163, at 50.

<sup>190</sup> See, e.g., *February 2009 MPTs and Point Sheets*, *supra* note 149, at 3-20 (showing that MPT-1 included significant portions of a client interview transcript that were not relevant, as they did not concern the nature and content of a letter at the center of the dispute).

<sup>191</sup> In contrast, on its three-hour performance test, the California Bar Exam has done this, albeit not frequently. See *infra* discussion accompanying notes 283-88.

<sup>192</sup> 2014 MPT INFORMATION BOOKLET, *supra* note 21, at 4.

<sup>193</sup> The Library would also need to contain some legal authority on the underlying substantive subject matter of the litigation. Several individual MPT questions have included both statutes and as many as three cases in the Library. See, e.g., *February 2009 MPTs and Point Sheets*, *supra* note 149, at 31-40; *Preparing for the MPT, February 2011 (MPT-1)*, NAT'L CONF. OF B. EXAMINERS,

might then be assigned not only to identify which categories of facts are missing but also to determine which means of discovery should be used to obtain the necessary facts within each category and from whom. In addition, the assignment could be to draft the relevant discovery requests or the critical questions to ask in one or more depositions. In combination with a discovery-based problem or in a non-litigation problem, the context from the File could suggest that certain facts are best obtained from the client or third parties through interviews. In such an instance, the applicant could be assigned to identify the specific questions he or she would ask the interviewee(s). Other formulations are surely available, and the underlying substantive law would also vary in each iteration.

Among newly licensed lawyers responding to the Job Analysis Survey, 96% indicated that they perform the skill of “Fact gathering and evaluation,” and they rated that skill as a significant one.<sup>194</sup> Over 80% of respondents indicated that they conduct fact investigations; over two-thirds of respondents indicated that they interview witnesses; over three-quarters of respondents indicated that they interview clients and client representatives.<sup>195</sup> The study conducted by Shultz and Zedeck concluded that Fact Finding and Questioning and Interviewing were critical skills for effective lawyering.<sup>196</sup> There can be little doubt that investigating facts is an important skillset for a beginning lawyer, whether in litigation or non-litigation settings. Bar examiners should hence respond to that reality, supported by empirical evidence, and carefully study the potential for reforming the performance test to better encompass fact investigation skills.

**4. Communication.** *The examinee should demonstrate the ability to communicate effectively in writing. Communication includes the ability to*

- A. *assess the perspective of the recipient of the communication; and*
- B. *organize and express ideas with precision, clarity, logic, and economy.*<sup>197</sup>

Because performance tests instruct the examinee to draft a specific type of document for a specific audience, success on the test depends in part on a proper assessment of the perspective of the recipient of the communication.<sup>198</sup> If

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<http://www.ncbex.org/about-ncbe-exams/mpt/preparing-for-the-mpt/> (last visited Jan. 24, 2015) (on file with author). Hence, even within the existing ninety-minute testing format, it seems more than plausible that a performance test could include legal authority on discovery as well as on the underlying substantive subject matter of the lawsuit.

<sup>194</sup> Fact gathering and evaluation received an average rating of 3.22 out of 4. JOB ANALYSIS SURVEY, *supra* note 139, at 285. The highest rated skill, Written communication, received an average rating of 3.77. *Id.*

<sup>195</sup> *Id.* at 273.

<sup>196</sup> SHULTZ & ZEDECK, *supra* note 179, at 26.

<sup>197</sup> 2014 MPT INFORMATION BOOKLET, *supra* note 21, at 6.

<sup>198</sup> Diane F. Bosse, *The MPT: Assessment Opportunities Beyond The Traditional Essay*, B. EXAMINER, Dec. 2011, at 17, 21.

the assignment is to draft an opinion letter to the client, an examinee goes badly astray if he or she writes a spirited and persuasive defense of the client's position.<sup>199</sup> This is an important way in which the performance test successfully distinguishes itself from most essay questions.

As for testing examinees' ability to "organize and express ideas with precision, clarity, logic, and economy," it is not entirely clear how important these writing characteristics are in the scoring of performance test answers. The NCBE's grading point sheets distributed to the subscribing jurisdictions fully defer to the jurisdictions on the allocation of points<sup>200</sup> and the method of grading.<sup>201</sup> These sheets, which amount to grading guidelines, focus mainly on the factual and legal issues implicated by the assigned task and do not address whether or to what extent the quality of the writing should count in the grading process.<sup>202</sup> The New York Bar Exam appears to consider writing as one factor in the grading process,<sup>203</sup> though to what extent is not clear. In contrast, the Pennsylvania Board of Law Examiners, which produces its own performance test, typically allocates one or two points out of twenty toward following instructions as to the format of the document but does not explicitly allocate any points toward the quality of the writing.<sup>204</sup>

The NCBE apparently encourages state bar examiners to evaluate writing skill in performance test answers,<sup>205</sup> and its long-range planning committee has recently taken up the question of whether to explicitly call for grading of writing skill in its MPT and MEE point sheets.<sup>206</sup> These are positive developments, but the proverbial devil will be in the details. If the performance test is to live up to its character as a testing instrument distinct from essay questions<sup>207</sup> and live up to its MacCrate Report-inspired list of tested skills, examiners ought to accord significant scoring weight and not mere lip service to the quality of the writing.

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<sup>199</sup> *Id.*

<sup>200</sup> See, e.g., *February 2013 MPTs and Point Sheets*, *supra* note 111. As such, the title "point sheet" is somewhat of a misnomer.

<sup>201</sup> Bosse, *supra* note 198, at 19 (discussing the analytical approach, which follows an item-driven grading scale, and the holistic approach, which evaluates characteristics of the answer against a fixed standard).

<sup>202</sup> See *id.* at 17 (indicating that the point sheets only "describe the factual and legal issues encompassed in the lawyering task to be completed by the candidate"). Bosse, the former Chair of the NCBE and the current chair of the New York Board of Law Examiners, focused the remainder of her article on encouraging state bar examiners to evaluate various competencies beyond those described explicitly on the point sheets. *Id.* at 18-21.

<sup>203</sup> *Id.* at 21.

<sup>204</sup> See, e.g., *July 2014 Pennsylvania Bar Examination*, *supra* note 111, at 66-69.

<sup>205</sup> Bosse, *supra* note 198, at 21 (former NCBE Chair expressing view that "writing most assuredly should count in grading the MPT").

<sup>206</sup> Moeser, Sept. 2013, *supra* note 17, at 4. The same committee is also tasked with exploring whether to assess legal writing skills, as well as legal research skills, through additional testing instruments. *Id.*

<sup>207</sup> RESULTS OF RESEARCH, *supra* note 163, at ii (noting that the panel of experts consulted for the pilot administration of the performance test agreed that the performance test should emphasize skills and abilities that cannot be tested on essay questions or the MBE).

Intelligent thinkers who cover the substantive analysis well can be sloppy writers. On an essay question, they still deserve a very high score; on a performance test, not necessarily.

On balance, it would appear that bar exams currently evaluate writing skill only minimally or not at all.<sup>208</sup> While taking steps toward grading the quality of writing must be carefully thought out,<sup>209</sup> writing is simply far too important of a skill not to be evaluated on its own merits on the legal profession's licensing examination. Indeed, and not surprisingly, over 99% of respondents to the Job Analysis Survey indicated that they engage in written communication.<sup>210</sup> Respondents also rated Written Communication as the most significant skill or task among all listed on the survey.<sup>211</sup> Related skills receiving very high scores included Answering questions succinctly (99% performing; 3.3 significance rating out of 4) and Paying attention to details (99% performing; 3.67 significance rating out of 4).<sup>212</sup> The Shultz and Zedeck study reinforces the importance of written communication as well.<sup>213</sup>

*5. Organization and Management of a Legal Task. The examinee 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; and*
- B. perform and complete tasks within time constraints.*<sup>214</sup>

While organizing and managing one's work is a critical skill generally for a practicing lawyer,<sup>215</sup> the focus within a testing construct for this skill category is more on time management. In the current examination format, the performance test certainly imposes time constraints on examinees, thereby incentivizing the efficient allocation of time, effort, and resources. But

<sup>208</sup> Wegner, *supra* note 129, at 17 (“I recently explored whether bar examiners in at least some states assess prospective lawyers’ writing skills as part of the bar examination and learned that in many instances they do not.”).

<sup>209</sup> One reason for this is the limited time afforded for completing the assigned task in an examination setting, especially given some evidence to suggest that time pressure in an exam setting might play some role in racially disparate bar exam results. Lynch & Connolly, *supra* note 129, at 33 (discussing the decision of New York’s Committee on Legal Education and Admission to the Bar to study the feasibility of a pilot program to assess test-taking speed and its potential contribution to disparate impacts of the bar exam” and citing William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975 (2004)). Increasing the time allotment for the performance test is advisable in order to accommodate the grading of both writing skill and time management skill. See *infra* discussion accompanying notes 218-23.

<sup>210</sup> JOB ANALYSIS SURVEY, *supra* note 139, at 285.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> SHULTZ & ZEDECK, *supra* note 179, at 26.

<sup>214</sup> 2014 MPT INFORMATION BOOKLET, *supra* note 21, at 7.

<sup>215</sup> SHULTZ & ZEDECK, *supra* note 179, at 26.

consideration should be given to reforming the test on two levels in this category: (1) allocating independent points to examinees who do in fact complete the entire task; and (2) increasing the time limit for the test.

Just as writing skills can and should be independently evaluated on performance test answers, so can and should the skill of completing a task within a specified time constraint. Respondents to the Job Analysis Survey gave an average significance rating of 3.44 to the skill of Working within established time constraints, ranking it twelfth among thirty-six general skills.<sup>216</sup> Given that the bar exam imposes strict time limits, all three testing instruments inherently challenge an examinee's ability to perform within time constraints. The performance test, however, should stand apart from essay questions and the MBE by crediting examinees with independent points for *completing* a task within time constraints. If an essay question has four subparts, and an examinee answers three of them perfectly and then fails to get to the fourth, the only missed points should be those designated for the substantive analysis of the fourth subpart. However, if the examinee does the same on a performance test question calling for four subparts in a document, there should be two categories of missed points—those designated for the substantive analysis of the fourth subpart *and* those designated for completion of the assigned task. By the appearance of the NCBE's grading sheet for MPT questions, this is not currently the case.<sup>217</sup>

Given the importance of completing the assigned task and creating a polished and precisely written work product, examinees need more time proportionally on the performance test than they do on the MBE or essay questions. A large percentage of examinees believe that the limit of ninety minutes imposes excessive time constraints for completion of the performance test.<sup>218</sup> In addition, the panel of experts consulted on the pilot administration of the performance test in 1994 expressed similar concerns, believing that the tight time constraint ultimately "reduced the richness of the measure"<sup>219</sup> and "restrict[ed] the quality of the results."<sup>220</sup>

Unfortunately, as with substantive changes to the exam, the NCBE's focus when it comes to time limits is again on the MBE.<sup>221</sup> Increasing the time limit on all parts of the bar exam deserves careful study.<sup>222</sup> However, in conjunction with other reforms proposed in this Article, the NCBE and state bar

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<sup>216</sup> JOB ANALYSIS SURVEY, *supra* note 139, at 285. Not surprisingly, 99% indicated that they must perform the skill. *Id.*

<sup>217</sup> See e.g. *February 2013 MPTs and Point Sheets*, *supra* note 111.

<sup>218</sup> RESULTS OF RESEARCH, *supra* note 163, at 79, 88. Examinees who took a three-hour performance test during the pilot administration had the same reaction. *Id.* at 79.

<sup>219</sup> *Id.* at 51.

<sup>220</sup> *Id.* at 53.

<sup>221</sup> Moeser, Sept. 2013, *supra* note 17, at 4.

<sup>222</sup> See *supra* note 209 (discussing possible link between test-taking speed and racially disparate impacts on the bar exam).



examiners should give serious consideration to a small but meaningful increase in the allotted time specifically for the performance test.<sup>223</sup>

**6. Recognizing and Resolving Ethical Dilemmas.** *The examinee 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;*  
*and*
- C. *ability to recognize and resolve ethical dilemmas.*<sup>224</sup>

This category is an anomaly for the performance test in that it suggests the testing of substantive knowledge of law, specifically the rules of professional conduct.<sup>225</sup> To be sure, many performance tests have used ethics as the underlying substantive topic, providing rules of professional conduct and cases interpreting those rules in the Library.<sup>226</sup> But the underlying substantive topic is only the vehicle through which lawyering skills are tested. Unless there is a specific *skill* related to ethical standards that the performance test seeks to evaluate, it makes no more sense to include Recognizing and Resolving Ethical Dilemmas than it does a reference to recognizing and resolving problems in any of the other myriad topics (torts, contracts, family law, criminal law, etc.) that have formed the underlying substance on performance test questions over the years.

The MPT questions administered over the sample period do not appear to have tested any *skills* related to ethical dilemmas independent of substantive analysis. Perhaps the ability to recognize and resolve ethical dilemmas can exist apart from interpreting and applying rules of professional conduct to a set of facts, but the parameters of such a skill set are not clear. Certainly, there are

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<sup>223</sup> This proposal to increase the time allotment to justify scoring the skills of task completion and precision in writing is distinct from the suggestion in Section IV herein to consider adopting a three-hour performance test instead of the current ninety-minute version. Just as a performance test set for substantive reasons at ninety minutes ought to be increased to perhaps 105 minutes to accommodate testing for task completion and writing precision, so should a performance test expanded for substantive reasons to three hours be further expanded to perhaps three and one-half hours to again accommodate testing for task completion and writing precision. The suggestions of fifteen minutes and thirty minutes are just hypotheses and are not empirically supported. The results of the Job Analysis Survey reveal nothing about the severity of time constraints in law practice, and it is difficult to assess what time limit imposed on the examination would fairly reflect the realities for beginning lawyers. However, the reality remains that lawyers have to *complete* tasks and they have to *write with precision*, even under time constraints.

<sup>224</sup> 2014 MPT INFORMATION BOOKLET, *supra* note 21, at 7.

<sup>225</sup> It is not clear if there is any significance to the MacCrate Report's and NCBE's use of "standards" as opposed to "rules."

<sup>226</sup> See, e.g., *February 2013 MPTs and Point Sheets*, *supra* note 111, at 3-16 (assigning applicant to the role of counsel to an attorney seeking advice on how to allocate funds received through a settlement without running afoul of the state's rules of professional conduct, and including in the Library excerpts from the rules of professional conduct and a state bar ethics opinion).

*professional* standards that exist apart from ethical rules,<sup>227</sup> and professionalism was very highly rated by respondents to the Job Analysis Survey.<sup>228</sup> But professionalism is a difficult topic to test and might fall more appropriately outside the examination process.<sup>229</sup> Moreover, the professional rules of conduct are tested on many states' bar exams<sup>230</sup> and on the Multistate Professional Responsibility Exam (MPRE).<sup>231</sup> Accordingly, the NCBE should better explain to examinees the relevance of this skill category or delete it from the list.

## B. Expanding beyond the Original Six<sup>232</sup>

In the mid 1990s, when the NCBE ran the pilot administration of the performance test and then began producing MPT questions for jurisdictions, it might have been appropriate to limit the scope of the new testing instrument to six of the ten fundamental skills from the MacCrate Report. Two decades later, it makes sense to consider the feasibility of expanding to test at least some of the remaining four or any other competencies that are important for today's newly licensed lawyer. The four categories from the MacCrate list that were not adopted by the NCBE are legal research, client counseling, negotiation, and litigation and alternative dispute resolution procedures.<sup>233</sup>

### 1. Client Counseling and Negotiation

While both of these skill categories retain considerable importance in today's legal profession,<sup>234</sup> neither one was ranked particularly high by newly

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<sup>227</sup> See Ben Bratman, *Toward a Deeper Understanding of Professionalism: Learning to Write and Writing to Learn During the First Two Weeks of Law School*, 32 J. LEGAL PROF. 115, 116-21 (2008).

<sup>228</sup> JOB ANALYSIS SURVEY, *supra* note 139, at 285 (reporting a 3.58 average significance rating, which was tied for fourth among thirty-six listed skills and abilities).

<sup>229</sup> Darrow-Kleinhaus, *supra* note 134, at 442-43.

<sup>230</sup> Many U.S. jurisdictions include Rules of Professional Conduct as a tested subject on their essay questions. See, e.g., N.Y. ST. BOARD OF L. EXAMINERS CONTENT OUTLINE FOR THE NEW YORK STATE BAR EXAMINATION, 1 (2014), available at <http://www.nybarexam.org/Docs/CONTENTOUTLINE.pdf> (last visited Jan. 24, 2015); *Scope of the California Bar Examination*, THE ST. B. OF CALIF. <http://admissions.calbar.ca.gov/LinkClick.aspx?fileticket=VQF73Jr-8iE%3D&tabid=250> (last visited Jan. 24, 2015).

<sup>231</sup> The vast majority of U.S. jurisdictions require applicants to pass the MPRE, a separate multiple-choice examination testing primarily on the ABA Model Rules of Professional Conduct and the ABA Model Code of Judicial Conduct. *Comprehensive Guide*, *supra* note 2, at 25.

<sup>232</sup> As is the case with expanding test coverage within the original six MacCrate skill categories, expanding to new categories will again implicate increasing the relative weight of the performance test on the bar exam as a whole, a subject addressed *infra* Section IV.

<sup>233</sup> MACCRATE REPORT, *supra* note 28, at 138-41.

<sup>234</sup> Among the twenty-six effectiveness factors for lawyers in the Shultz & Zedeck study were Negotiation Skills and Providing Advice & Counsel & Building Relationships. SHULTZ & ZEDECK, *supra* note 179, at 26-27.

licensed lawyers in the Job Analysis Survey.<sup>235</sup> As the goal of the bar exam is to test for competencies relevant for newly licensed lawyers, there is legitimate reason to prioritize other skill sets in pursuing bar exam reform. Nonetheless, the possibility of testing for client counseling and negotiation skills should not be dismissed out of hand.

Given the considerable interpersonal component to client counseling and negotiation, proposals to evaluate these skills have called for significant changes to the existing testing construct of a closed-book, anonymously graded and written examination.<sup>236</sup> These proposals are thoughtful and warrant consideration. However, recalling the reality that bar exams change slowly and incrementally, it is worth first considering the extent to which the performance test can be adjusted within the existing testing construct to test for client counseling and negotiation skills.

Written performance test questions very well could present examinees with problems that require execution of some skills relevant to client counseling and negotiation, and the potential deserves some study.<sup>237</sup> At their core, good counseling skills and good negotiation skills both depend on understanding what the client wants or needs. Akin to the skills implicated within the Problem Solving category, effective client counseling requires the ability to cater advice to the specific wants and needs of the client. In the same vein, effective negotiation requires strategizing in light of the client's priorities and adherence to those priorities or explicit client instructions during the negotiation. Performance test questions can deliver information on client priorities in the File. They can also assign tasks premised in negotiation or counseling settings that emphasize awareness of and adherence to those client priorities. A careful review of potential approaches might reveal other ways in which the performance test can emphasize negotiation and counseling skills, albeit in a limited manner given the testing construct.

## 2. Litigation and Alternative Dispute Resolution Procedures

"Litigation and Alternative Dispute Resolution Procedures" is less a skill category than a knowledge base. The MacCrate task force concluded that it is fundamental for a lawyer to "understand the potential functions and consequences of" the processes of litigation and alternative dispute resolution,

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<sup>235</sup> JOB ANALYSIS SURVEY, *supra* note 139, at 285 (showing that Negotiation was ranked twenty-seventh among thirty-six general skills and abilities and received an average significance rating below three out of four). The task included on the Survey most representative of client counseling was "Advise client," which received a significance rating of 3.2. *Id.* at 274.

<sup>236</sup> See, e.g., Grosberg, *supra* note 8, at 355-56, 374-83; Curcio, *supra* note 8, at 396-97, 411-14 (proposing a testing format allowing for oral interviews and negotiation simulations); Grosberg, *supra* note 6, at 849-50 (suggesting use of simulation testing).

<sup>237</sup> The panel of experts consulted on the pilot administration of the performance test suggested that the existing format could be used in the future to test a variety of generic skills, including counseling and negotiation. RESULTS OF RESEARCH, *supra* note 163, at 50.

and to “have a working knowledge of [their] fundamentals.”<sup>238</sup> To a certain extent, the Litigation and Alternative Dispute Resolution Procedures category calls for knowledge of the fundamental rules of civil procedure. But it also calls for familiarity with “advocacy in administrative and executive forums” and “proceedings in other dispute-resolution forums” outside traditional litigation in trial and appellate courts.<sup>239</sup> As knowledge domains ranked on the Job Analysis Survey, Rules of Civil Procedure and Other Statutory and Court Rules of Procedure received the highest scores.<sup>240</sup> The categories of Administrative Law and Regulatory Practice and Alternative Dispute Resolution both were ranked considerably lower.<sup>241</sup>

As a knowledge-focused category, Litigation and Alternative Dispute Resolution Procedures is of lesser importance to the skills-focused purpose of the performance test. However, the performance test has premised problems in administrative settings<sup>242</sup> and alternative dispute resolution settings,<sup>243</sup> and can and should continue to do so. It also has used Civil Procedure as the underlying substantive topic,<sup>244</sup> and on one MPT question from the sample period, examiners assigned applicants to draft a Complaint.<sup>245</sup> Within the framework of the performance test, these are all appropriate efforts to incorporate the important context of various dispute resolution procedures.

### 3. Legal Research

In comparison to the other skill categories, the potential of testing legal research has received considerable attention from bar examiners. The NCBE began evaluating the prospect of testing legal research nearly a decade ago,<sup>246</sup> and

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<sup>238</sup> MACCRATE REPORT, *supra* note 28, at 139.

<sup>239</sup> *Id.*

<sup>240</sup> JOB ANALYSIS SURVEY, *supra* note 139, at 282.

<sup>241</sup> *Id.*

<sup>242</sup> See *supra* discussion accompanying notes 151-54; see also STATE BAR OF CAL., CALIFORNIA BAR EXAMINATION: PERFORMANCE TESTS AND SELECTED ANSWERS FEBRUARY 2011 59 (2011) (on file with author) (assigning applicants to draft a persuasive memorandum to the Board of Immigration in an asylum case) [hereinafter CALIFORNIA BAR EXAMINATION: PERFORMANCE TESTS AND SELECTED ANSWERS].

<sup>243</sup> See, e.g., *Preparing for the MPT, February 2010 (MPT-2)*, NAT'L CONF. OF B. EXAMINERS, <http://www.ncbex.org/about-ncbe-exams/mpt/preparing-for-the-mpt/> (last visited Jan. 24, 2015) (on file with author) (assigning applicants to draft a report to an Early Dispute Resolution Judge describing both the merits and weaknesses of the case).

<sup>244</sup> See, e.g., *July 2013 Pennsylvania Bar Examination: Essay Questions and Examiners' Analyses and Performance Test*, PA. BOARD OF L. EXAMINERS at 47, <http://www.pabarexam.org/pdf/qa/qa713.pdf> (last visited Jan. 24, 2015) (on file with author) (assigning applicants to write a memorandum on the question of whether a default judgment can be opened).

<sup>245</sup> *July 2008 MPTs and Point Sheets*, NAT'L CONF. OF B. EXAMINERS, at 31, [http://www.ncbex.org/assets/media\\_files/MPT/MPT-Point-Sheets/July.08MPTPS102208.pdf](http://www.ncbex.org/assets/media_files/MPT/MPT-Point-Sheets/July.08MPTPS102208.pdf) (last visited Jan. 24, 2015) (on file with author).

<sup>246</sup> Moeser, May 2006, *supra*, note 17, at 4-5.

the idea is still on the agenda of its long-range planning committee today.<sup>247</sup> The NCBE's focus has been mainly on creation of a new testing instrument<sup>248</sup> or perhaps even one to be used by law schools to test students' research competency at some interim stage.<sup>249</sup>

The case for testing legal research skills on the bar exam is a strong one. Arguably, legal research competency is of even greater importance for lawyers today than it was at the time of the MacCrate Report because accessing legal information is more complex and costly.<sup>250</sup> "Researching the Law" is, not surprisingly, one of the effectiveness factors for lawyers in the Shultz and Zedeck study.<sup>251</sup> Electronic researching was a highly rated skill on the Job Analysis Survey, and notably a much higher rated skill than non-electronic researching.<sup>252</sup>

In his thoughtful article *Should Legal Research Be Included on the Bar Exam*,<sup>253</sup> Professor Steven M. Barkan explored various practical approaches to testing legal research skills on the bar exam, including expanding the performance test to encompass it.<sup>254</sup> He concludes that with an all-electronic research environment, the performance test could expand to encompass legal research "simply by not providing the examinees with the legal information needed to complete its questions."<sup>255</sup> However, such a test would not evaluate specific legal research competencies directly but rather evaluate general research competency indirectly as a predicate to success on the ultimate assignment in the performance test. Accordingly, testing electronic research skill through the performance test might not meet standards of testing validity.<sup>256</sup> Moreover, given the need to access resources electronically, it might also require transitioning to a computer-administered examination at commercial testing centers,<sup>257</sup> an

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<sup>247</sup> Moeser, Sept. 2013, *supra* note 17, at 4.

<sup>248</sup> See, e.g., Moeser, *supra* note 19, at 5 (referencing the possibility of a "new test" of legal research skills); Diane F. Bosse, *Letter from the Chair*, B. EXAMINER, NOV. 2006, at 2, 3 (referencing a test of legal research skills being a "possible adjunct to the current NCBE battery of licensing tests").

<sup>249</sup> Moeser, May 2006, *supra* note 17, at 5.

<sup>250</sup> Barkan, *supra* note 8, at 403.

<sup>251</sup> SHULTZ & ZEDECK, *supra* note 179, at 26.

<sup>252</sup> JOB ANALYSIS SURVEY, *supra* note 139, at 285. While 91% of respondents indicated that they perform non-electronic researching, the average significance rating was a mere 2.27. *Id.* This compares to 98% performing electronic researching, which received an average significance rating of 3.26. *Id.*

<sup>253</sup> Barkan, *supra* note 8.

<sup>254</sup> *Id.* at 409-11.

<sup>255</sup> *Id.* at 410.

<sup>256</sup> Case, *supra* note 52, at 30 ("Validity in testing refers to the extent to which the test score reflects the attribute you are intending to measure.").

<sup>257</sup> Currently, examinees who use their laptops to answer essay and performance test questions, which are distributed in hard copy, are prevented by the exam taking software from accessing the internet or any other content on their computer. If electronic research were to be tested within this framework, the limitation would have to be lifted in part. Even if that could be done while still preserving test security, there would remain the challenge of how to ensure that all examinees have equally glitch-free access to the same internet site or fixed database for the purpose of doing the

expensive and complicated step for the bar exam that is currently under consideration for only the MBE.<sup>258</sup> Using a paper research environment, either in part or in full, would be even more problematic, Barkan concludes, because of the difficulty inherent in providing access to the research resources.<sup>259</sup>

Hence, within the existing testing construct, the best means by which to test legal research competency would appear to be short-answer questions or multiple-choice questions.<sup>260</sup> These types of questions would inevitably test *knowledge* of legal research methodology as much as or more than legal research *skill*.<sup>261</sup> If and how legal research can be tested on some expanded version of the performance test is worthy of study. But the more likely result of the NCBE's current evaluation of the matter, if anything, is a new testing instrument of some sort.

### C. The Interplay between the Bar Exam and Legal Education

Because of the MacCrate Report's influence; the relationship between legal education and the bar exam is central to the story of the performance test. Law schools and bar examiners both responded to MacCrate by recognizing the imperative, respectively, of teaching and testing specific lawyering *skills*. The parallel tracks of reform—bar examiners testing skills and law schools teaching skills—have produced something of a dichotomy for bar examiners: Should they follow the lead of law schools and test only what the schools clearly teach, or should they take the lead and implement change to the exam, believing that law schools will respond by enhancing coverage of what they test?<sup>262</sup>

This dichotomy is not as cut and dried with lawyering skills or competencies as it is with knowledge domains. The NCBE surely took into account that Federal Civil Procedure is a standard first-year course in law schools before adding it to the MBE, but is it anywhere near that clear the extent to which law schools teach problem solving? Factual analysis? Organization and management of a legal task? Communication? Legal Research?

To whatever extent uncertainty about coverage of specific skill sets in law schools is an impediment to expanding skills testing on the bar exam, it simply should not be. Where evidence shows a skill set to be important for a newly licensed lawyer, then bar examiners have an obligation to carefully consider testing that skill set, regardless of what law schools are or are not doing. Moreover, even small enhancements to skills testing on the bar exam can make a big difference. Though the difference on the bar exam itself might not be

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necessary research. Presumably, a commercial testing center could better manage these challenges.

<sup>258</sup> Susan M. Case, *The Testing Column: Exploring the Pros and Cons of Moving to Computer-Based Testing for the Bar Exam*, B. EXAMINER, Mar. 2012, at 46, 46-49.

<sup>259</sup> Barkan, *supra* note 8, at 410-11.

<sup>260</sup> *Id.* at 411.

<sup>261</sup> *Id.*

<sup>262</sup> See Wegner, *supra* note 129, at 17-18 (discussing this dynamic generally and encouraging bar examiners to take some initiative to effect change in legal education).

dramatic, any moves toward more skills testing can be an effective incentive for law schools to further enrich and emphasize the training of students in those newly tested skill sets.<sup>263</sup>

In important ways, bar examiners are in a better position to incentivize change in legal education than legal education is to incentivize change in the bar exam. The NCBE is a centralized organization with significant resources and tremendous influence over the content of bar exams. As of 2015, all fifty states will use at least one of its testing instruments on their bar exams, and a majority of states use all three.<sup>264</sup> In addition, the UBE initiative will only further the NCBE's status as a near juggernaut in bar examinations. Large states with several law schools, most prominently New York and California, have boards of bar examiners with considerable influence as well.<sup>265</sup>

Moreover, history proves not only that bar examiners can take the lead in reforming the bar exam, but also that law schools indeed follow that lead. Before the NCBE instituted the MBE in the 1970s, there was little multiple-choice testing being used in law schools.<sup>266</sup> Since the MBE, law professors have increased the use of multiple-choice tests significantly.<sup>267</sup> While there is no empirical evidence of a causal connection, it is no stretch to suggest that some law schools have encouraged faculty adoption of multiple-choice testing in order to expose students adequately to the testing format and thereby possibly improve bar pass rates of graduates.<sup>268</sup>

As to the performance test specifically, its addition to the bar exam has directly influenced legal education in meaningful and positive ways. Many law professors—clinical, legal writing, and doctrinal—have adopted the performance test format for exercises and even examinations.<sup>269</sup> Moreover, law schools

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<sup>263</sup> See Conison, *supra* note 33, at 16 (discussing how the ABA Task Force's recommendation that bar examiners reduce the testing of doctrinal subjects and increase testing of competencies is designed to "promote the ability of law schools to deliver more practice competencies").

<sup>264</sup> *Comprehensive Guide*, *supra* note 2, at 25.

<sup>265</sup> For example, the New York Board of Law Examiners has recently taken the initiative to alter its rules on eligibility for bar admission concerning what courses applicants must take in law school. *Rules of the Court*, 520.3(c)(1)(iii), N.Y. ST. BOARD OF L. EXAMINERS, <http://www.nybarexam.org/Rules/Rules.htm#520.3> (last visited Jan. 24, 2015) (requiring a two-credit course specifically focused on professional responsibility as opposed to a substitute course). It has also recently enacted a requirement of fifty hours of pro bono service. *Rules of the Court*, 520.16, N.Y. ST. BOARD OF L. EXAMINERS, <http://www.nybarexam.org/Rules/Rules.htm#520.16> (last visited Jan. 24, 2015).

<sup>266</sup> Sheppard, *supra* note 81, at 684.

<sup>267</sup> *Id.*

<sup>268</sup> See Herbert T. Krimmel, *Dear Professor: Why Do I Ace Essay Exams But Bomb Multiple Choice Ones*, 63 J. LEGAL EDUC. 431, 433 (describing the standard reaction of students who do poorly on the author's multiple-choice examinations as fear that they will do poorly on the bar exam).

<sup>269</sup> See generally Nancy L. Schultz, *There's a New Test in Town: Preparing Students for the MPT*, 8 PERSP. TEACHING LEGAL RES. & WRITING 14 (1999) (legal writing); Eric J. Gouvin, *The Document Package Exam as a Teaching Tool*, L. TCHR., Fall 2003, at 4 (legal writing); John D. Schunk, *Can Legal Writing Programs Benefit from Evaluating Student Writing Using Single-*

throughout the country continue to offer more skills-focused courses and more expansive training in skills.<sup>270</sup> These trends in legal education—using performance test formats and expanding skills training—will surely continue. And, if bar examiners begin to expand the scope of the performance test, law schools will expand their skills instruction accordingly.<sup>271</sup>

Teaching to the test is not the goal, and the concept of teaching to the test in substantive fields is largely counter to the purpose of legal education.<sup>272</sup> Rather, the goal is to incentivize increased attention by law schools to core competencies that are essential for beginning lawyers.

#### IV. IT'S NOT JUST THE QUALITY; IT'S ALSO THE QUANTITY

If the performance test is to grow into a more critical and influential component of the bar exam, then it has to grow not just qualitatively but also quantitatively. A small percentage of U.S. jurisdictions have not adopted the performance test at all, and whatever the obstacles to their doing so might be, those obstacles can and should be overcome. Where the performance test has already been adopted, there is a strong case to be made for expanding the current proportion of the exam devoted to it. Specifically, bar examiners should consider administering more performance tests per exam, increasing the time allotment for

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*Submission, Semester-Ending, Standardized, Performance-Type Assignments?*, 29 HAMLINE L. REV. 308 (2006) (legal writing); Steven D. Jamar, *Using the Multistate Performance Test in an LRW Course*, 8 PERSP. TEACHING LEGAL RES. & WRITING 118 (2000) (legal writing); Barbara M. Anscher, *Turning Novices into Experts: Honing Skills for the Performance Test*, 24 HAMLINE L. REV. 224 (2001) (legal writing); Alice M. Noble-Allgire, *Desegregating the Law School Curriculum*, 3 NEV. L.J. 32 (Fall 2002) (doctrinal); Carolyn Grose, *Outcome Based Education One Court at a Time: My Experiment with Estates and Trusts*, 62 J. LEGAL EDUC. 336 (2012) (doctrinal); Timothy W. Floyd et al., *Beyond Chalk and Talk*, 38 OHIO N. U. L. REV. 257 (2011) (doctrinal); Grosberg, *supra* note 8, at 349 (clinical); Stella L. Smetanka, *The Multi-State Performance Test: A Measure of Law Schools' Competence to Prepare Lawyers*, 62 U. PITT. L. REV. 747 (2001) (generally); Suzanne Darrow-Kleinhaus, *Incorporating Bar Pass Strategies*, 37 GONZ. L. REV. 17 (2002) (generally).

<sup>270</sup> Wegner, *supra* note 129, at 17-18. See also Susan D. Carle, *Standing Room Only at the 2012 Workshop on the Future of the Legal Profession: Implications for Legal Education*, AALS NEWS, Feb. 2012, at 26, 27, available at <http://www.aals.org/wp-content/uploads/2014/04/february2012.pdf> (“[T]here is – and has been for some time now – more work on so-called skills training, as encouraged by the Carnegie Report but as has been virtually ignored in high-profile media reports on legal education in recent months.”).

<sup>271</sup> Others have noted the effect that bar examiners can have on legal education through reform of the exam and have encouraged bar examiners to enact reform to effect change in legal education. See, e.g., Wegner, *supra* note 129, at 19 (“I’m convinced that greater attention to the apprenticeship of skills and practice by bar examiners could help law schools move in productive ways that would benefit and protect the public.”); Barkan, *supra* note 8, at 405 (“Including legal research on state bar exams would be an effective way to create incentives for improving legal research instruction in law schools.”).

<sup>272</sup> See, e.g., SALT Statement on the Bar, *supra* note 7, at 448-49 (criticizing the focus on the bar exam in schools as distracting from student learning of the law as more than a set of legal rules); see also Sam Hanson, *The Relationship Between Bar Admissions and Law Schools*, B. EXAMINER, Aug. 2003, at 7, 9 (discussing the pressure the bar exam places on law school deans to conform).



each performance test, and according more weight to the performance test in scoring relative to the other tests. To be sure, several factors—psychometric, financial, and otherwise—prevent a dramatic expansion of the performance test. Notwithstanding all of these factors, examiners should be able to achieve roughly a doubling of the performance test's presence and weight on the bar exam without dramatically altering the current construct of the bar exam.

### A. On the Way to Becoming a Truly National Exam

About 20% of U.S. jurisdictions continue to administer bar exams without any performance tests or any other testing instrument that evaluates only skills and not substantive knowledge of law.<sup>273</sup> By way of comparison, the MBE will achieve fifty-state status with its adoption by Louisiana in 2015,<sup>274</sup> forty-three years after its first administration. The MPT is comparatively young, entering its nineteenth year in 2015, but already thirty-nine states and the District of Columbia have adopted it or are administering their own performance test.<sup>275</sup>

It seems likely that over the course of the next decade or two, most or all of the remaining jurisdictions will join the movement toward performance-based testing. Though it is not entirely clear why certain jurisdictions have not adopted the performance test, the reason might again relate to a perception that law schools are not training students in the tested skills or assigning students to draft all of the types of documents that the performance test can ask applicants to draft. As law schools continue to expand and innovate in the arena of skills instruction and, one hopes, do a better job of publicizing such efforts, bar examiners in the remaining jurisdictions should have any such concerns allayed. Moreover, it behooves bar examiners to give serious consideration to expanding and innovating in skills testing regardless of the state of legal education, thereby creating important incentives for law schools to respond accordingly.<sup>276</sup>

Offering a potent assist to adoption of the performance test is the UBE. Any jurisdiction that wants to adopt the UBE and achieve its advantages related to score portability will have to administer two MPT questions on its bar exam and accord those questions 20% weight in scoring.<sup>277</sup> Hence, if a jurisdiction that does not administer the MPT or administers only one MPT question chooses to join the UBE, the profile of the MPT immediately goes up in that jurisdiction. However, the UBE serves as a double-edged sword: It compels participating jurisdictions to administer performance tests, but at the same time it sets in place the administration of only two questions and the lowest scoring weight among the three testing instruments.

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<sup>273</sup> *Comprehensive Guide*, *supra* note 2, at 25 (referring to Florida, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, New Jersey, North Carolina, Oklahoma, South Carolina, and Virginia).

<sup>274</sup> *Bar Fight*, *supra* note 11.

<sup>275</sup> *Comprehensive Guide*, *supra* note 2, at 25.

<sup>276</sup> See *supra*, discussion accompanying notes 262-72.

<sup>277</sup> *Early*, *supra* note 1, at 19.

## B. Expanding the Proportion of the Bar Exam Devoted to the Performance Test

The current NCBE recommendation to subscribing jurisdictions (a requirement for those joining the UBE) is to administer both of the two ninety-minute MPT questions that the NCBE drafts for each exam administration.<sup>278</sup> To ensure that the bar exam meaningfully and thoroughly tests on skills of relevance to the newly licensed lawyer, the NCBE should produce, and state bar examiners should administer, more performance test questions.

An ambitious but realistic goal would be to double the performance test's presence on the bar exam. Others have proposed an expansion from two to four ninety-minute performance tests.<sup>279</sup> The doubling could alternatively be achieved through the use of three-hour performance tests, which are currently administered on the California Bar Exam.<sup>280</sup> Testing time for performance tests would in either event be increased from three to approximately six hours.<sup>281</sup> In conjunction with this expansion, examiners should also consider a separate slight increase in allotted testing time, which could arguably justify more explicit evaluation of an applicant's precision in writing and structure.<sup>282</sup> Total testing time for the performance tests could be, for example, six and a half or seven hours, allowing an extra thirty minutes or one hour for applicants to fine-tune their writing and the flow and structure of their answers.

Doubling testing time for the performance test should allow for qualitative improvements to the questions, including some discussed in this Article in Section III. For example, one of the three-hour performance tests administered in California on the February 2009 exam<sup>283</sup> evaluated both problem solving and fact gathering to a more profound degree than any of the MPT questions from the sampling period.<sup>284</sup> Applicants were told that their clients—long-time residential tenants in an apartment complex—had received a thirty-day eviction notice.<sup>285</sup> The assigned task was to draft a counseling memo advising which of multiple legal actions the clients should take and whether the clients should stay put or move out.<sup>286</sup> Applicants were expressly instructed also to relate the clients' goals to the advice and to discuss what other factual information was

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<sup>278</sup> 2013 Statistics, *supra* note 10, at 41.

<sup>279</sup> Wesoky, *supra* note 22, at 96.

<sup>280</sup> Description and Grading of the California Bar Examination, *supra* note 75, at 1.

<sup>281</sup> An exam could include four ninety-minute questions, two three-hour questions, or one three-hour question and two ninety-minute questions.

<sup>282</sup> See *supra*, discussion accompanying notes 218-23.

<sup>283</sup> CALIFORNIA BAR EXAMINATION: PERFORMANCE TESTS AND SELECTED ANSWERS FEBRUARY 2009 62 (2009) (on file with author).

<sup>284</sup> Problem solving and fact gathering are discussed, *supra*, in Sections III-A-1 and III-A-3, respectively.

<sup>285</sup> CALIFORNIA BAR EXAMINATION, *supra* note 283, at 63-68.

<sup>286</sup> *Id.* at 62-65. This is an example of front-end problem solving, a skill not effectively evaluated to date on the MPT. See *supra* earlier discussion in Section III-A-1.

required and how to obtain it.<sup>287</sup> More recent California performance test questions have similarly implicated problem solving and fact gathering in meaningful ways that could serve as a model for an expanded MPT format.<sup>288</sup>

The use of four ninety-minute performance test questions would foreclose the kind of depth in a single question that a three-hour format affords. However, it would presumably allow examiners to test a wider array of skill sets on each exam, possibly leading to a more expansive baseline of skills that all applicants would have to execute, no matter when they take the bar exam.

At least one testing expert has evaluated the expense and testing reliability of administering four ninety-minute questions.<sup>289</sup> Four ninety-minute performance test questions achieve testing reliability equal to or greater than that of an essay examination consisting of six thirty-minute questions.<sup>290</sup> There is also a basis for concluding that exactly four performance test questions achieve the best return when it comes to testing reliability.<sup>291</sup> Because of the labor-intensive work of creating performance test questions, doubling the number of questions would increase the estimated cost per applicant, but the increase is mitigated by the relatively low cost associated with scoring of performance test answers.<sup>292</sup>

One consequence of doubling the number of performance test questions is that bar exams would have to last more than two days. This is not a trivial concern, but it is hardly a barrier. As of the July 2014 bar exam, seven states already administer an exam that stretches over three days, including California.<sup>293</sup> Other states could follow California's lead, whether using four ninety-minute performance tests or two three-hour ones. Moving to a three-day exam seems problematic only in the sense that the current construct calls for the testing to take place on consecutive days in a single exam.<sup>294</sup> By comparison, medical students seeking to become doctors spend more time in licensing examinations but over the course of multiple tests, as medicine has a stepped licensing

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<sup>287</sup> *Id.* at 62. Assigning applicants to identify missing facts and a method for gathering them is again a skill not effectively evaluated to date on the MPT. See *supra* earlier discussion in Section III-A-3.

<sup>288</sup> See, e.g., CALIFORNIA BAR EXAMINATION: PERFORMANCE TESTS AND SELECTED ANSWERS JULY 2013 (on file with author).

<sup>289</sup> Klein, *supra* note 125, at 14-19.

<sup>290</sup> *Id.* at 19.

<sup>291</sup> *Id.* at 15 (noting that “[g]oing from three to four questions produces a greater increase in reliability than does going from four to five questions”).

<sup>292</sup> See *Id.* at 19 (identifying the cost per applicant for two ninety-minute performance test questions as \$25, \$5 of which is attributable to scoring; and the cost per applicant for six thirty-minute essay questions as \$32, \$12 of which is attributable to scoring).

<sup>293</sup> *Comprehensive Guide*, *supra* note 2, at 20-21 (stating that Delaware, Nevada, Ohio and Texas have two and a half days of testing and California, Louisiana and South Carolina have three full days of testing).

<sup>294</sup> Bifurcating the bar exam to allow for law students to take the MBE after one or two years of law school is not on the immediate horizon, though bar examiners have considered the idea. Diane F. Bosse, *Letter from the Chair*, 75 B. EXAMINER 2, 3 (May 2007).

process.<sup>295</sup> Hence, adding more performance tests would not even approach an undue burden in terms of total testing time in comparison to the licensing process for the medical profession. Especially given the precedent already set in California, the benefits of testing more skills of relevance to the newly licensed lawyer might very well outweigh any burden on applicants.

A related consequence would be the increased expense for applicants to take the exam. The application fee for taking the California Bar Exam, a useful benchmark because it includes six hours of performance testing, is \$1,170.<sup>296</sup> In comparison, states administering the UBE, which includes two ninety-minute MPT questions, have application fees ranging from \$475 to \$880.<sup>297</sup> This does not necessarily suggest, however, that states adding two more performance test questions would incur costs requiring an increase to a fee comparable to California's, as several other factors besides the extent of performance testing surely affect costs and fees, especially in a state as large as California. Moreover, even if all bar applicants had to pay fees as high as California's or even slightly higher, the fees would still pale in comparison to those incurred by aspiring medical doctors in taking the medical profession's required examinations. Over the course of the four separate required examinations, an individual training to be a physician will pay over \$3,200 in fees,<sup>298</sup> approximately three times what a law school graduate pays to take a bar exam that includes six hours of performance testing.

### C. Increasing the Scoring Weight of the Performance Test Relative to the MBE and Essay Questions

As the testing vehicle capable of evaluating the most lawyering competencies, the performance test should not be the one accorded the lowest scoring weight.<sup>299</sup> Bar examiners should therefore give serious consideration to

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<sup>295</sup> See *United States Medical Licensing Examination*, WIKIPEDIA (July 30, 2014, 8:23 AM), [http://en.wikipedia.org/wiki/United\\_States\\_Medical\\_Licensing\\_Examination](http://en.wikipedia.org/wiki/United_States_Medical_Licensing_Examination) (describing the four separate examinations required for achieving a license to practice medicine); *The USMLE: Purpose, Test Format, and Test Lengths*, USMLE.ORG, <http://www.usmle.org> (last visited Jan. 24, 2015) (describing Step 1 as a one-day examination; Step 2-CK as a one-day examination, Step 2-CS as a clinical skills test completed over the course of eight hours; and Step 3 as a two-day examination).

<sup>296</sup> *Comprehensive Guide*, *supra* note 2, at 23. In addition, applicants pay a \$146 fee if they choose to take the exam on a laptop computer. *Id.*

<sup>297</sup> *Id.* at 23, 32 (showing Alabama's fee at \$475 and Arizona's fee at \$880, and listing the states that administer the UBE).

<sup>298</sup> See *USMLE Examination Fees*, NBME.ORG, <http://www.nbme.org/students/examfees.html> (last visited Jan. 24, 2015); *Cost and Fees: USMLE Step 3, Eligibility Extension, Score Recheck and Transcripts*, FSMB.ORG, <http://www.fsmb.org/licensure/usmle-step-3/cost-and-fees> (last visited Jan. 24, 2015).

<sup>299</sup> See *Comprehensive Guide*, *supra* note 2, at 29-30 (The District of Columbia and Oregon weigh the performance test and the essay examination each at 25% of the total score. No state gives greater scoring weight to the performance test than to the essay examination.).

increasing the scoring weight placed on the performance test, and they should do so even if the current norm of two ninety-minute performance tests remains in place. Psychometric concerns once again bear consideration but should not be insurmountable.

Even if bar exams retain only two performance test questions, the importance of the performance test justifies according it a greater scoring weight. UBE jurisdictions and those voluntarily following the NCBE's recommendations are devoting the same testing time (three hours) to an essay examination as they are to the performance test. Yet, the NCBE recommends weighing the essay examination at 30% and the performance test at 20% of the overall score.<sup>300</sup> A few states have an even greater discrepancy between scoring weights for the essay examination and the performance test, weighing the performance test at lower than 20%.<sup>301</sup> Only concerns related to testing reliability could justify these discrepancies.<sup>302</sup> But it is not clear that shifting to, for example, 30% for the performance test and 20% for the essay examination would have a significantly adverse effect on testing reliability, as long as the scores for each written component were scaled to the MBE.<sup>303</sup>

Any adverse effect on testing reliability could very well be outweighed or at least mitigated by an increase in testing validity. A greater scoring weight for the performance test means that examinees' scores would depend more on their ability to perform skills that realistically reflect what lawyers do. By way of analogy, several jurisdictions take the broader view that the written component of the exam should count for more than the MBE and, despite the NCBE's psychometrically-based recommendation to weigh the written component at only 50%, those jurisdictions weigh it at 60% or higher.<sup>304</sup> Presumably, those jurisdictions do so on the belief that writing is more important than selecting answers to multiple-choice questions. Within the written component of the exam, jurisdictions can and should take the analogous view that the performance test is more important than the essay examination, and hence should count for more in scoring, notwithstanding the resulting limited adverse impact on testing reliability.

Should more performance test questions be added to the bar exam, there would of course be an even greater case for increasing the scoring weight. Were two more ninety-minute performance test questions added to the existing bar

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<sup>300</sup> Case, *supra* note 56, at 54.

<sup>301</sup> Most states that weigh the performance test at lower than 20% use only one performance test question, but both New Mexico (33.3% weight for the essay examination and 16.7% for the performance test) and Ohio (53.3% and 13.3% respectively) administer two performance test questions. See *Comprehensive Guide*, *supra* note 2, at 29-30.

<sup>302</sup> See Klein, *supra* note 125, at 19 (table showing a score reliability of .65 for six thirty-minute essay questions and a score reliability of .52 for two ninety-minute performance tests).

<sup>303</sup> See Case, *supra* note 52, at 31 (emphasizing the central importance of scaling written exam components to the MBE).

<sup>304</sup> Twelve states weigh the MBE at less than 50%, eleven of them at 40% or lower. *Comprehensive Guide*, *supra* note 2, at 29-30.

exam for a total of four, there would be a basis for increasing the scoring weight to 40%. The essay examination could be reduced to 20%, and the MBE from 50% to 40%. It is not entirely clear that the MBE needs to remain weighted at 50% in order to perform its critical function as the psychometric anchor of the bar exam.<sup>305</sup>

## V. CONCLUSION

Criticisms of the bar exam abound, as do proposals for abolishing and replacing it, but the foreseeable future in the world of lawyer licensing includes a bar exam. The question then is how to reform the exam so that it better serves the stated goal of evaluating minimum competence. The recent addition of yet another subject to the MBE does little to advance this goal, instead exacerbating the already heavy emphasis on knowledge of substantive content.

The answer lies in the performance test, which has not yet become what it was supposed to be: a strong and flexible means of evaluating examinees on a wide range of competencies central to the work of the newly licensed lawyer. Through careful attention to the performance test's origins and the various skills today's beginning lawyers have to perform, examiners should be able to reinvigorate the performance test and expand its skills coverage. They should also be able to increase the inadequate weight given to the performance test in scoring. As long as there are bar exams, achieving a passing score ought to depend as much as possible on performance on the performance test.

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<sup>305</sup> Michael T. Kane, *What the Bar Examination Must Achieve: Three Perspectives*, B. EXAMINER, Sept. 2012, at 6, 13 (“[A]ny weighting system that assigns at least 40% to the objective component works reasonably well.”).

