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## Turducken™ Legal Writing: Deconstructing the Multi-State Performance Test Genre

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# TURDUCKEN™ LEGAL WRITING: DECONSTRUCTING THE MULTI-STATE PERFORMANCE TEST GENRE

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Alexa Z. Chew\*\*

## Abstract

*The Multistate Performance Test (MPT) has been praised as the most redeeming part of the otherwise unredeemable bar exam because it most aligns with what new attorneys do in practice. It has also been praised, along with other performance tests, as a useful teaching tool throughout the law school curriculum. This article builds on prior scholarship about the MPT by analyzing the MPT as a tool for teaching and testing legal writing and professional communication skills.*

*The new insight that this article brings is that the testing aspect of the MPT tends to engulf the teaching aspect; understanding both of these attributes of the MPT and how they complement one another enhances the efficacy of the MPT as a teaching tool. To get the most out of the MPT as a bar taker or a law teacher, view the MPT as a legal writing assignment stuffed inside a teaching tool that is then stuffed inside a time-pressured test. To help convey this layering, you might think of the MPT as a legal writing Turducken, which is a layered dish with “a chicken stuffed inside a duck that’s then stuffed inside a turkey.”*

*From the outside, the MPT is a test—a timed test. That’s the turkey part of the Turducken. But somewhere inside that test is a decent legal writing assignment. That’s the chicken part of the Turducken. And the chicken is pretty great for teaching legal writing skills! Because these two layers currently clash more than they complement each other, we suggest connecting the two with thoughtful teaching. That’s the duck—a rich, juicy layer of pedagogy that can keep the testing turkey from overwhelming and compromising the benefits of the legal writing chicken. This article deconstructs the MPT by examining each layer, with the goal of*

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\* Associate Clinical Professor of Law, University of North Carolina School of Law. We are grateful to the students in the Writing for the Bar classes in 2019-20 and 2020-21 who helped us understand the MPT and the rich teaching opportunities it provides. We are also grateful to Katie Rose Guest Pryal for her feedback, to Aaron Kirschenfeld and the Kathrine R. Everett Law Library for their excellent research assistance, and to Research Assistants Laura Johnson and Stephanie Long. We also thank colleagues at Carolina Law and the 2021 Carolinas Colloquium for helping us improve the article.

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*teaching bar takers to develop best legal writing practices while also preparing for a time-pressured test of “minimal competency.”*

*The article also offers serving suggestions! The National Conference of Bar Examiners recently announced that it plans to remake the Uniform Bar Exam into a performance test, so the last part of the article details how to improve the MPT to better assess bar takers’ professional communication skills and practice-readiness.*

## Introduction

Originally, bar exams were judge—or lawyer-administered oral examinations aimed at assessing the candidate’s “legal knowledge and moral character.”<sup>1</sup> There were no guidelines,<sup>2</sup> and the rigor varied from judge to judge.<sup>3</sup> Thus these exams might have more accurately assessed the candidate’s “good fellowship.”<sup>4</sup> They also served in many ways as “super all-time final exam[s]” at a time when students could go to law school after two years of undergraduate work or sit for the bar without even having gone to law school.<sup>5</sup> States began moving to written bar exams in the second half of the nineteenth century, but these “early written exams demanded only rote learning and basic literacy skills.”<sup>6</sup> Over the decades since, the bar exam has evolved into a standardized test created and administered by the National Conference of Bar Examiners (NCBE), providing some “minimal national standards” for being licensed as an attorney<sup>7</sup> and increasing efficiency in administering and grading the exams<sup>8</sup> while reserving some authority to the states to set their own standards and requirements.<sup>9</sup>

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<sup>1</sup> Robert M. Jarvis, *An Anecdotal History of the Bar Exam*, 9 GEO. J. LEGAL ETHICS 359, 374 (1996).

<sup>2</sup> See, e.g., Margo Melli, *Passing the Bar: A Brief History of Bar Exam Standards*, GARGOYLE (Alumni Magazine for University of Wisconsin School of Law) 3, 3, [https://media.law.wisc.edu/m/ywq4n/gargoyle\\_21\\_1\\_2.pdf](https://media.law.wisc.edu/m/ywq4n/gargoyle_21_1_2.pdf) [<https://perma.cc/2SK5-PGU2>].

<sup>3</sup> Jarvis, *supra* note 1, at 374.

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

<sup>5</sup> Joseph Marino, *Ask the Professor: Why Do We Need the Bar Exam Anyway?*, ABOVE THE LAW (Feb. 26, 2015), <https://abovethelaw.com/2015/02/ask-the-professor-why-do-we-need-the-bar-exam-anyway/> [<https://perma.cc/J9BC-49SH>] (noting that “state bar exams moved away from that [all-time final exam] type of test” as “the ABA began heavier regulation of law schools,” and “the bar exam became a test to see if a person has the skills and ability to practice”).

<sup>6</sup> Jarvis, *supra* note 1, at 374.

<sup>7</sup> Melli, *supra* note 2, at 4-5.

<sup>8</sup> Jarvis, *supra* note 1, at 378-80.

<sup>9</sup> See Melli, *supra* note 2, at 4; see also Nat’l Conf. of Bar Exam’rs, *About NCBE: Our Mission*, NCBE, <https://www.ncbex.org/about/> [<https://perma.cc/R69Z-JTS8>] (“The mission of the Conference is . . . to assist bar admission authorities by providing standardized examinations of uniform and high quality for the testing of applicants for admission to the practice of law[.]”); see also American Bar Association, *Bar Admissions Basic Overview*, ABA (June 26, 2018), [https://www.americanbar.org/groups/legal\\_education/resources/bar\\_admissions/basic\\_overview/](https://www.americanbar.org/groups/legal_education/resources/bar_admissions/basic_overview/) [<https://perma.cc/XX3G-5HP2>]; NAT’L CONF. OF BAR EXAM’RS & AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2021* vii

The Multi-State Performance Test (MPT) was, at least in part, the NCBE's response to the "call for legal educators to promote the basic skills and values new lawyers need to acquire."<sup>10</sup> At the time, most states' bar exams tested their new lawyers using multiple-choice questions and exam essays, which are not commonly used in legal practice.<sup>11</sup> But some states included performance tests as part of their bar exam, including California, which had "concluded that important lawyering skills were not fully assessed by the MBE [Multi-State Bar Exam (i.e., the multiple choice portion of the exam)] or essay portions of the bar."<sup>12</sup> A performance test, on the other hand, could "test an applicant's ability to use fundamental lawyering skills in a realistic situation."<sup>13</sup>

The addition of the MPT to the Uniform Bar Exam (UBE) reflects that skills training has become an important and integral part of the law school curriculum and validates that having lawyering skills is "essential" to being licensed to practice law.<sup>14</sup> Moreover, it "promise[d] 'to be the best measure of one's ability to perform as an attorney, and, also, the most realistic regarding case situations when compared to the MBE and essay portion of the examination.'"<sup>15</sup> Since it came onto the scene, more and more states have adopted the UBE, including the MPT, or otherwise added other performance tests to their bar exams.<sup>16</sup>

Even with its limits, the MPT has been lauded as the most redeeming part of the bar exam because, as an assessment, it most aligns with and simulates what new attorneys need to be able to do in

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(2021) (acknowledging that licensure requires minimal competency and a character and fitness worthy of trust to protect the public interest).

<sup>10</sup> Suzanne Darrow-Kleinhaus, *Incorporating Bar Pass Strategies into Routine Teaching Practices*, 37 GONZ. L. REV. 17, 17 (2001). The call, more specifically, was the MacCrate Report, formally known as ABA SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MacCrate Report].

<sup>11</sup>MacCrate Report, *supra* note 10, at 277-78.

<sup>12</sup> Darrow-Kleinhaus, *supra* note 10, at 18 n.5 (citing E-mail from Dean E. Barbieri, Dir. for Examinations, State Bar of California, to Suzanne E. Thompson, Editor in Chief, Gonzaga Law Review, Gonzaga University School of Law (Jan. 7, 2002, 15:09 PST) (on file with the Gonzaga Law Review)).

<sup>13</sup> *Id.* at 18 (quoting NAT'L CONFERENCE OF BAR EXAM'RS, THE MULTISTATE PERFORMANCE TEST: 2001 INFORMATION BOOKLET 1 (2000)).

<sup>14</sup> Stella L. Smetanka, *The Multi-State Performance Test: A Measure of Law Schools' Competence to Prepare Lawyers*, 62 U. PITT. L. REV. 747, 750 (2001).

<sup>15</sup> *Id.* at 751 (quoting Alan Ogden, *Performance Testing in Colorado*, THE BAR EXAMINER, at 19, 21 (Nov. 1989)).

<sup>16</sup> *See, e.g.*, Ben Bratman, *Improving the Performance of the Performance Test: The Key to Meaningful Bar Exam Reform*, 83 UMKC L. REV. 565, 570 & n.37 (2015).

practice.<sup>17</sup> It also has been lauded, along with other performance tests, as providing useful teaching tools throughout the law school curriculum.<sup>18</sup> Section I of this Article provides an overview of this prior scholarship.

This Article then builds on that literature by detailing how the MPT could be used as a vehicle for teaching and testing legal writing and professional communication skills, specifically. The new insight that this Article brings to the literature is that, while the testing aspect of the MPT tends to engulf the teaching aspect, understanding both of these attributes of the MPT and how they complement one another enhances the efficacy of the MPT as a teaching tool. For a bar taker or law teacher to get the most out of the MPT, we argue that the MPT should be viewed as a legal writing assignment stuffed inside a teaching tool that is then stuffed inside a time-pressured test. This is, at minimum, a silly visualization. To better maximize the silly aspect of this claim, we have chosen the Turducken<sup>19</sup>—which is “a chicken stuffed inside a duck that’s then stuffed inside a turkey”—as our visual metaphor.<sup>20</sup>

From the outside, the MPT is a test—a timed test. That is the turkey part of the Turducken. But somewhere inside that test is a decent legal writing assignment. That is the chicken part of the Turducken. And the chicken is pretty great for teaching legal writing skills! These two layers often clash more than complement each other, and the timed test aspect of the MPT often subverts and compromises the very skills the MPT is designed to assess. Section II of this Article explores these two different layers. It also introduces the duck layer—a rich, juicy layer of pedagogy that bridges the layers and can keep the testing turkey from overwhelming or compromising the benefits of the legal writing chicken.

These rich teaching opportunities are explored in greater depth in Section III, which identifies ways to not only help students excel at the MPT but also maintain and further hone their best legal writing practices. Mediating the chicken and turkey layers of the MPT allows for better teaching—and for bar takers to be better prepared for the bar and for their practice beyond the bar. Section III highlights how helping bar takers improve their legal writing skills assists them in

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<sup>17</sup> See discussion *infra* Part I.A.1.

<sup>18</sup> See discussion *infra* Part 1.B.

<sup>19</sup> “The term *turducken* is a combination of the words ‘turkey,’ ‘duck,’ and ‘chicken,’ as the dish consists of a chicken stuffed inside a duck that’s then stuffed inside a turkey.” Peggy Trowbridge Filippone, *Turducken*, THE SPRUCE EATS, <https://www.thespruceeats.com/turducken-recipe-1809374> [<https://perma.cc/R7BF-VSML>] For more on the history of the Turducken and other types of global and local engastration (i.e., stuffing food with food), see Josh Friedland, *Turducken Has Been Weird for a Very Long Time*, FOOD52, <https://food52.com/blog/14637-the-brief-history-of-the-turducken-and-stuffing-food-in-food>, [<https://perma.cc/D65U-C86D>].

<sup>20</sup> Could this have been nesting dolls? Sure. But the bar is serious and stressful and thus a more ridiculous visual metaphor was called for.

being most effective on the MPT and in their practice. Similarly, it demonstrates how teaching certain test-taking strategies can help bar takers improve their legal writing and analytical abilities.

In Section IV, this Article suggests some concrete ways for how the MPT might be “served” in the future to better assess one’s legal writing and professional communication skills and ability to practice. This Serving Suggestions section builds on the current bar reform scholarship and contributes to the conversation by offering concrete suggestions for how the MPT or other performance tests could be improved: namely, by having a clearer understanding of minimal competency, by allotting more time to complete it, or by expanding it.

## **I. What Is Known About The MPT (A Brief Review Of The Literature)**

Since the MPT’s early days, law journals have been publishing articles and essays about the MPT. Most early articles focused on whether the MPT was a good test of lawyerly competence.<sup>21</sup> One early article and several later articles focused on using the MPT as a teaching tool, describing ways to incorporate the MPT into law school curriculums.<sup>22</sup> Those articles, written by academic support experts and legal writing professors, also included advice for bar takers on how to succeed on the MPT.

### **A. The MPT Is a Test**

The reviews of the MPT as a test of lawyerly competence have been mixed. Some scholars argued that the MPT improved the bar exam because it “test[ed] the technical skills and abilities a new attorney is presumed to possess”<sup>23</sup> and satisfied the concern that the bar exam should fairly credit “law graduates’ developing legal skills.”<sup>24</sup> An additional side benefit was that the MPT would stimulate law schools to improve their courses’ “relevant connections to law practice.”<sup>25</sup> However, other scholars questioned whether the MPT “really measure[d] skills different than those measured by the essay portion of the exam”<sup>26</sup> and argued that, “[h]owever generously one

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<sup>21</sup> See discussion *infra* Part I.A.

<sup>22</sup> See discussion *infra* Part I.A.

<sup>23</sup> Darrow-Kleinhaus, *supra* note 10, at 18.

<sup>24</sup> Smetanka, *supra* note 14, at 754 (“Besides satisfying the concern that law graduates’ developing legal skills be fairly credited, the implementation of the MPT serves to address a very serious issue of the bar and the public: that is, whether new lawyers possess the competencies to be able to serve their clients well.”).

<sup>25</sup> *Id.* at 756.

<sup>26</sup> Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363, 378–79 (2002).

views the MPT, it only marginally improve[d] upon the skills-testing limitations of the traditional bar exam.”<sup>27</sup>

As a test, the MPT deserves both praise and criticism. The rest of this section summarizes each, with the goals of educating the reader, crediting earlier work, and setting up the status quo that Part II will refute.

### 1. (According To Some) The MPT Is A Better Test!

Of all the parts of the Uniform Bar Exam, the MPT is the part that most closely reflects the work new lawyers do in their first years of practice. The MPT assesses minimal competency to practice law “by requiring the applicant to complete a task that a new lawyer should be able to perform.”<sup>28</sup> New attorneys have noted that it is the “most useful part of the bar exam” and “very practical.”<sup>29</sup> Early surveys of bar applicants showed that the applicants “judge[d] performance tests to be a significantly better measurement of their ability to perform as an attorney than either multiple choice or essay testing.”<sup>30</sup> As Professor Stella L. Smetanka observed in 2001, skills like “problem-solving, legal analysis and reasoning, factual investigation, and written communication [were] tested on the [pre-MPT] bar exam,” but on the MPT, “[t]he questions are placed within a scenario from which they derive their meaning.”<sup>31</sup>

Rather than writing essays that would be evaluated for only how well they answered the question, MPT takers would write practical legal documents that would be assessed on the basis of “whether a

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<sup>27</sup> Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession*, 23 PACE L. REV. 343, 414 (2003).

<sup>28</sup> Sabrina DeFabritiis & Kathleen Elliott Vinson, *Under Pressure: How Incorporating Time-Pressured Performance Tests Prepares Students for the Bar Exam and Practice*, 122 W. VA. L. REV. 107, 117-18 (2019) (outlining the history of the bar exam). Some states administer performance tests that are not the NCBE’s MPT but are similar to the MPT in form and objectives. See, e.g., *California Bar Exam Grading*, STATE BAR OF CALIFORNIA, <https://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination/Grading> [<https://perma.cc/GN6R-JZFM>] (providing overview of the performance test as being ninety minutes and being composed of a closed universe packet with a File and a Library and task from a supervising attorney).

<sup>29</sup> See DEBORAH JONES MERRITT & LOGAN CORNETT, IAALS: INST. FOR THE ADVANCEMENT OF THE AMER. LEGAL SYS., BUILDING A BETTER BAR: THE TWELVE BUILDING BLOCKS OF MINIMAL COMPETENCE 67 (December 2020) (quoting survey responses). See generally *id.* (defining twelve building blocks of minimal competency based on surveys and research conducted with fifty practitioner focus groups).

<sup>30</sup> Smetanka, *supra* note 14, at 755 (citing Stephen P. Klein, *The Costs and Benefits of Performance Testing on the Bar Examination*, THE BAR EXAMINER 13, 16 (Aug. 1996)).

<sup>31</sup> *Id.* at 754.



client will understand it or whether the partner will be enlightened.”<sup>32</sup> Unlike writing an essay, writing an MPT response would require following “express and often detailed instructions as to both format and content.”<sup>33</sup>

The MPT was (and still is) designed to test “six fundamental lawyering skills that are required for the performance of many lawyering tasks”:

- (1) problem solving
- (2) legal analysis and reasoning
- (3) factual analysis
- (4) communication
- (5) organization and management of a legal task
- (6) recognizing and resolving ethical dilemmas.<sup>34</sup>

To test these skills, the MPT gives bar takers a problem to solve using legal reasoning and factual analysis.<sup>35</sup>

This problem arrives in the form of a packet of documents divided into a File and a Library. The first document in each File is an assigning memo with instructions from a supervising attorney describing the task that the bar taker needs to complete, such as writing the argument section of a brief. Sometimes, the assigning memo also identifies the specific issue(s) the bar taker should address or dictates how the bar taker should organize the answer to the legal problem. The File also includes all the factual documents, like “transcripts of interviews, depositions, pleadings, correspondence or medical records, etc.”<sup>36</sup> Thus, unlike an essay prompt that contains a short factual synopsis, the File of an MPT asks bar takers “to cull through actual source documents to gather the facts and to determine which facts matter” and which facts don’t.<sup>37</sup>

The Library contains legal authorities, including statutes, regulations, cases, ethics opinions, and so on.<sup>38</sup> The Library is designed to be the only law necessary to analyze the issues presented

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<sup>32</sup> *Id.*

<sup>33</sup> Bratman, *supra* note 16, at 581.

<sup>34</sup> NAT’L CONF. OF BAR EXAM’RS, *The MPT Skills Tested*, NCBE (2014), <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F54> [<https://perma.cc/W8X6-BXBX>].

<sup>35</sup> In addition to these stated skills, the MPT has been championed as testing bar takers’ time management. *See* DeFabritiis & Vinson, *supra* note 28, at 132 (“Practicing time management on an MPT acclimates students to the type of time pressure they will experience on the bar exam and practice.”). Time management is an important lawyering skill, but how much the MPT actually assesses time management or any of the six stated skills is discussed throughout this Article.

<sup>36</sup> Smetanka, *supra* note 14, at 752.

<sup>37</sup> Bratman, *supra* note 16, at 581; *see also* DeFabritiis & Vinson, *supra* note 28, at 132 (“Interacting with a case file on a performance test is also more realistic than reading a redacted case where students assess how a judge resolved a problem at the end of a case.”).

<sup>38</sup> *See* Smetanka, *supra* note 14, at 752.

in the File; although as we explain later, this is not always true. Because the bar taker need not (cannot) look at law or facts beyond the MPT packet, the MPT is often referred to as a “closed universe” test.<sup>39</sup>

Even with these constraints, the MPT is the most client-centered aspect of the bar exam.<sup>40</sup> A key difference between testing lawyering skills using bar essays and testing them using the MPT is that the MPT creates a client-centered context to apply the skills. Thus, “the implementation of the MPT serves to address a very serious issue of the bar and the public: that is, whether new lawyers possess the competencies to be able to serve their clients well.”<sup>41</sup> Although the client herself is not well developed in the MPT,<sup>42</sup> the MPT does provide the bar taker with a client, and the bar taker is assessed on how well she solves the client’s problem. This focus on the client is apparent in the MPT’s Point Sheets,<sup>43</sup> which emphasize to the bar grader that the answers may take different forms and that the bar taker should focus on meeting the client’s goals.

The MPT is also the only part of the bar exam that does not require memorizing “the law of nowhere.”<sup>44</sup> Instead, bar takers use existing legal research and writing skills to read unfamiliar law from a fictional jurisdiction and apply it to an unfamiliar factual situation. In theory, a bar taker would not need to study for the MPT at all

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<sup>39</sup> *E.g., id.*

<sup>40</sup> This client-centered aspect of the MPT may be another reason to include this kind of assessment in the law school curriculum beyond the first year. Other than experiential courses in the law school curriculum, including the first-year legal writing courses and clinics or externships, most law courses are law- and lawyer-centered, not client-centered. Having more MPT-like assessments throughout the law school curriculum would help bar takers be better trained to be client-focused on the MPT as well as in their law practice.

<sup>41</sup> Smetanka, *supra* note 14, at 754.

<sup>42</sup> The File is limited and narrowly tailored, which makes the client unidimensional. *See infra* Section II.A for a discussion of how the facts map onto the law.

<sup>43</sup> Point Sheets are what are provided to bar graders to help them grade the MPTs. They are not rubrics or sample answers, and they do not assign points for scoring. Rather, they provide a summary of the problem, the law, and the facts, and they outline the points (i.e., legal claims and arguments) that bar takers should be making. They generally align with the packets, but in reviewing many, the authors have seen that some Point Sheets include law and related arguments that are only implicitly invoked in the corresponding Library. Point Sheets sometimes provide points, even points of law, that are not in the packet. Thus, the bar grader may be expecting to see something in the answers that the bar takers do not have in their packets to provide.

<sup>44</sup> *See* Bratman, *supra* note 16, at 581 (“[B]y 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.”). Credit to Professor Joan Howarth for introducing the authors to the phrase “the law of nowhere.”

because there is no new knowledge to memorize, and the skills being tested are skills that bar takers would have used during law school. Given recent research showing that “time spent studying” is the best indicator of whether a first-time bar taker will pass the exam,<sup>45</sup> having a portion of the bar exam that does not require much studying can make licensure more accessible.

## 2. (According to Others) The MPT Is Not Better

In 2002, Professor Andrea Curcio questioned whether the MPT “really measures skills different than those measured by the essay portion of the exam.”<sup>46</sup> One reason for this question was a 1996 study indicating that applicants’ performances on the MPT were correlated with their performances on the essay section of the bar exam.<sup>47</sup> Another reason was that the intense time pressure imposed by the MPT meant that bar takers would have no time to edit their quickly written documents, even if the documents themselves were briefs, letters, or other real lawyering genres.<sup>48</sup> Lacking time to reflect on and edit one’s writing is a feature of the bar essays as well and is a situation “most lawyers seldom face.”<sup>49</sup>

Thirteen years later, Professor Ben Bratman wrote an extended critique of the MPT with the goal of suggesting ways to expand and improve the MPT.<sup>50</sup> As he put it, the MPT is “a stagnant component of the exam that has not fulfilled its potential.”<sup>51</sup> Bratman argued that the MPT does a “good job” of evaluating one of the six skills that it purports to test, the “Legal Analysis and Reasoning” skill.<sup>52</sup> Like Curcio, he noted that the bar essays also do a good job of evaluating that skill.<sup>53</sup> But the other five skills did not fare so well in Bratman’s analysis, which sampled ten years of MPT questions.<sup>54</sup> In particular, Bratman found that the MPT had not adequately incorporated the first and sixth skills—Problem Solving and Recognizing and Resolving Ethical Dilemmas—and did not sufficiently test aspects of the third,

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<sup>45</sup> ANALYZING FIRST-TIME BAR EXAM PASSAGE ON THE UBE IN NEW YORK STATE, ACCESSLEX INSTITUTE 2 (May 2021), <https://www.accesslex.org/NYBOLE> [<https://perma.cc/5PDJ-DYSJ>] (“The key ingredient to first- and second-time bar passage is extensive time dedicated to bar exam preparation.”).

<sup>46</sup> Curcio, *supra* note 26, at 378; *see also* discussion *infra* Section II.B.

<sup>47</sup> *Id.* at 379 (citing Klein, *supra* note 30, at 13, 16).

<sup>48</sup> *See id.* at 378-79.

<sup>49</sup> *Id.* at 378.

<sup>50</sup> Bratman, *supra* note 16, at 568.

<sup>51</sup> *Id.* at 571.

<sup>52</sup> *Id.* at 586.

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

<sup>54</sup> *Id.* at 584.

fourth, and fifth skills—Factual Analysis, Communication, and Organization and Management of a Legal Task.<sup>55</sup>

### **B. The MPT Is a Good Teaching Tool**

Unlike the reviews of the MPT as a test, the reviews of the MPT as a teaching tool have been uniformly positive. The first of the articles, by Professor Darrow-Kleinhaus in 2001, drew on an insight the author had while teaching students how to take the MPT: “I realized that most of the skills tested could be incorporated almost seamlessly into what law professors already do in the classroom.”<sup>56</sup> Her article called on law professors to “seize every opportunity to cultivate these skills” during their “regular teaching activities.”<sup>57</sup> Later articles by Sara Berman<sup>58</sup> and by Sabrina DeFabritiis and Kathleen Elliott Vinson<sup>59</sup> answered that call by describing how to improve legal education by incorporating MPTs into academic support courses, legal writing courses, and casebook courses.

As a pedagogical tool, the MPT can be used to teach a variety of skills and has the benefits of (1) already existing and (2) being designed for quick completion. This Article focuses on using MPTs to teach legal writing skills specifically, but other articles focus on additional skills. For example, in their 2019 article, Professors Kathleen Vinson and Sabrina DeFabritiis identified many benefits of incorporating MPTs (or similar performance tests) into law school courses:

- (1) Teaching students that the kind of skills and time-management skills needed to succeed in practice are the same skills and time-management skills needed to pass the bar exam.<sup>60</sup>
- (2) Helping students get jobs by preparing students to “complete a time-pressured writing assignment as part of a job application,” an assignment an employer might use to better assess an applicant’s writing ability than an academic writing sample that has been edited.<sup>61</sup>

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<sup>55</sup> *Id.* at 584, 586.

<sup>56</sup> Darrow-Kleinhaus, *supra* note 10, at 19.

<sup>57</sup> *Id.* at 19-20.

<sup>58</sup> See generally Sara J. Berman, *Integrating Performance Tests into Doctrinal Courses, Skills Courses, and Institutional Benchmark Testing: A Simple Way to Enhance Student Engagement While Furthering Assessment, Bar Passage, and Other ABA Accreditation Objectives*, 42 J. LEGAL PRO. 147 (2018).

<sup>59</sup> See generally DeFabritiis & Vinson, *supra* note 28.

<sup>60</sup> *Id.* at 131-32.

<sup>61</sup> *Id.* at 132.

- (3) “[F]ostering grit and growth mindset”<sup>62</sup> while addressing the “weaker critical reading, thinking, and writing skills” possessed by Generation Z.<sup>63</sup>
- (4) Improving students’ abilities to transfer skills across different learning environments by “helping students make connections and cueing them to previously learned skills.”<sup>64</sup>
- (5) Sending an early message that “law school places a priority on success on the bar exam and practice.”<sup>65</sup>

Bar exam expert Sara Berman identified some of these same benefits in her 2018 article about integrating performance tests into the law school curriculum.<sup>66</sup> But her article also includes a teacher-ready appendix of ten existing performance tests that professors can embed into doctrinal courses.<sup>67</sup>

## II. New Insight: The MPT Is a Turducken™

If current readers of this Article read the literature review in Part I, then they will know that viewing the MPT as both a test and a teaching tool is not new. We presented this old news in as tidy a list as we could. The new insight that this Article brings to the literature is that the “both/and” attributes of the MPT are better understood by appreciating the complementary layers of the MPT. From the outside a Turducken might look only like a turkey but knowing of the different layers within it allows the person consuming the Turducken to have an enhanced experience. We argue the same is true for the MPT.

At one layer, it is a decent legal writing assignment that simulates what new attorneys have to do in practice. That’s the everyday chicken part of the MPT. All those great features that Professor Darrow-Kleinhaus identified twenty years ago comprise the chicken. And the chicken is pretty great for teaching legal writing skills! But this layer is often engulfed by what we call the turkey layer—that the MPT is a timed test. Whatever else one might use the MPT for, the NCBE writes it to be part of the UBE. Its sole reason for existing is to test bar takers. As Section II.B elaborates below, the turkey layer of the MPT often compromises the very skills the MPT is designed to assess.

Criticisms of the MPT could fill the void between the turkey and the chicken. Instead, we suggest connecting the two with thoughtful teaching. That is where the duck layer comes in: a layer of pedagogy

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<sup>62</sup> *Id.* at 131, 134.

<sup>63</sup> *Id.* at 133.

<sup>64</sup> *Id.* at 135.

<sup>65</sup> *Id.* at 136.

<sup>66</sup> See Berman, *supra* note 58, at 149-53 (identifying how attorneys no longer need to have memorized the law, are more likely to encounter malleable than frozen facts, and need to be client-focused, among other things).

<sup>67</sup> *Id.* at 165-70.

that connects the other layers, providing rich teaching opportunities to keep the testing turkey from overwhelming the benefits of the legal writing chicken, allowing them to better complement each other.

### **A. Everyday Chicken: A Decent Legal Writing Assignment**

At its chicken core, the MPT seeks to mimic what a new attorney would be doing in practice: receiving an assignment from a supervising attorney, critically reading legal authorities and factual documents, identifying legal issues, analyzing those legal issues, and communicating that analysis to a legal audience.<sup>68</sup> It is meant to measure “whether new lawyers possess the competencies to be able to serve their clients well.”<sup>69</sup>

#### **1. The MPT Uses A Familiar “Closed Universe” Test Design**

The MPT packet, with its “closed universe” of factual documents and legal authorities,<sup>70</sup> is similar to “packets” that law students receive during their coursework. For example, in casebook courses, law students read edited cases and then apply the law from those cases to novel fact patterns during in-class questioning and exams. In legal writing courses, law students may be assigned edited or unedited legal authorities and then apply the law from those authorities to novel fact patterns and communicate their legal analyses in the form of a memo or brief. Law school coursework goes beyond these simple examples, but our point is that the MPT is asking bar takers to do basic things that they did in law school.<sup>71</sup>

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<sup>68</sup> See Nat’l Conf. of Bar Exam’rs, *Preparing for the MPT: Skills Tested*, NCBE (2021), <https://www.ncbex.org/exams/mpt/preparing/> [<https://perma.cc/AKR5-4T55>] (“These skills are tested by requiring examinees to perform one or more of a variety of lawyering tasks. For example, examinees might be instructed to complete any of the following: a memorandum to a supervising attorney, a letter to a client, a persuasive memorandum or brief, a statement of facts, a contract provision, a will, a counseling plan, a proposal for settlement or agreement, a discovery plan, a witness examination plan, or a closing argument.”); Nat’l Conf. of Bar Exam’rs, *Instructions for Taking the MPT*, NCBE (2016), <https://www.ncbex.org/pdfviewer/?file=/dmsdocument/53> [<https://perma.cc/MK42-5DRA>] [hereinafter MPT Instructions]; see also Berman, *supra* note 58, at 151 (noting “that bar examiners deem these tasks to be those that a beginning lawyer would be able to draft”).

<sup>69</sup> Smetanka, *supra* note 14, at 754; see also *id.* at 763.

<sup>70</sup> See MPT Instructions, *supra* note 68; ALEXA Z. CHEW & KATIE ROSE GUEST PRYAL, *THE COMPLETE BAR WRITER* 9, 11-12 (2020).

<sup>71</sup> CHEW & PRYAL, *supra* note 70, at 5.

## 2. The MPT Test Materials Are “Pretty Good”!

Overall, the MPT packets and materials are designed well. As discussed below in Section IV, there are ways that the MPT materials could be improved or expanded. But, as they are, our opinion is that they provide a pretty good simulated closed universe of factual documents and legal authorities for bar takers to use to demonstrate core analytical and professional communication skills. The subpoints below describe the good qualities of the MPT as a closed universe writing assignment.<sup>72</sup>

### a. Each Task’s Audience Is Usually Described And Consistent Across MPTS

In reading through the MPT packet, the bar taker must first discern what she is being asked to do, whom she needs to address as the audience, and what the purpose is of the communication that she will be writing. Because the MPT generally puts the bar taker in the position of being a new associate or staff attorney, or sometimes a law clerk to a judge, the task in the MPT will have a legally trained supervisor as one of the intended audiences. The bar taker will need to discern, though, whether her writing will also go to the client or an adjudicator and opposing counsel. In other words, the bar taker must decide whether the communication is internal or external. With the MPTs, however, even when the intended audience includes a client, the client is often an attorney seeking counsel. Thus, for the most part, the audience for any MPT task—be it the supervising attorney, a judge, or the client—is legally trained and can be presumed to have a foundational understanding of the law and legal terms. The audience for the MPT’s task rarely shifts significantly.

### b. Each Task’s Purpose Is Either Analysis-To-Conclusion Or Conclusion-To-Analysis

The fundamental question for determining what the bar taker must write is whether the purpose of the task is to analyze the law and facts to reach a conclusion or to analyze the law and facts with a particular conclusion already in mind. If the purpose is analysis-to-conclusion,<sup>73</sup> the bar taker will be writing in a style that is often referred to as “predictive” or “objective,”<sup>74</sup> assessing and presenting

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<sup>72</sup> *But see infra* Section II.B for a discussion of how the time constraints inhibit the MPT from being doable and compromise the very skills it is meant to assess.

<sup>73</sup> CHEW & PRYAL, *supra* note 70, at 26 (introducing the analysis-to-conclusion and the conclusion-to-analysis frameworks).

<sup>74</sup> This analysis-to-conclusion writing is legal analysis with a conclusion about what the law supports. Framing them as “objective” falsely supposes

the strengths and weaknesses of a case given the law and what is likely to be the outcome of the case. Usually, these analysis-to-conclusion genres are internal communications, like an intra-office memo, a client letter, or a bench memo, which may include recommendations or advice.

If the purpose is conclusion-to-analysis,<sup>75</sup> the bar taker is likely writing what will ultimately be an external communication to an adjudicator or opposing counsel or party, like a brief or demand letter. This conclusion-to-analysis purpose is often referred to as persuasive communication or advocacy, but it also may be implemented for judicial opinions and drafting of contracts or articles of incorporation. With the latter genres, which may be less familiar to the bar takers, identifying that the task is conclusion-to-analysis will help the bar taker know to start with the client or the supervising attorney's desired conclusion and draft the documents to support it.

### **c. Most Tasks Are A Familiar Genre: Office Memo Or Brief**

Although the assigning memo in the MPT may use a name for an underlying genre, like a demand letter or bench memo, that is unfamiliar to a bar taker, the MPT provides what the bar taker will need to determine what genre she should write. But most of the time, the bar taker will be asked to write an internal analysis-to-conclusion memorandum of law or the argument section of an external conclusion-to-analysis brief to an administrative, trial, or appellate court or adjudicator.<sup>76</sup> Other than a memorandum<sup>77</sup> or brief, the most common genre tested on the MPT is a letter. This letter could be an internal analysis-to-conclusion client or advice letter or an external conclusion-to-analysis demand letter. With all these more common legal writing genres,<sup>78</sup> the bar taker is likely to have practiced these genres in her first-year legal writing and research class, if not also in other classes, in internships, or as part of pro bono projects or extracurricular activities. These are the most common types of legal

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that there is some objective truth or that any of us are capable of being entirely objective. Neither is the analysis predictive of what a court will do or an adjudicator decide, which involves more than just what the law provides. See Kevin Bennardo, *Abandoning Predictions*, 16 LEGAL COMMUN & RHETORIC 39, 39 (2019); Joe Fore, *A Court Would Likely (60-75%) Find . . . : Defining Probability Expressions in Predictive Legal Analysis*, 16 LEGAL COMMUN & RHETORIC 49, 51 (2019).

<sup>75</sup> CHEW & PRYAL, *supra* note 70, at 26.

<sup>76</sup> *Id.* at 12-13.

<sup>77</sup> *Id.* at 23-24 (discussing how the MPT's use of "memorandum" is often meaningless because it is used to mean a variety of different document types hence why identifying audience and purpose become more important).

<sup>78</sup> *Id.* at 13 (giving an overview of the most commonly and most infrequently tested genres).



writing genres tested because they are the foundational legal document types that new attorneys have traditionally had to write once in practice.<sup>79</sup> The assigning memos thus provide little, if any, guidance as to how to write these genres.<sup>80</sup> Generally, one of these types of documents will account for at least one of the two MPTs included as part of the Uniform Bar Exam—and often both an analysis-to-conclusion memorandum and a conclusion-to-analysis argument section of a brief are tested.<sup>81</sup>

#### **d. Some Tasks Are Unfamiliar Genres, Like Contract Provisions Or Articles Of Incorporation**

Sometimes, the MPT requires that bar takers write a rarer genre, like contract provisions or articles of incorporation, which may require demonstrating a slightly different set of skills.<sup>82</sup> With these genres, the bar taker is likely less familiar with the genre. Usually, the MPT accommodates this lack of familiarity by providing a sample or description of the genre type.<sup>83</sup> Many of the skills assessed with the rare genres overlap with the skills assessed with the more common genres. The bar taker must still discern the audience and purpose of the document and keep her client's goals at the forefront. She must still identify and analyze the legal and factual issues and communicate her analysis or explanation clearly and coherently.

But drafting or revising contract provisions or articles of incorporation, among other types of documents, also prioritize other skills and test skills in a different way. These documents will mostly be conclusion-to-analysis in the sense that the bar taker must draft with a specific outcome in mind. However, with these genres, bar takers do not write one contiguous document. Rather, the bar taker

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<sup>79</sup> See MERRITT & CORNETT, *supra* note 29, at 51 (providing survey responses from practicing attorneys attesting that they often need to write analytical memos to their supervisors but that email communications were replacing the traditional office memo); see also Brad Desnoyer, *E-Memos 2.0: An Empirical Study of How Attorneys Write*, 25 LEGAL WRITING 213, 214-15 (2021) (emphasizing that e-memos are now the “practicing lawyer’s primary means of communicating legal analysis” and that they have succeeded the “traditional legal memorandum” because they are “quicker, leaner, and cheaper” but still thorough analytically).

<sup>80</sup> CHEW & PRYAL, *supra* note 70, at 22.

<sup>81</sup> *Id.* at 9, 12-13.

<sup>82</sup> *Id.* at 12-13.

<sup>83</sup> See, e.g., NAT’L CONF. OF BAR. EXAM’RS, Task Memo in MPT-2 of the July 2018 UBE, *Rugby Owners & Players Ass’n*, in *July 2018 MPTs and Points Sheets* (on file with the authors). The task is to write a draft of articles of association. The task memo asks bar takers to “please use the following format, as illustrated below.” The requested format is described using three bullet points, and then followed by an example of a short article of association.

must write or revise several discrete provisions for the contract or the articles.<sup>84</sup> Then, the bar taker must explain how and why those changes are recommended given the law and the client's objectives.<sup>85</sup> This puts a greater emphasis on using the Library and the File to determine which words to best incorporate in her analysis and thus best serve the client. Selecting words and structuring sentences precisely is of a greater importance. Conversely, the organization of a document as a whole and how it flows would not be as important, although the explanation following each drafting recommendation would still use a standard legal writing organization of having law before fact (e.g., C-RAC<sup>86</sup>). The bar taker must also account for how the proposed provisions and modifications affect the entire contract or articles of incorporation.

### e. Legal Authorities Are Used In Familiar Ways

Because the Library contains the entire universe of applicable law, weighing the authorities is required. The packet is small<sup>87</sup> so bar takers cannot do too much, but they can still assess the weight of the included authorities depending on the type of authority, geographic jurisdiction (a fictitious one), recency, and level of deciding court. Most MPT packets include some statutory rules or regulations and some case law—both binding and nonbinding.<sup>88</sup> The bar taker must evaluate and synthesize the law in these authorities to identify the

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<sup>84</sup> Examples of these types of tasks are MPT-2 July 2018, *Rugby Owners & Players Ass'n* (draft articles of association), and MPT-2 July 2013, *Palindrome Recording Contract* (redraft contract provisions) (on file with the authors). See *supra* note 83.

<sup>85</sup> For example, see MPT-2 of the July 2018 UBE: "Provide an explanation for why you drafted each the way you did (including, if appropriate, brief citations). In each of your explanations, you should take into account the clients' goals, the governing law, and the advantages and disadvantages of your recommendations. Your explanations are important, as I will use them as a basis for advising the clients as to the choices made." See *supra* note 83.

<sup>86</sup> C-RAC, shorthand for Conclusion-Rule-Application-Conclusion, denotes having conclusions precede and follow the analysis and organizing the analysis with the law before facts or rules before application. Variations of C-RAC are used throughout legal writing programs and instruction, like CREAC (emphasizing the explanation part of the rule) and TREAC (Thesis-Rule-Explanation-Application-Conclusion). See CHEW & PRYAL, *supra* note 70, at 5.

<sup>87</sup> In our review of MPTs from 1997 to present, a packet for one 90-minute MPT test generally ranged from 14 to 22 pages.

<sup>88</sup> See, for example, the Library in MPT-1 from July 2018, which includes a statute section, a rule of criminal procedure, a rule of evidence, one high court case, and one intermediate appellate court case. NAT'L CONF. OF BAR. EXAMINERS, *State v. Hale*, in *July 2018 MPTs and Points Sheets* (on file with the authors).

relevant legal rules and frame the relevant legal theories.<sup>89</sup> While the accuracy of citation format is not a skill assessed on the MPT,<sup>90</sup> the bar taker would need to demonstrate her competency in supporting her legal analysis by including at least a shorthand citation for the source of all statements of law—and occasionally to the factual evidence.

#### **f. The Facts Map Onto The Law**

Using the factual documents from the File, the bar taker will need to identify the relevant facts, evaluate those facts, and incorporate those facts into the analysis, aligning those facts with the rule statements.<sup>91</sup> As needed, the bar taker should<sup>92</sup> also further develop her legal theories and statements of law by deciding where rule examples (case illustrations) are needed to show how the law has been applied in the past. She must provide the essential facts in these examples to set up analogies. In her analysis, the bar taker must also address counterarguments or explain and contextualize weaknesses. As part of this analysis, the bar taker is deciding which legal issues require more in-depth treatment and which ones can be handled more quickly or even disposed of as given or uncontroverted.

#### **g. You've Got To Be Organized**

More significantly, though, for the purposes of the MPT, the bar taker must employ her skills related to organizing and managing a

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<sup>89</sup> See MPT Skills Tested, *supra* note 34.

<sup>90</sup> See MPT Instructions, *supra* note 68 (“In citing cases from the Library, you may use abbreviations and omit page references.”).

<sup>91</sup> See, e.g., NAT'L CONF. OF BAR. EXAM'RS, MPT Point Sheet for the February 2009 MPT-2, *Ronald v. Dep't of Motor Vehicles*, in *February 2009 MPTs and Point Sheets* <https://www.ncbex.org/dmsdocument/42> [<https://perma.cc/46R3-J6WC>] (instructing bar graders that “[a]pplicants are instructed not to draft a statement of facts” but that they are to “incorporate the relevant facts into their arguments”); NAT'L CONF. OF BAR. EXAM'RS, MPT Point Sheet for the February 2016 MPT-1, *In re Anderson*, in *February 2016 MPTs and Point Sheets*, <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F293> [<https://perma.cc/5874-U8B2>] (on file with the authors) (instructing bar graders that “examinees are instructed not to prepare a separate statement of facts but to be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect their analyses”).

<sup>92</sup> To be transparent, we are describing what we have inferred the MPT requires of test takers. These inferences come from our analysis of the MPT's Point Sheets and the NCBE's published statements about the MPT. However, as will be discussed, the MPT is graded by graders who themselves are often time pressured and who will bring their own analysis and writing preferences to the grading. There is no uniform grading rubric or scoring sheet that all MPT graders must adhere to.

legal task. The MPT assesses a bar taker’s ability to “allocate time, effort, and resources efficiently” and to “perform and complete tasks within time constraints.”<sup>93</sup> Bar takers must:

- read through the MPT’s File and the Library;
- identify the genre of the document they are to write;
- identify and analyze legal and factual issues; and
- organize and write a clear, concise, and precise document that accomplishes the assigned goals.

Being strategic when proceeding through these tasks to maximize the short time allotted are key to being successful on the MPTs—and in many parts of law practice. As we will discuss below, though, the time constraint imposed on the MPT can also undermine the very legal writing and lawyering skills sought to be assessed.

In these ways, the MPT assesses and mirrors law school’s learning objectives for legal writing and practical lawyering skills. It is the portion of the Uniform Bar Exam that most closely tests foundational legal writing and communication skills. It is not a test of substantive law but rather one’s ability to problem solve, analyze, and synthesize unfamiliar legal authorities, analyze and apply a set of facts to that law, identify ethical dilemmas and respond to a client’s needs, discern a task from a supervisor, and communicate clearly and professionally. These lawyering tasks are only one layer of the MPT, though.

### **B. Special Occasion Turkey: Test of Minimal Competence at Speed**

As well designed as the MPT’s chicken core is, it is often subsumed by the turkey layer. That is, the legal writing assignment aspect of the MPT cannot be fully realized because of the timed test. As a result, the MPT doesn’t test what it says it tests: foundational lawyering skills. Instead, it tests “minimal competence” at high speed.

Writing the MPT answer conflicts with and subverts legal writing and lawyering objectives and principles.<sup>94</sup> It also can disrupt the writing process, thereby disadvantaging some students and

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<sup>93</sup> See MPT Skills Tested, *supra* note 34.

<sup>94</sup> In addition to the skills discussed in this Section, the MPT only minimally assesses some of the skills it claims to assess, such as organization of task and task management. The bar taker has to do these to some extent, but the tasks are discrete, and the time is so short that a bar taker is likely not organizing or managing the task too deliberately. As is discussed *infra* in Section III.C, bar takers may benefit from the test-taking strategy of developing individualized plans of approach, which may facilitate then how they organize and manage the task. The goal of teaching such a strategy, however, is for the steps in one’s plan of approach to become automatic enough that the bar taker does not need to spend much time on it during the test and can focus instead on the substantive analysis and its organization.

workstyles.<sup>95</sup> These sacrifices arise out of the tight time constraint and test conditions. After all, the MPT is a high-stakes standardized test—offered only twice a year on the special occasion of the bar exam. Rather than being about legal writing or analysis, at the turkey layer, the MPT becomes about time and taking the test.

### 1. Turkey Features: Time Constraint, Unknown Bar Grader, “Minimal Competence”

Bar takers have ninety minutes to complete each MPT. The problems are tailored to assess bar takers’ analytical and lawyerly skills efficiently and in a block of time reasonable for a standardized test. (Neither bar takers nor proctors want to engage in testing for much longer than they already do.) This time constraint is also justified by the value the profession puts on working fast under pressure.<sup>96</sup> But working efficiently and managing time well in legal

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<sup>95</sup> As is discussed later in this section, *see infra* pp. 20-26, students who need more time to process, organize, or type are especially disadvantaged.

<sup>96</sup> One need only look to the many articles discussing attorney burnout and impoverished mental health in attorneys due to the high workloads, long hours, and intense demands to see how the legal profession places a premium on working expeditiously under pressure. *See, e.g., Lawyers Stress: How Can a Lawyer Manage the Stress*, THE LAW PRACTICE DOCTOR (2018), <http://www.thelawpracticedoctor.com/lawyers-stress-how-can-lawyer-manage-stress/> [<https://perma.cc/JC6Y-72KQ>]; Kate Mangan, *How to Recognize and Prevent Lawyer Burnout*, LAWYERIST (Aug. 1, 2019), <https://lawyerist.com/blog/recognize-prevent-lawyer-burnout/> [<https://perma.cc/9GNJ-FR3B>]; Leigh McMullan Abramson, *The Only Job With an Industry Devoted to Helping People Quit*, THE ATLANTIC (July 29, 2014), <https://www.theatlantic.com/business/archive/2014/07/the-only-job-with-an-industry-devoted-to-helping-people-quit/375199/> [<https://perma.cc/JP5D-DW5V>].

Another consideration is that some bar takers receive disability accommodations that extend the time that they have to complete the MPT. For example, an accommodation of “double time” turns a three-hour assessment into a six-hour assessment. Disability accommodations are notoriously difficult to obtain from bar examiners, which could suggest that the MPT is not written with accessibility in mind. *See generally* Morton Ann Gernsbacher, Raechel N. Soicher & Kathryn A. Becker-Blease, *Four Empirically Based Reasons Not to Administer Time-Limited Tests*, 6 TRANSLATIONAL ISSUES IN PSYCHOLOGICAL ISSUES IN PSYCH. SCI. 175, 179-81 (2020) (discussing how timed tests are not equitable and how they disadvantage those with disabilities, particularly those whose disabilities may not be diagnosed or when the stigma of having a disability keeps someone from disclosing it or seeking an accommodation); ADA, NAT’L NETWORK: INFO., GUIDANCE & TRAINING ON THE AMS. WITH DISABILITIES ACT, EXAMS & COURSES, <https://adata.org/> [<https://perma.cc/35SY-MQJ8>]; William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L.

practice (or on untimed writing assignments in law school) are different than the speed required for a timed test.<sup>97</sup>

Along with the time constraint, the MPT has the bar grader as its ultimate audience. Regardless of who the audience is for the assigned task, like a supervising attorney, client, or judge, the bar taker knows that the bar grader is the true audience. In that way, the MPT, as a genre, has its own conventions and purpose that have to always be part of the bar taker's process when she is deciding how to organize her answer, what issues she will handle, and how she prioritizes where to spend her time. Accordingly, the bar taker would do well to strategically choose what may give her the most points for any answer—and what gives her the most points may not align with legal writing or lawyering objectives for practice beyond the bar exam.

What may be lost with the tight time constraint and by the MPT being a graded test is offset by the bar exam's requiring only minimal competency to pass. This lower threshold for passing accounts for the time constraint and recognizes that bar takers with more time would be able to spot and analyze more issues, better organize their answers, and polish their work. It recognizes that the MPT is thus a rough or 80% draft<sup>98</sup> (or less) of what the finished product would be if the bar taker were completing this assignment in practice. This balance of high speed and minimal competency thus provides an efficient way to measure one's preparedness to practice law, at least for those who are skilled test takers or quick thinkers, who type quickly, and who do not have disabilities or test-anxieties.<sup>99</sup>

However, though these characteristics are practical for a standardized exam, they send a message that licensure rests on being minimally competent but speedy.<sup>100</sup> While the MPT is the part of the bar exam most closely aligned with measuring the skills needed for practice, it also—like the other portions of the bar exam—

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REV. 975 (2004); Stuart Duhl & Gregory M. Duhl, *Testing Applicants with Disabilities*, 73 BAR EXAM'R 7 (Feb. 2004).

<sup>97</sup> See DeFabritiis & Vinson, *supra* note 28, at 138.

<sup>98</sup> CHEW & PRYAL, *supra* note 70, at 139 (discussing the eighty percent draft). Aiming for an 80% draft helps bar takers maximize their time and relieve themselves of any perfectionist tendencies during the exam. It's also a good model for other writing and work too—usually it feels easier to aim for an 80% draft than a 100% draft. See *id.* Both authors often had the 80% draft as a goal in the early phases of writing this piece.

<sup>99</sup> See *supra* note 77 and the discussion *infra* in the following section.

<sup>100</sup> “Minimal competence” is not, of course, what clients seek in their attorneys. Nor is it what law schools generally emphasize in their curriculums. Indeed, this idea of “minimal competency” is incompatible with many of the ethical obligations that attorneys are meant to be held to. Whether they are held to these standards is beyond the scope of this article, but here are a few recent pieces that describe the weak enforcement of professional responsibility standards and incompetent counsel.

disadvantages some types of learners and bar takers<sup>101</sup> and compromises other skills that are also equally important for legal writing and professional communication.

## **2. Speed Is A Lawyering Value, But An Overvalued One**

The time constraint on the MPT is often justified by pointing out that a lawyer needs to be able to act and respond quickly to meet the needs of a client, supervisor, or court in a fast-paced society.<sup>102</sup> However, speed as a necessary lawyerly skill is overvalued<sup>103</sup> and the emphasis of speed as justification for the time constraint on the MPT is misplaced. Moreover, the premium placed on speed in law school admissions testing, in law school exams, as well as on the bar exam—falsely equates speedy test-taking with the ability to think and argue on a moment's notice. This Section first explores how thinking like a lawyer requires both intuitive and deliberative thinking. It then identifies how too often only fast intuitive thinking is assessed and used for law school admissions, grades, and the bar exam.

### **a. Thinking Like a Lawyer: Quickly but Critically**

Legal education aims to train law students to think like lawyers, which means being able to think critically—and quickly. The ability to think on one's feet “in the courtroom and the boardroom with quick reactions, rapid responses, and on-the-spot decisions” is highly valued in the legal profession.<sup>104</sup> Lawyers also have to respond quickly to clients and give advice “without the benefit of any research or reflection.”<sup>105</sup> There are high workloads and deadlines, “so there is plenty of incentive for sound fast thinking” as well as being able to “make arguments and defend positions on short notice” and “respond

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<sup>101</sup> See *supra* notes 95-96; see also Gernsbacher, Soicher & Becker-Blease, *supra* note 96 at 178-81 (discussing how timed-tests are less inclusive and less equitable and how some test takers who have accommodations do not so much need the extra time as they need to take a test without the pressure of knowing the clock is ticking).

<sup>102</sup> See, e.g., SARA J. BERMAN, BAR EXAM MPT PREPARATION & EXPERIENTIAL LEARNING FOR LAW STUDENTS 22 (2d ed. 2021) (acknowledging that law practice might not “obligate attorneys to achieve the rapid turnaround of work product” required by the MPT, but asserting that nevertheless today’s attorney “will likely have to act and react very quickly on many occasions” and thus, the MPTs are “tremendously useful learning tools”); see also DeFabritiis & Vinson, *supra* note 28, at 120-21 (“While it is true that the practice of law does not obligate attorneys to produce a polished product in 90 minutes, equally true is that attorneys in today’s fast-paced society must react quickly to client demands.”).

<sup>103</sup> See, e.g., Henderson, *supra* note 96, at 1037-38.

<sup>104</sup> Mark K. Dickson, *Fast - and Slow - Thinking*, 11 LANDSLIDE 1, 1 (2018).

<sup>105</sup> Henderson, *supra* note 96, at 1035.

quickly and coolly with precision and logic.”<sup>106</sup> The keys here are “*sound* fast thinking” and responding with “*precision and logic*.” Thinking critically and thinking quickly don’t have to be diametrically opposed. Both are important for a lawyer and doing both takes training and practice.

As described by psychologist Daniel Kahneman, people engage in two types of thinking: fast thinking, which is intuitive and automatic, and slow thinking, which is deliberative and effortful.<sup>107</sup> Both are important—and important in the practice of law. The first is what enables lawyers to make quick decisions under high pressure situations, but this thinking often relies on biases and stereotypes and can make one prone to errors.<sup>108</sup> Slow reflective thinking, by contrast, allows for more cautious, measured, and methodical processing, useful for tasks like making policy decisions, developing a case strategy, or writing an argument.<sup>109</sup> It requires sustained attention and might not be so helpful at moments of high stress.<sup>110</sup> Engaging in both types of thinking, when appropriate, minimizes the potential risks of thinking in only one way in isolation, and thus both types of thinking should be valued.

Much of what becomes a person’s intuitive thinking is thinking that is practiced enough to become automatic. Thus, an experienced attorney might give advice to a client in the moment and an experienced litigator might make decisions on the fly. This fast thinking is not an innate instinct, but knowledge built and refined through repetition over time.<sup>111</sup>

Legal education is meant to help students develop these two types of thinking through repetition. Let’s use the Socratic method as an

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<sup>106</sup> See Dickson, *supra* note 104; see also Henderson, *supra* note 96, at 1035 (“Lawyers bill by the hour. They are also occasionally pressed by clients to provide immediate legal advice over the phone without the benefit of any research or reflection. An objection to an evidentiary issue cannot be the subject of an appeal unless it has been *timely* raised before the trial court. Similarly, appellate judges pride themselves on raising novel and unexpected issues during oral argument.”).

<sup>107</sup> Daniel Kahneman, THINKING, FAST AND SLOW 20-21 & *passim* (2011).

<sup>108</sup> See Dickson, *supra* note 104, at 1; Jasmine T. Akbarali, *Why Lawyers Need to Think about Their Thinking*, OSGOODE PRO. DEV. (Apr. 11, 2016) <https://osgoodepd.ca/blog/lawyers-need-think-thinking/> [<https://perma.cc/9MET-ZWU8>].

<sup>109</sup> See Dickson, *supra* note 104, at 1; Akbarali, *supra* note 108.

<sup>110</sup> See Dickson, *supra* note 104, at 1.

<sup>111</sup> See Marybeth Herald, *Your Brain, Law School, and Law Practice: The Lure of Truthiness*, Ms. JD (May 5, 2016), <https://ms-jd.org/blog/article/your-brain-law-school-and-law-practice-the-lure-of-truthiness> [<https://perma.cc/MK3F-CE7Q>]; see also DeFabritiis & Vinson, *supra* note 28, at 138 (advocating that practice with the MPT or other time-pressured writing will help law students get comfortable being pushed beyond their comfort zones and with working speedily).



example. Fundamentally, the Socratic method of teaching is designed to move students beyond instinct by challenging their initial answers with more questions, thereby requiring them to stop a moment and consider “the reasoning and consequences of the rules.”<sup>112</sup> When students are “forced to articulate the reasoning behind a position, simple inconsistencies or gaping holes in reasoning may be exposed because relevant factors or long term issues have not been considered.”<sup>113</sup> The Socratic method, in this light, becomes about training students to “inject” deliberative thinking into their intuition.<sup>114</sup>

However, this duality in how lawyers need to be able to think is sometimes lost through a premium being placed on fast thinking and speedy processing.

### **b. A Misplaced Premium on Speed**

Beginning with admissions testing and extending through the bar exam, legal education places a premium on speedy processing—and at least in the case of the MPT part of the bar exam, we argue this need for speed de-values essential lawyering skills. The value placed on speedy processing caught the attention of Malcolm Gladwell, who critiqued how much it is valued in his Revisionist History podcast.<sup>115</sup> In focusing on the Law School Admissions Test (LSAT), Gladwell observes that timed tests like the LSAT favor fast thinkers—or hares—over slower thinkers—or tortoises.<sup>116</sup> Those who score the highest on the LSAT are those who can answer the most correct answers quickly. Others who need more time to consider their answers may not fare as

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<sup>112</sup> Herald, *supra* note 111.

<sup>113</sup> *Id.*

<sup>114</sup> See *id.*; see also Susan L. Brooks, *Fostering Wholehearted Lawyers: Practical Guidance for Supporting Law Students' Professional Identity Formation*, 14 U. ST. THOMAS L.J. 412, 427 (2018) (discussing how it has been shown through Daniel Kahneman’s work “that the expectation of thinking fast actually does a disservice” to our students).

<sup>115</sup> Malcolm Gladwell, *Revisionist History: Puzzle Rush*, PUSHKIN, <https://www.pushkin.fm/episode/puzzle-rush/> [<https://perma.cc/3SK3-HK8B>] (hereinafter *Puzzle Rush*); *id.*, *The Tortoise and the Hare*, <https://www.pushkin.fm/episode/the-tortoise-and-the-hare/> [<https://perma.cc/YU8R-JC3A>] (hereinafter *Tortoise and the Hare*); see also Henderson, *supra* note 96, at 1037-38.

<sup>116</sup> Gladwell, *Puzzle Rush*, *supra* note 115; Gladwell, *Tortoise and the Hare*, *supra* note 115; see also Jennifer Jolly-Ryan, *The Fable of the Timed and Flagged LSAT: Do Law School Admissions Committees Want the Tortoise or the Hare?*, SSRN (Apr. 12, 2007), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=979590](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=979590) [<https://perma.cc/X7UK-SMRT>].

well.<sup>117</sup> The cycle perpetuates itself. Elite law schools accept only those with the highest LSAT scores, and law school ranking is closely aligned with the schools' median LSAT scores.<sup>118</sup> As Gladwell points out in these podcasts, the Supreme Court and Circuit Courts of Appeal largely only accept as clerks those who went to the most elite law schools<sup>119</sup> and these are then the people who are most valued in the profession, becoming the next round of judges, leaders in big law firms, and prestigious faculty in law schools.<sup>120</sup> Even if Gladwell's argument oversimplifies things, what he observes about the LSAT can also be seen in the ways many law school classes and exams are conducted—as well as the bar exam. This repetition demonstrates ways the profession values fast intuitive thinking and speedy processing over slower deliberative thinking.

Although, as discussed above, the goal in the legal classroom might be to help students inject deliberative thinking into their intuition, fast automatic thinking is nevertheless often prioritized and overly rewarded. The practice of cold calling that often accompanies the use of the Socratic method in law school classes requires that students think quickly in front of a crowd,<sup>121</sup> leading to the social reward of not being embarrassed if they can answer correctly in a second's time.<sup>122</sup> But students who, with a little more time to process the question could answer correctly and perhaps in a more nuanced

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<sup>117</sup> See generally Gladwell, *Puzzle Rush*, *supra* note 115; Gladwell, *Tortoise and the Hare*, *supra* note 115.

<sup>118</sup> See Gladwell, *Tortoise and the Hare*, *supra* note 115, at 27:48 *et seq.*

<sup>119</sup> Gladwell's podcast also points out, however, that Justice Antonin Scalia acknowledged that his best law clerk was one who would have been a tortoise by Gladwell's description: the law clerk was the best because he deliberately thought through all the angles and nuances for every issue before the Supreme Court. Gladwell, *Tortoise and the Hare*, *supra* note 115, at 5:35 *et seq.*

<sup>120</sup> *Id.* Gladwell's popular podcast aligns with critical views of the legal profession's unhealthy focus on elite credentials and easy heuristics. For example, he discusses the damage of elite credentials and how this unhealthy cycle perpetuates sameness, excludes diverse viewpoints, and artificially limits access to the legal profession. With respect to easy heuristics, the easy admissions heuristics are LSAT score and undergraduate GPA, which also drive the U.S. News and World Report rankings, which in turn drive many law school budgeting decisions. And overreliance on easy heuristics is not limited to admissions—scores of articles have been written about law professors' use of "article placement" as a proxy for "article quality," although whether that overreliance is a result of laziness or inability to identify "good" scholarship is an open question.

<sup>121</sup> See Brooks, *supra* note 114, at 427 ("Many of us and our students expect law school classrooms to be places of high tension and rapid-fire activity in which students are trained to think on their feet.").

<sup>122</sup> Is this the right reward? We don't think so, but it is what it is.

way, are often made to feel inadequate, because they are not given adequate time.<sup>123</sup>

However, even if students' training in the classroom is balanced, most law school exams still favor speed over deliberation. Most law school courses have only one summative assessment at the end of the semester that accounts for a student's entire grade in the course.<sup>124</sup> These exams are usually testing how well the student identifies the issues and, frequently, the number of issues to be identified cannot be thoroughly analyzed in the three hours allotted for an exam. As a result, the exam grade reflects the ability to process quickly and make quick automatic associations.<sup>125</sup> These exams also reward those who type quickly.<sup>126</sup> A student who analyzes fewer issues has fewer opportunities to earn points. Similarly, the legal writing aspect of exams is often devalued—a well written exam rarely earns a student many points.

These issue-spotting exams are also at odds with the goals of teaching students to analyze thoroughly and respond soundly. For example, analysis done in three hours is unlikely to be the level of analysis that a supervising attorney would want from a new associate, and rarely would a new associate be expected to engage in this kind of analysis on such a short timeline.<sup>127</sup> By contrast, a supervising attorney would expect “a polished appellate brief or motion for

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<sup>123</sup> See, e.g., Kaci Bishop, *Framing Failure in the Legal Classroom: Techniques for Encouraging Growth and Resiliency*, 70 ARK. L. REV. 959, 994-95 (2018); A. Rachel Camp, *Creating Space for Silence in Law School Collaborations*, 65 J. LEGAL EDUC. 897, 899-900, 908-09 n.67 (2016).

<sup>124</sup> See, e.g., Bishop, *supra* note 123, at 982; see also Corie Rosen, *The Method and The Message*, 12 NEV. L.J. 160, 177 (2011).

<sup>125</sup> The MPT provides one model for how professors could modify their final exams “to familiarize students with the format they will encounter in the MPT” and to replicate more what skills their students will need for practice. See Smetanka, *supra* note 14, at 756-57. Many first-year legal writing classes do use a closed universe packet like the MPT for their final assessments. See, e.g., John D. Schunk, *Can Legal Writing Programs Benefit from Evaluating Student Writing Using Single-Submission, Semester-Ending, Standardized, Performance-Type Assignments?* 29 HAMLIN L. REV. 307, 308-09 (2006) (discussing the benefits of doing so). But non-legal writing classes could also adapt their exams to such a format. See Smetanka, *supra* note 14, at 756-57; see also DeFabritiis & Vinson, *supra* note 28, *passim*.

<sup>126</sup> See Henderson, *supra* note 96; see also Kif Augustine-Adams Candace Berrett & James R. Rasband, *Speed Matters*, 61 HOWARD L.J. 239, 243 (2018).

<sup>127</sup> See Henderson, *supra* note 96, at 1035-36 (discussing a hypothetical situation in which a supervising attorney assigns a junior associate a legal memo, which after three hours is only a snapshot of a work in progress).

summary judgment [to be] written over a period of weeks or months.”<sup>128</sup>

Given the value of speed on both the LSAT and most law school exams, it makes sense that the LSAT is a predictor of law school grades.<sup>129</sup> When students are given more time to analyze issues, however, like on take-home exams, the LSAT is less of a predictor.<sup>130</sup> This demonstrates how speed is valued over deliberation and belies the efficacy of having a tight time constraint on the bar exam, including the MPT.<sup>131</sup>

Although the MPT does not connect directly to the LSAT or to law school exams, it similarly values being able to think quickly in a test setting.<sup>132</sup> Both intuitive and deliberative thinking are important for the MPT as is “process[ing] information effectively, especially while taking long and arduous standardized exams.”<sup>133</sup> Intuitive thinking “allows for speed and rapid assessment, but it is highly error-prone and susceptible to our own biases,” while deliberative thinking “gives us precision, but is tiring and slow.”<sup>134</sup> But as will be discussed in Section IV below, a bar taker’s ability to engage in each of these kinds of thinking could be better assessed with more time. As is, the MPT places too much value on speed, meaning that those who can process quickly with fewer mistakes—and type quickly—will score better on

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<sup>128</sup> See *id.* at 1035 n.177, 1038 (emphasizing that the legal “academy’s current emphasis on time-pressured testing methods (both for admission and for grading) may lack both a theoretical and an empirical justification”).

<sup>129</sup> See *id.* at 1043.

<sup>130</sup> See *id.* (noting that a professor who gave one section a three-hour in-class exam and another section of the same class a take-home exam observed a wider grade distribution in the section that had the shorter in-class exam).

<sup>131</sup> Whether the legal profession should be so fast-paced is a worthy question that this Article does not address. We recognize for now, at least, that working under time constraints and in a fast-paced practice are the norm in law—and thus appropriately something legal education should be helping law students prepare for. However, as we discuss in the Serving Suggestion section, *infra*, there are better ways to test the time management aspect of law practice without sacrificing some of the other key skills needed to be effective in practice.

<sup>132</sup> We echo the question raised by others as to whether “test-taking speed is related to lawyer efficiency.” See, e.g., Andrea A. Curcio, Carol L. Chomsky & Eileen Kaufman, *Testing, Diversity, and Merit: A Reply to Dan Subotnik and Others*, 9 U. MASS. L. REV. 206, 238 (2014); Henderson, *supra* note 96, at 1035 (analyzing how the “time facility” needed to do well on the LSAT and other timed tests diverges from the efficiency and speed valued in practice, namely: “(1) efficiency in generating a quality written work product, and (2) intellectual agility or quickness in a verbal exchange, such as an oral argument”).

<sup>133</sup> Ashwin, *My Essential Strategy Checklist on Standardized Tests*, CAMBRIDGE COACHING, <http://blog.cambridgecoaching.com/my-essential-strategy-checklist-on-standardized-tests> [<https://perma.cc/7Q9T-3R4D>].

<sup>134</sup> *Id.*

the MPT. But those who need a little more time or to slow down to effectively compose an answer will not fare as well. While the time constraint is balanced by only requiring minimal competency—discussed below— and by bar graders being generous in their grading,<sup>135</sup> the time constraint not only conveys that the profession prioritizes speed but also means that legal writing skills are compromised.

### **3. Testing “Minimal Competence” With A Speeded Test Subverts Good Legal Writing Skills**

To some extent, all the legal writing objectives and skills discussed above in the Everyday Chicken Section are compromised because few bar takers can execute all of them in the ninety minutes allotted to each MPT.<sup>136</sup> Indeed, most bar takers taking their first MPTs will not finish their answers,<sup>137</sup> leaving out essential portions, like applying the law to the facts of the case. Some skills are more often undermined, however. While it may make sense to deprioritize some skills for the purposes of the bar exam, the risk is that best practices will be sacrificed beyond the exam.

Most significantly, deliberative thinking is sacrificed. Bar takers must quickly read, process, and respond to the problem and the prompt; they do not have time to reflect on the material or engage with it deliberatively, only reactively. Compromising deliberative thinking inherently compromises how effective the bar takers' legal writing will be. But other legal writing skills are also compromised: some by the tight time constraint and others by how the MPT is designed, edited, and tailored to fit into the ninety-minute block of time.

#### **a. Compromised Skill: Blending Law and Fact**

Many bar takers will not have time to blend law and fact in headings, conclusions, and in the traditional office memoranda: the Questions Presented and Brief Answers. While someone who processes and types quickly may be able to add in one to three

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<sup>135</sup> See *infra* Section V. Serving Suggestions: Making the MPT Better, for a discussion on minimal competency and bar grading.

<sup>136</sup> Curcio, *supra* note 26, at 378 (commenting that, although designed to address some of the deficiencies in the bar essays and to test more accurately the skills that attorneys will need for practice, the MPT does not provide a realistic measure of these skills because of the extremely short time constraint).

<sup>137</sup> See Curcio, *supra* note 26, at 379 (noting that most bar takers taking the MPT for the first time cannot complete the test in the allotted time); Smetanka, *supra* note 14, at 757 (noting that many bar takers struggled with the time constraints).

determinative facts to their point headings and sub-headings,<sup>138</sup> many bar takers will have to use their time for the primary analysis. They may be able to note that their future selves should add facts to headings if time allows, but too often time will not allow. Those bar takers do not have time to revise their first drafts and fill in the facts after writing the rest of the answer. Blending the facts with the law in the heading is an advocacy best practice, but given the time constraint of the MPT, any heading at all is probably a success.<sup>139</sup>

### **b. Compromised Skill: Counterarguments**

The opportunity to address counterarguments is limited. Although bar takers are instructed in most MPTs to address any counterarguments or weaknesses, many will not have time to address them. The counterarguments included in the MPTs usually don't require bar takers to grapple with any complicated analysis<sup>140</sup>; there might be a case or two that encompass the other side of the law or what would favor the opposing counsel's case, but these cases are readily distinguishable from the client's case. But with the tight time constraint, many bar takers are pressed to affirmatively address all the issues; they run out of time before they can handle even these straightforward counterarguments or to even describe any unfavorable precedent much less distinguish their client's case from it.

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<sup>138</sup> CHEW & PRYAL, *supra* note 70, at 147-49 (explaining conclusion headings and incomplete headings).

<sup>139</sup> Occasionally, particularly with more recent MPTs, the assigning task memo may instruct bar takers to blend law and fact in the headings. For example, these instructions were included in the MPT-1 from July 2017 *Peek v. Stern* MPT, in *July 2017 MPTs and Points Sheets*, NAT'L CONF. OF B. EXAM'RS (on file with the authors):

The argument headings should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example: Improper: Plaintiff has satisfied the exhaustion of administrative remedies requirement. Proper: Where Plaintiff requested an administrative hearing by timely completing Form 3B, but the prison has refused to schedule a hearing, Plaintiff has satisfied the exhaustion of remedies requirement.

This example is helpful even if clunky, but it's buried in the task memo with the examples as included in the text of the paragraph rather than separated out visually, which means, as an instruction, it may be missed.

<sup>140</sup> Absent from the MPT is the chance to navigate law or a corresponding argument that is murkier, less certain, and that does not align as closely with one's client's facts.

### c. Compromised Skills: Weighing and Citing Authorities

That the MPT is a timed test also disturbs the need to properly use authorities. The MPT packets are closed universes: they provide all the law needed to complete the task assigned and analyze the issues presented. While bar takers need to assess the weight of each authority, including whether it is binding in the jurisdiction and its primacy and recency, they have relatively few authorities to assess. And because the packets are narrowly tailored, all the authorities are needed to complete an MPT task. Thus, bar takers only need to engage in assessing the weight of the authorities on a limited basis.<sup>141</sup>

The authorities included within the authorities provided (i.e., internal citations) are also considered to be part of the authorities in the closed universe, and bar takers can use them as though they have read them rather than only having read what the opinions they have in the MPT pack say about those cases.<sup>142</sup> This way of using authorities might make sense on a timed exam but may reinforce—or at least not correct—lackadaisical research habits.

Moreover, while citing the authorities is encouraged, bar takers are informed in the MPT instructions that they may use abbreviations and need not worry about citing to specific pages.<sup>143</sup> Given the time constraints for the MPT, bar takers should not have to worry about the form or format of their citations. However, the lack of precision required in citing authorities on the MPT perpetuates the notion that citations are merely about formatting as opposed to an integral part of the analysis and argument.<sup>144</sup>

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<sup>141</sup> For example, in July 2019, bar takers were tasked with writing two memos—one for MPT-1, *American Electric v. Wuhan Precision Parts*, and one for MPT-2, *Estate of Carl Rucker*, both in *July 2019 MPTs and Points Sheets*, NAT'L CONF. OF B. EXAM'RS (on file with the authors). For MPT-1, the authorities packet contained short excerpts of Rules 4 and 5 of the Federal Rules of Civil Procedure and two federal district court opinions. For MPT-2, the authorities packet included a two-page excerpt from a treatise and two intermediate appellate court opinions.

<sup>142</sup> CHEW & PRYAL, *supra* note 70, at 34.

<sup>143</sup> See MPT Instructions, *supra* note 68.

<sup>144</sup> See, e.g., Alexa Z. Chew, *Citation Literacy*, 70 ARK. L. REV. 869, 887 (2018). Along these lines, MPTs rarely instruct bar takers to cite to the factual evidence. When the task memos do so advise bar takers, they may not include any guidance on how to cite to the factual documents or even mention anything about citation in the point sheets that will be given to the bar graders. See, e.g., July 217 MPT-1, *Peek v. Stern*, in *July 2017 MPTs and Points Sheets*, NAT'L CONF. OF B. EXAM'RS (on file with the authors).

#### d. Compromised Skills: Revision and Editing

There is also scant time for reflection or revision. With the minimal competency threshold and time limit, bar graders cannot expect the type of answer or document that they would if the bar takers had the time to brainstorm, plan, or revise the work.<sup>145</sup> Nor can bar graders expect the piece to be well polished. A test-taking strategy, discussed more in the Duck section, is for bar takers to aim for an 80% draft. But probably a 50-60% draft would be passing. Bar takers, if they have the time, should take a minute or two to clean up their answer, filling in blanks they might have left for themselves—like for the key facts to blend into a heading—but many bar takers will be writing new words until the end to get out as much substance as they can.

#### e. Compromised Skill: Organizing an Analysis

Bar takers' organizing skills are also compromised or subverted by the MPT's being narrowly tailored for the ninety-minute timeframe or for the bar grader. The latter, for instance, undermines a bar taker's ability to choose how to best organize the answer. In practice, organizing an argument or analysis effectively is often dictated by the law and how it is structured. But the author usually has some discretion about how and when to separate or combine issues and how to order the issues. For most issues, there are multiple ways to organize the analysis or argument effectively.

On the MPT, however, how to order or how to group issues is often provided in the assigning memo from the supervising attorney.<sup>146</sup> Not only does this assigned organization remove the author's discretion, but it can also be at odds with how the relevant law is itself structured. Because the bar grader is the ultimate audience, the bar taker should organize and answer as prescribed by the task memo when the organization is so prescribed.<sup>147</sup> The Point

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<sup>145</sup> An attorney writing an office memo or the Argument section of a brief or any other significant writing project in practice will likely engage in all these writing process steps. *See, e.g.*, Peter Elbow, *Teaching Thinking by Teaching Writing*, CHANGE MAGAZINE (Sep. 1983), also in EMBRACING CONTRARIES: EXPLORATIONS IN TEACHING AND LEARNING (1986). As a test with the bar grader as an ultimate audience is already an artificial writing project, if one at all. As this Article argues, the MPT, despite being most aligned with legal writing and lawyering skills fundamental to the practice of law, does not genuinely assess—without more time allotted for it—those skills.

<sup>146</sup> *See, e.g.*, Darrow-Kleinhaus, *supra* note 10, at 25-26 (stressing the importance of organizing and following the task directions).

<sup>147</sup> In keeping one's audience in mind, a writer should organize a document in a way that will make the most sense and be clearest to the reader. Often, the way that will be clearest to the reader will also be the way that is clearest to the writer. The exception, however, is if an organization is prescribed by a



Sheets used to guide the bar graders will follow this organization so it will be the organization that the bar grader expects. The bar taker who deviates from this assigned organization might be disadvantaged and risks losing points if the bar grader does not see that the bar taker addressed an issue because the bar taker addressed it somewhere other than where the bar grader expected the issue to be.

Adhering to the preferences of a quirky boss is also an important skill for new attorneys, so in this way, bar takers can view the MPT as a quirky boss<sup>148</sup> and organize their answers as the quirky boss instructs, helping the bar graders can give them the most points. As is discussed in the Duck section, the crucial piece in teaching the MPT is for bar takers to know while they may be compromising their preferred organization for the test, they are doing so deliberately and can opt to organize in ways that follow their own understanding of the law at other times.

Bar takers will also not be able to reorganize their writing if they realize part way through the MPT that a different organization would be more effective. Because the vast majority of bar takers use a computer for the MPT portion,<sup>149</sup> they may have time to move some sentences or paragraphs around by copying and pasting. But beyond that minimal amount of reorganizing, bar takers will have to commit to an organization, even if it means that their answer repeats analysis or is not fluid.

#### **f. Compromised Skills: Synthesis and Complete Rule Statements**

Similarly, while some synthesis of the law is required to effectively answer the MPTs, they rarely test or require the ability to synthesize the law on more than a couple of points or from more than a few sources. To be doable within ninety minutes, the MPTs

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supervisor or in this case, the MPT. The supervisor or the bar grader is thus the audience, and the writer needs to organize as the audience has instructed. While in practice, a newer associate may be able to suggest a different organization to a supervisor, the bar taker will not have that same opportunity on the MPT. Additionally, the bar taker can save some of her cognitive load and time by following the MPT's suggested organization, even if she might organize the material differently if left to her own discretion. Thus, when the MPT so instructs, the bar taker should follow those instructions. *See, e.g.*, BERMAN, *supra* note 102, at 25.

<sup>148</sup> *See* CHEW & PRYAL, *supra* note 70, at 11 (characterizing the MPT as a quirky boss).

<sup>149</sup> *See, e.g.*, Rose Safarian, *Planning to Handwrite the Bar Exam – Ask These Questions First*, Bar Exam Toolbox (May 20, 2019), <https://barexamtoolbox.com/planning-to-handwrite-the-bar-exam-ask-these-questions-first/> <https://perma.cc/SJD9-VKQ8>] (“It used to be common to take the bar exam using a bluebook. Now, the vast majority of people use a laptop to take the bar exam, while a very small minority writes.”).

problems are necessarily narrowly tailored: the facts map on to the law neatly and vice versa.<sup>150</sup> Bar takers do usually have to draw on both statutory and case law to write effective rule statements for their MPT answer—or incorporate non-binding authority into binding authority, contextualizing it appropriately.

However, the law in the MPT libraries covers and aligns with the facts of the case closely and answers directly the question or questions posed as part of the task. For example, the Library of an MPT will include a case that is directly comparable or readily distinguishable to the client's case.<sup>151</sup> The binding law in the packet may not fully answer the question, but if not, a case from another jurisdiction will. While this close alignment makes sense for a timed exam—the knowledge of which can be the basis for test-taking strategies, as are discussed in Section III.C—it does not recognize that the law often less coherent requires more work to describe coherently.

Furthermore, despite MPT Libraries being narrowly tailored substantively, they still can omit some of the essential rules needed for a complete analysis. For example, some MPTs include an intersection of state and federal law or an evaluation of who is a state actor but at the city or county level, and they omit a legal authority to draw the connection that the city or county is part of the state.<sup>152</sup> (Or they may use a factual but not legal authority.)<sup>153</sup> These connections may seem obvious, but the lack of authority to prove these connections shows how the MPT subverts best practices of including all the steps of a legal analysis.

More significantly, the MPTs rarely include the procedural standards even when the problems involve procedural issues as well as substantive law, like why a motion for summary judgment or a

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<sup>150</sup> See our discussion, *supra*, at Section II.A.2.f.

<sup>151</sup> See, for example, MPT-1 from July 2013, in which the plaintiff sued an amusement park for negligence after going to a haunted house, in which she was scared by a zombie (costumed employee) and ran into a wall, breaking her nose. The only legal authorities are two high court opinions with similar facts to the client. In the first opinion, the plaintiff went to a haunted house, in which he was scared by a vampire and fell over his own feet, breaking his arm. In the second opinion, the plaintiff went to a haunted house, in which she was startled by “ghoulish apparitions” and then backed into a bench, falling and injuring herself. See July 2013 MPT-1, *Monroe v. Franklin Flags Amusement Park*, in *2013 MPTs and Points Sheets*, NAT'L CONF. OF B. EXAM'RS (on file with the authors.).

<sup>152</sup> See, e.g., July 2009 MPT-2, *In re City of Bluewater*, in *July 2009 MPTs and Points Sheets*, NAT'L CONF. OF B. EXAM'RS; July 2017 MPT-1, *Peek v. Stern*, in *July 2017 MPTs and Points Sheets*, NAT'L CONF. OF B. EXAM'RS (both on file with the authors.).

<sup>153</sup> For example, in the July 2017 MPT-1, *Peek v. Stern*, the analysis focused on whether an entity contracting with the County was a state actor, but the law only addressed state actors and the only support showing that county actors were state actors came as an answer to a question about a third party in the Deposition.

motion to dismiss should be granted. The best practice would be to include a statement of the procedural law before moving into the underlying substantive law, but bar takers may not have much, if any, of the procedural law in the MPT packet. The authors of the MPT might choose to omit the procedural law to balance the goal of minimal competency with the tight time constraint, but this omission compromises other best practices: namely, the best practice of framing the substantive law of an issue within the client's procedural context.

The MPT also provides little opportunity to extract implicit (or invisible)<sup>154</sup> rules from case law, a sophisticated legal research skill. The case law in the MPTs is usually explicit: there are not many implicit rules to deduce from the authorities' rationales by assessing the facts used to support the holdings. These implicit rules are the principles underlying the decision<sup>155</sup> that are not explicitly written in the opinion. While we all might prefer that judicial opinions laid out in no uncertain terms the rules their authors are applying, they do not. In large part, they do not because these implicit underpinnings to the rationale are so inherently understood by the opinions' authors.

To fully make use of these judicial decisions, attorneys must be able to identify, extract, and then articulate these implicit rules, providing the rule back to the court in a clearer and more cogent way. But on the MPT, there are few opportunities to engage in this important deductive analysis, and certainly not the time. For some bar takers, there is barely time to organize the explicit law into coherent rule statements and to apply the law to the facts of their client's case.

### **g. Compromised Skills: Planning and Factual Investigation**

Being narrowly tailored also means that some of the skills the MPT claims to test are minimized. For example, the ability to develop a plan of action and plan a factual investigation or decide when to continue a factual investigation are limited. The MPT is a closed

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<sup>154</sup> ALEXA Z. CHEW & KATIE ROSE GUEST PRYAL, *THE COMPLETE LEGAL WRITER* 42, 69, 370 (2d ed. 2020) (explaining invisible rules and how to extract them from the law).

<sup>155</sup> See, e.g., Bart Verheij, *Evaluating Arguments Based on Toulmin's Scheme*, Springer Science and Business Media (2005), [https://www.researchgate.net/publication/225873988\\_Evaluating\\_Arguments\\_Based\\_on\\_Toulmin's\\_Scheme](https://www.researchgate.net/publication/225873988_Evaluating_Arguments_Based_on_Toulmin's_Scheme) [<https://perma.cc/Y8PV-BS74>] (discussing Stephen Toulmin in his 1958 book, *The Uses of Argument*, and describing these underlying principles as the warrant and the backing linking the claim and the evidence); see also Excelsior Online Writing Lab, *Toulmin Argument*, <https://owl.excelsior.edu/argument-and-critical-thinking/organizing-your-argument/organizing-your-argument-toulmin/> [<https://perma.cc/H56Y-Q3GC>].

universe, so the factual investigation is necessarily limited. But by narrowly tailoring the law to the facts, there is less need for the bar taker to plan or investigate.<sup>156</sup> Additionally, the time constraint means the already limited planning or factual investigation that there might be through the recursive process of going back and forth between the law and the facts—which is the closest factual investigation one can do with a closed universe problem—is even more curtailed. For many bar takers, the abbreviated ninety minutes are insufficient to address the right issues, provide coherent rule statements, and articulate sufficient facts to show how the law applies. The ability to plan and investigate is diminished because of the short time, but for many, so is having a clear, cogent, and complete response. Like the other skills discussed above, bar takers rarely have enough time to employ these skills, even if they have them at their disposal.

#### 4. The Trouble with Turkey

Compromising these legal writing and lawyering skills may make sense for a timed test that need only measure minimal competency. But it means that the portion of the bar exam most aligned with the skills attorneys will need for practice, sets about assessing these skills through “situations most lawyers seldom face: the need to read and digest the applicable law and a large amount of information about a new case and draft a legal document with virtually no time for reflection or editing.”<sup>157</sup>

Thus, the MPT does not adequately test legal writing. Clear communication is purportedly tested, but in a limited and compromised way. Bar takers are told almost nothing about how their legal writing will be evaluated.<sup>158</sup> All they are told is that their MPT answer will be “graded on [their] responsiveness” to the task memo and “on the content, thoroughness, and organization of [their] response” and one skill being tested on the MPT is their ability to “communicate effectively in writing.”

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<sup>156</sup> Indeed, this approach is commonly used in introductory legal writing courses. By using a closed universe of facts and legal authorities, and by telling students what the narrow issue is, students have more mental capacity to focus on the novel skills of reading those authorities, analyzing them, and conveying that analysis. But in upper-level writing and skills courses, particularly clinics, students have to search a much bigger universe of facts and law and they need to spot potential legal issues and decide which ones have enough merit to pursue. So, in at least this way, the design of the MPT tests competency at the 1L level rather than the law-school-graduate level.

<sup>157</sup> Curcio, *supra* note 26, at 378 (“Unfortunately, because the MPT requires the applicant to digest a lot of information in a short amount of time and then produce a written product with no time for editing, it is questionable whether it really measures skills different than those measured by the essay portion of the exam.”); *see also* Section II.A.2.d, *supra*.

<sup>158</sup> *See* MPT Instructions, *supra* note 68.

The bar graders are similarly situated to bar takers. The Point Sheets they receive do not include guidance for assessing the legal writing in MPTs.<sup>159</sup> Rather, the MPT presumes that bar takers will write effectively, or they will not and that bar graders will know effective legal writing when they see it.

Teaching the MPT with a legal writing context thus not only helps bar takers continue to develop their legal writing skills to be sure that they can communicate effectively in writing but also to help them understand what skills are being compromised or subverted. Similarly, knowing what skills may be sacrificed in the short term can help bar takers understand the buffet of best practices available to them in their legal writing and analysis to then choose how and when to divert from or preserve those practices when in practice depending on their assignment and time constraints.

### C. Duck in the Middle: Pedagogy

Appreciating the layers of the MPT may not be as savory an endeavor as eating a Turducken but understanding the chicken and turkey layers and how they complement or compromise each other provides a rich opportunity for teaching. This teaching richness is the duck layer: it connects the chicken and turkey layers to promote both essential legal writing skills and essential test-taking strategies. This layer enhances both the other layers, maximizing the MPT experience.

This pedagogical duck layer, elaborated on in the next Section, is especially important given how few resources are devoted to legal writing during bar prep. Usually, the focus of bar prep services is to review substantive law and give test-taking strategies. Legal writing skills might get some light eye contact, like “include persuasive headings,” or “organize your answer.” But bar prep’s gaze is elsewhere.<sup>160</sup> Given that “overwhelming majority of graduates hesitate to take the bar exam without the intense preparation of a bar review course[,]”<sup>161</sup> an opportunity for improving bar takers’ legal writing skills for both the MPT and beyond is lost.

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<sup>159</sup> See, e.g., any Point Sheets.

<sup>160</sup> Sometimes more instruction is given on certain components. See, e.g., Darrow-Kleinhaus, *supra* note 10, at 35 (explaining what persuasive headings are); BERMAN, *supra* note 102, at 60 (providing examples of ineffective headings that do not include facts and effective headings that blend law with fact).

<sup>161</sup> Smetanka, *supra* note 14, at 750.

### III. Better Teaching Through Turducken™

The rich duck of teaching mediates the chicken and turkey layers of the MPT. Understanding that the MPT as one thing stuffed inside another inside another allows for better teaching—and for bar takers to be better prepared both for the bar and beyond. Teaching the MPT with a legal writing focus can help bar takers not only be successful on the bar exam but also help them develop their legal writing skills to be more effective in their law practice. Similarly, in addition to learning how legal writing best practices can help them on the test, learning certain test-taking strategies can help bar takers improve their legal writing and analytical abilities. This Section demonstrates both how reinforcing legal writing and how learning more about one's own work style and processes and other test-taking strategies help bar takers improve their performance on the MPT and their lawyering skills for their eventual practice.

#### A. Separate the Chicken from the Turkey

Being able to separate the chicken from the turkey is important for both professor and bar taker alike. Teaching the MPT as a Turducken allows bar takers to hone their legal writing skills, continue to develop their best practices, and ascertain when to deviate from those skills and practices, such as on a timed test. Similarly, teaching the layers of the MPT provides an opportunity to help students understand their work style and how they make decisions in their legal research, analysis, and writing, as well as learn strategies (and even some shortcuts) for the MPT. Over multiple MPTs, both the professor and bar taker can see the progress on legal writing skills as well as on test-taking skills.<sup>162</sup>

Both sets of skills, with deliberate guidance, can influence and enhance each other. Refreshing and practicing legal writing and analytical skills will help bar takers on the bar exam. Moreover, teaching test-taking strategies do not simply benefit the bar takers for the bar exam but also help enhance their legal writing and analytical skills generally. Separating these layers and using one to reinforce the other often requires bifurcating the lessons to identify when and how the bar taker should focus on legal writing skills versus test-taking strategies. It also requires diagnosing weaknesses and offering deliberate repetition with targeted and individualized feedback and the chance to revise to address those weaknesses and improve. The

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<sup>162</sup> DeFabritiis & Vinson, *supra* note 28, at 138 (“Having multiple opportunities to take performance tests throughout law school will help students be more successful than if they had to struggle for the first time during the bar exam.”).

section below offers practical recommendations for professors and bar takers.<sup>163</sup>

### 1. Bifurcate The Lessons

To teach the MPT with a legal writing focus, bifurcate some lessons to focus separately on what is best for a bar taker's "long-term" legal writing skills and what must be compromised to succeed on the MPT and bar exam. It is this dichotomy that provides the rich teaching opportunity.

The essential elements required for this kind of bifurcated learning are legal writing guidance, self-reflection, and the opportunity to revise. Guiding bar takers through learning and developing their legal writing and analytical skills and giving them targeted feedback is not only important in improving their skills but also in assisting them to understand how continuing to develop their skills will help them on the MPT and beyond. This guidance is crucial for bar takers to understand the range of best practices available to them and how to deliberately choose when and if they need to diverge from those best practices. Then, the reiterative process of reflection, feedback, and revision helps make the skills more effective and intrinsic, allowing bar takers to realize how this process can help in other realms—and their lawyering and legal writing skills generally. Though bar takers will not be able to meaningfully revise their answers on the bar exam, revising answers or removing time constraints as part of teaching MPTs, allows bar takers to develop

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<sup>163</sup> For some bar takers, even with significant practice, the ninety minutes will not be enough time. It may be difficult for bar takers to even finish reading the MPT packet in this amount of time. Although some of these bar takers may be able to get extra time as a testing accommodation, accommodations for the bar exam are generally more limited than they are in law school, which means these bar takers may be further disadvantaged. *See generally* ADA National Network, Information, Guidance and Training on the Americans with Disabilities Act, Exams and Courses, <https://adata.org/> [<https://perma.cc/ZH47-TN46>] (demonstrating that as a licensing exam, the bar exam must comply with the Americans with Disabilities Act and its regulations for exams and courses); American Bar Association, Bar Information for Applicants with Disabilities, <https://www.americanbar.org/groups/diversity/disabilityrights/resources/biad/> <https://perma.cc/2UEG-XA4V> (indicating that each state bar regulates its administration of the bar exam and process for applicants to seek accommodations); North Carolina Board of Law Examiners, Applicants Requesting Special Testing Accommodations, <https://www.ncble.org/applicants-requesting-special-testing-accomodations> [<https://perma.cc/BG62-HLTW>] (requiring proof of an applicant's accommodations for as far back as the person has had them, like back to high school if the applicant received accommodations then, but also that the applicant was re-assessed for the need of the accommodation relatively recently). *See also* note 95, *supra*.

these legal writing skills. Without this guidance and opportunity for reflection and revision, a student may not recognize the import beyond the MPT.

But teaching the MPT also requires teaching test-taking strategies and fostering bar takers' ability to distinguish between skills that will be needed for practice and those that are bar-specific. It further assists bar takers in making effective choices when they find themselves running out of time on the exam.

## **2. Diagnose Weaknesses And Use Repetitions To Improve**

A bar taker needs to be able to demonstrate multiple skills at once to be successful on the MPT, as is the case in practice. Because the MPTs are closed universes and contain all the facts and law that the bar takers will need to complete the assigned task, handling the MPTs effectively depends not on memorizing the substantive law but on the skills of reading, digesting, analyzing, organizing, and writing—all at once!

Teaching a legal writing course on the MPT allows a professor—and even the bar takers themselves—to identify which parts of these processes are not yet happening automatically. Some bar takers may not have done much legal writing since their 1L year—or at least not in a way that focused on the process of writing rather than on the content.<sup>164</sup> Teaching the MPT—guiding bar takers through multiple practice MPTs giving them feedback and allowing for reflection and revision—allows bar takers to refresh and hone their legal writing and analysis techniques and skills with the goal of having as many best practices be intrinsic as possible before the bar exam. They may then have to scrap these best practices on the bar exam, but they will be doing so consciously, choosing deliberately which skills to set aside given the particular issues and the time constraint.

For example, a bar taker might be reminded of how effective headings can be when they blend law and fact and work on drafting such headings over several MPTs. Then, even if the bar taker decides during the bar exam that she does not have time to add a determinative fact or two to her headings, she has refreshed and enhanced this legal writing skill.

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<sup>164</sup> Bar takers who have not had meaningful live-client experiences or significant simulations practice applying law to different fact patterns or who have only had legal writing and lawyering skills taught in a superficial way may be at a disadvantage. They may not know “why they are taking certain actions and therefore will have a very limited ability to improve their performances.” See Smetanka, *supra* note 14, at 759. Teaching the layers of the MPT and with multiple MPTs with different fact patterns and with guidance and feedback to reinforce skills can help provide this repeated and deliberate practice necessary to hone the legal writing and lawyering skills.



## B. Eat the Chicken: Improving Writing Skills

Teaching the MPT provides the chance to revisit legal writing skills that may not yet be intrinsic—and to improve them before the bar exam. Facing the bar exam and becoming familiar with the MPT can motivate bar takers to develop their legal writing skills. Among other things, teaching the MPT advances the following legal writing goals and best practices.

### 1. Goal: Follow Directions

Being successful on the MPT, requires being able to follow directions and pay attention to details. These are the exact same skills that a novice attorney needs. The MPT instructs bar takers that their answers will be “graded on [their] responsiveness to the instructions regarding the task [they] are to complete.”<sup>165</sup> A bar taker who does not adhere to the task assigned in the MPT by the fictional supervising attorney will not score well with the bar grader. While there are many legal writing conventions that are generally practiced across document types and practice areas throughout the legal profession, each law office or court may have its own preferences, which the novice attorney needs to follow. Often an MPT prescribes an organization, providing the specific issues to be analyzed and setting forth the order in which they should be analyzed in the assigning memo. The Point Sheet correspondingly instructs the bar grader that the bar taker should organize the MPT answer in this prescribed manner. Similarly, a bar grader is always assessing whether a bar taker has adhered to the task, deducting points if the bar taker fails to do so.

Accordingly, bar takers should be taught to adhere not just to the task but also to any specific order or structure prescribed by the MPT for their answers, even if they would otherwise organize the material differently. Teaching the MPT thus means teaching bar takers to comply with the demands or expectations of their quirky boss: in this case, the MPT. But bar takers will also benefit from then being able to recognize this adherence to what is prescribed by the MPT as a choice—one that makes sense on the MPT to maximize the points awarded—that they then can have available to them later once in practice.

Bar takers are thus learning to be strategic about what they prioritize, what they compromise, and what will best serve their audience and the document’s purpose. Even when the suggested organization may not reflect how the bar taker herself would organize the answer, by practicing with multiple MPTs and deconstructing several tasks or assigning memos, the bar taker is reminded of the importance of adhering to directions and attending to those details.

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<sup>165</sup> See MPT Instructions, *supra* note 68.

## 2. Goal: Read and Synthesize Legal Authorities

Additionally, teaching MPTs can help bar takers reinforce their strategic reading, legal analysis, and synthesis skills.

### a. Practice Strategic Reading

Many law students learn over the course of law school that they do not need to read opinions from start to finish. Instead, they can skim parts of the opinion that are less crucial and home in on the parts where they can find the holdings and rationales. If students have not learned to do this by the time they are preparing for the bar exam, the MPT can help them develop this skill, as it necessitates strategic reading.<sup>166</sup>

Bar takers wanting to maximize their time on the test learn how to quickly find an opinion's holding and rationale and then circle back to other parts, like the case's statements of facts, if needed. They also have the impetus to learn other strategic reading techniques, like using tables of contents (helpful for case books but also for statutes and regulations) and other contextual cues.<sup>167</sup> The MPT similarly allows bar takers to refresh their understanding of how to use the weight of authority to guide their reading of those of authorities, helping them to focus first on the binding and most recent law to build their rule statements and understand how any statutory or regulatory law fits with the case law. Moreover, bar takers can use to their advantage their understanding that the MPT is narrowly tailored: every fact and every law was included in the packet for a purpose.<sup>168</sup> Knowing this can help bar takers practice reading strategically, evaluating why each fact and law was included.

### b. Find And Describe Legal Tests

Teaching the MPT also can help bar takers learn to or practice finding and describing legal tests, like elements or factors tests, and to see how the analytical organization might flow from the structure of the law tests. Because the MPTs are narrowly tailored, bar takers can more easily see the patterns in the law, especially after practicing several MPTs. Through practice, they can become more adept at seeing commonalities across disciplines in the law; they thus become

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<sup>166</sup> See, e.g., CHEW & PRYAL, *supra* note 70, at 165-67 (advising bar takers to read like a lawyer not a law student); BERMAN, *supra* note 102, at 22 (explaining the read-skim method for approaching a performance test).

<sup>167</sup> From the Table of Contents, a bar taker can tell not only whether the problem is statutory or common law, see, e.g., Darrow-Kleinhaus, *supra* note 10, at 28, but also the recency of the cases, the level of the court that authored them, and whether binding or nonbinding based on the jurisdiction.

<sup>168</sup> See Darrow-Kleinhaus, *supra* note 10, at 30.

better able to understand the law not just on the MPTs but also beyond. Teaching the MPT similarly helps reinforce how to dispose of undisputed issues quickly, move from broad to narrow when presenting the law, and decide whether to cluster issues or branch into separate sub-analyses.

### **c. Synthesize And Summarize The Law**

In addition to helping bar takers identify the legal tests, teaching the MPT can reinforce bar takers' ability to synthesize and articulate the law in their own words, which will help them both with the bar exam and in practice.<sup>169</sup> Attorneys can usually copy and paste the law from their electronic research platforms to their document and then modify it. But copying and pasting is not possible on the MPT—either when offered on paper as part of an in-person exam or with the PDF packet offered with remote exams because the latter does not allow text to be copied.

Having taught the MPT, our experience suggests that many bar takers want the full quoted law there on the page before them and then modify it as needed for their answer. Or that they do not have the confidence in their understanding of the law to put it in their own words. The temptation is thus for bar takers to type words from the Library into their answers verbatim. Rarely, though, will they have time to do this—even those who can type very quickly. Not only is this time consuming, but it also means that bar takers might not be processing the law while typing it verbatim from the MPT authority.

Teaching bar takers to read a paragraph of law in the Library of the MPT and then take a moment to distill the rules from that paragraph before writing those rules in their own words is a good habit for bar takers to develop. Paraphrasing and summarizing the law allows a bar taker to better demonstrate her mastery over the law for the MPT (and beyond); it saves time too.

### **d. Choose Examples To Illustrate Rules**

Likewise, teaching the MPT offers opportunities to reinforce knowing how and when to illustrate rules using examples from case law. Given the time constraints of the MPT, bar takers are very receptive to revisiting how to explain how the law has been applied in the past and set up analogies to their client's case, while not sacrificing time needed to write their application portions. Teaching the MPT thus provides a great opportunity to remind bar takers that illustrations are most needed when the issue is fact-laden or when it is important to ground your argument within the parameters of the law. Bar takers are similarly helped to learn that rule illustrations do

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<sup>169</sup> See Darrow-Kleinhaus, *supra* note 10, at 36-37 (conveying the importance of summarizing).

not need to be lengthy, particularly for the MPT.<sup>170</sup> Rather, they should center on the relevant holding and the key facts that support that holding and parallel the facts in their client's case.

A professor can emphasize that illustrations might grow or shrink in practice depending on how intricate or complex the facts of the precedent are and how much needs to be explained before these facts are tied back to the case at hand. But given the tight time constraint for the MPT, usually no more than the following will be required: "For example, in *Case name*, the court held x, y, and z because a, b, and c happened."<sup>171</sup> A bar taker can use this formula to set up an illustration on one side of the law, then provide a counter illustration and then compare or contrast these cases to the client's case in the application. In addition to streamlining how bar takers handle case examples on the MPT, this method helps their future legal writing by training them to focus on *why* the illustration helps their argument and by giving them an easy formula that they then can adjust as needed.

### e. Handle Counterarguments

Teaching the MPT provides an opportunity to reinforce how to handle counterarguments. Almost every MPT instructs bar takers to incorporate or address counterarguments as part of the analysis. But in our experience, this part of the analysis is often omitted. In part, as is discussed above in Section II.B, the MPT's time constraint means bar takers must prioritize, and crafting an affirmative argument appropriately takes priority over a counterargument. However, handling counterarguments is also a higher level and less-practiced skill that is thus easier to sacrifice on the MPT. It is in response to this latter point where the rich teaching opportunity exists. Some bar takers have had so little practice with counterarguments, and maybe not since their first year in law school, that they cannot effectively address counterarguments in their writing, even if they have the time to do them. Teaching the MPT can help bar takers learn to ask what the best argument is on the other side and how best to refute that argument. Given that the MPT packets are tightly edited and narrowly tailored, the counterarguments can be identified more readily. With practice, thinking through and handling counterarguments will become more automated, allowing bar takers to more easily bring at least some counterarguments into their MPT responses—and generally hone this skill.

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<sup>170</sup> See CHEW & PRYAL, *supra* note 70, at 155-56 (discussing rule examples and case illustrations); see also Darrow-Kleinhaus, *supra* note 10, at 36-37 (admonishing bar takers to not "include long passages and quotations from the cases" that are both time consuming and add little value but rather to write case examples in one sentence that provides the holding and the factual basis for that holding).

<sup>171</sup> See CHEW & PRYAL, *supra* note 70, at 155-56 (providing a case example template).

### 3. Goal: Sensible Large-Scale Organization

Although the MPT task memo sometimes prescribes a particular organization,<sup>172</sup> the MPT nevertheless provides the opportunity to refine large-scale organization skills. Before entering practice, bar takers can internalize the legal writing convention of explaining the law before applying it. Professors can remind bar takers that lawyers like to have the answer or conclusion up front and then to see the relevant law. And only subsequently have the novice attorney explain how the law on any issue applies to the facts of the client's case. Bar takers often recall that they learned in their first-year legal writing classes some version of C-RAC, but if they have not yet practiced it meaningfully in other contexts, this legal writing norm may not yet be intuitive to them. When they start practicing MPTs under time pressure, bar takers might revert to alternating between law and fact on any one issue. Teaching the MPT and teaching or refreshing how to use reverse outlining, along with having bar takers review the work of peers or sample answers, enables bar takers to practice C-RAC and to make using it automatic.

Similarly, working through and getting feedback on multiple MPTs allows bar takers to revisit other tenets of large-scale organization. While the MPT problems sometimes omit the broadest law, like the procedural law, or omit pieces of logical syllogism,<sup>173</sup> professors can use these omissions to nevertheless teach best practices and to assure bar takers of their ability to navigate these challenges on the bar exam.

### 4. Goal: Support Claims About the Law with Appropriate Citations

Teaching the MPT also helps bar takers focus on supporting their claims about the law with appropriate citations and not worry about whether the citation is formatted correctly. The emphasis is on citing to the proper authority and supporting the claim, recognizing that this is the essential part of a citation and reinforcing the heterogeneity of citation systems.<sup>174</sup> What is most essential in citing authorities is that the reader knows where to look to verify the law if needed. The correct citation of authority and pin cites is thus extremely important. Given that the MPT packets are relatively small and that it is a closed universe, the MPT appropriately excuses bar takers from having to

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<sup>172</sup> See Goal: Follow Directions, *supra*, at Section III.B.1.

<sup>173</sup> See Compromised Skills: Synthesis and Complete Rule Statements, *supra*, at Section II.B.3.f.

<sup>174</sup> See Chew, *supra* note 144, at 905 (citing David J.S. Ziff, *The Worst System of Citation Except for All the Others*, 66 J. LEGAL EDUC. 668, 682 (2017)).

worry about page numbers and encourages them to abbreviate.<sup>175</sup> This allows bar takers to save precious time on the bar exam; however, in teaching the MPT, professors can nevertheless help them see the communicative function of citations even when formal citation formatting is not required.

## **5. Goal: Edit Paragraphs and Sentences**

As noted above in Section II.B, revising and polishing are essential legal writing skills that are compromised by the MPT being a timed test. But as with the other legal writing and lawyering skills highlighted in this section, teaching the MPT as a Turducken allows bar takers to nevertheless refine these skills through guided, deliberate practice. Revising at the sentence or paragraph level may be most challenging during the MPT. While students may have time to move sections around, they are unlikely to have any more than a minute or two to edit or polish at the sentence or paragraph level.

These are also the skills that professors may deprioritize when reviewing bar takers' written work and triaging feedback. Thus, devoting time to practicing using strong verbs, writing in plain language, and beginning paragraphs with strong topic sentences can become crucial parts of teaching the MPT. Bar takers will want to ensure that the bar grader can understand their points, so there is a short-term benefit to the forever skill of improving sentences and paragraphs through targeted revision. Guiding bar takers through this process as part of teaching the MPT will help them maximize their time and their score on the bar exam and also serve them well in practice.

### **C. Eat the Turkey: Improving Test-Taking Skills**

Teaching the MPT can also help illuminate for bar takers their own work styles and their processes or preferences for research, analysis, and writing, thereby helping them understand how to make the best use of those styles, processes, and preferences, both on the bar exam and in practice. By learning about one's processes and work style the bar taker comes to understand how she works under time pressure and what level of practice and what kinds of test-taking strategies will best assist her in doing her best on the MPT. It will thus enable a bar taker to demonstrate her competency in the tight time limit.

In taking a practice MPT within the ninety-minute time constraint, bar takers quickly learn what they are not able to do in that small amount of time. Over the course of several timed practice MPTs,

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<sup>175</sup> See MPT Instructions, *supra* note 68 (instructing bar takers that they “may use abbreviations and omit page references” when citing to authorities in the Library).

bar takers gain familiarity with the MPT genre and hone their ability to work the problem more efficiently.<sup>176</sup> Likewise, they can develop a personalized plan for approaching the MPTs they can then use on the bar exam. Helping bar takers observe and reflect on their own processes through taking the practice MPTs and then sharing with them some test-taking strategies based on their specific individual needs, means that bar takers not only develop a plan of approach for the MPTs but also learn more about their own processes and work style for their law practice following the bar exam.

As mentioned above, bar takers may learn that they need to read more strategically or to look for the tests in the law. They also learn whether they prefer to read the law or the facts first<sup>177</sup> and whether they type quickly or not.<sup>178</sup> Most significantly, they learn more about whether they process quickly or more slowly, and then can learn strategies and approaches that best complement their work style and processing.

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<sup>176</sup> Doing the MPTs effectively takes practice—just like learning any new skill or program to become fit. They may not need to put in the 10,000 hours of deliberate practice, *see* ANDERS ERICSSON & ROBERT POOL, PEAK: SECRETS FROM THE NEW SCIENCE OF EXPERTISE 99-100 (2016) (defining deliberate practice as being both purposeful and informed practice that pushes people outside of their comfort zone, engaging “a person’s full attention and conscious actions” as well as feedback on and modification to the person’s efforts), but the more bar takers practice, and the more they practice with opportunities for reflection and feedback, the better they will do. *See* BERMAN, *supra* note 102, at 38 (emphasizing the importance of practice for gaining the skills or “fitness” to be more effective and efficient on the MPT, rather than just reading time-saving tips, which may seem like merely telling someone to do it all faster); *see also* Darrow-Kleinhaus, *supra* note 10, at 38 (stating that the key to success will be practice); DeFabritiis & Vinson, *supra* note 28, at 120 (“Only through practice will applicants be able to adjust their time in recognition of their strengths and weaknesses.”).

<sup>177</sup> *See* BERMAN, *supra* note 102, at 21-22, 26-27 (recommending that bar takers skim the File, read and brief the Library, and then return to the File but acknowledging that bar takers will learn what works best for them); CHEW & PRYAL, *supra* note 70, at 32-33 (outlining the advantages of reading the law first and vice versa and encouraging bar takers to decide for themselves what works best, advising bar takers to also consider that they might decide it depends on the genre for the task).

<sup>178</sup> The person who types more slowly might supplement their bar preparation with typing practice and speed work—a skill that will only help them after the bar, too.

### 1. Move Through The Packet With As Few Touches As Possible

One strategy that can help all bar takers is learning how to move through the packet with as few “touches”<sup>179</sup> as possible: bar takers should take as much information as they can from the task document—and then from the Library and the File in their first reading of the documents—and incorporate it into an outline<sup>180</sup> for their answer. While bar takers will likely need to circle back to the facts in the File or to the law in the Library, the more they can outline their answers during their first reading, the more time they will have for developing their answers more fully. Going back and forth between the File and the Library is a helpful recursive process that mimics the recursive processes in law practice of fact investigation and developing a case theory.

But with the tight timeline of the MPT, there is little time for too much of a recursive process. This outlining or scaffolding process also has the benefit of helping a bar taker focus on the task by giving her a clear process for approaching the MPT; this can stave off getting overwhelmed by the test and limited time. It also helps the bar taker who might freeze up at the sight of a blank page, because she then has something to write.

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<sup>179</sup> By “touches” we mean each time a bar taker looks at the assigning memo, the File, or the Library. To maximize one’s time on the MPT, we recommend that bar takers keep to a minimum how many times they need to refer back to the packet by trying to transfer to their outline as much from each part of the MPT packet as they can the first time they read that part. The “touch” metaphor is borrowed from productivity advice “that an office worker shouldn’t touch the same piece of paper more than once.” See, e.g., Cal Newport, *The Rise and Fall of Getting Things Done*, NEW YORKER (Nov. 17, 2020), <https://www.newyorker.com/tech/annals-of-technology/the-rise-and-fall-of-getting-things-done> [<https://perma.cc/G8WB-NHBM>].

<sup>180</sup> THE COMPLETE BAR WRITER refers to this process as the “schematic approach.” This process of layering information with each document to build the answer helps students have other tools for approaching legal writing. Although outlining one’s research or argument has long been a pre-writing tool, the methodical schematic approach of building the outline by first noting any genre conventions and then adding in the key law and facts not only helps bar takers work through the MPT and begin their answer but also helps bar takers understand and appreciate outlining in a new way. CHEW & PRYAL, *supra* note 70, at 28-35 (explaining the schematic process for layering information as a bar taker works through an MPT packet and to maximize time on the exam); see also BERMAN, *supra* note 102, at 26-32; Darrow-Kleinhaus, *supra* note 10, at 31-33 (describing the outlining process the author used in teaching her students how to succeed on the MPT).



## **2. Scaffold An Answer By Identifying The Genre**

Along these lines, the first part of this scaffolding process should be to identify the genre of the task assigned in the MPT. As noted in the Everyday Chicken section, the task in the MPT is most often an intra-office memorandum, the argument section of a brief, or a letter. These are the most common genres on the MPT, because they are the most common legal genres taught in law school.

However, the MPT does not always refer to these genres by these particular names. For example, many MPTs instruct bar takers to write a “memorandum” when the document might be either an intra-office communication or a document that will be submitted to a court. Thus, the more important questions for assessing genre are (1) who is the audience for the document? and (2) what is its purpose? Knowing whether the document will be going to an internal audience, like a supervisor, or to an external one, like a judge, helps the bar taker to immediately understand what will be needed for the MPT answer. Likewise, determining whether the purpose of the document is to analyze the law and facts to reach a conclusion or make a prediction or to argue the law and the facts in a way that supports a particular conclusion will greatly assist the bar taker in knowing what and how to write.

This genre discovery process is thus a key test-taking strategy for bar takers to have for the MPT, allowing them to have the tools to quickly determine and know how to approach any genre they might encounter. Learning the genre discovery technique is not just helpful for the MPT, though. Bar takers might learn it for the MPT, but the process will serve them well beyond the bar too—whenever they are assigned to write a type of document they have never written before, they will know that they need to study samples to learn the audience and purpose and the common conventions for that genre. Thus, they will be able to write any type of document.

## **3. Develop Test Savvy**

Remembering that the MPT is a test is also key to being successful on it. That may seem obvious but keeping it in mind while practicing and taking the MPT is an important test-taking strategy. For example, in addition to teaching bar takers to engage in genre discovery for the genre assigned within the MPT, a professor can help bar takers better understand the MPT as its own genre with the bar grader as its primary audience. Bar graders, like most of the audiences for the genres within the MPTs, are legally trained and busy; they generally devote only a few minutes to each MPT answer. Bar takers will set themselves up to receive the most points for their answer, if they make it easier on the bar grader to understand their arguments, analysis, and answer.

Additionally, the MPT's being narrowly tailored also provides helpful test-taking strategies. As mentioned above,<sup>181</sup> the law in the MPT Libraries closely aligns with the facts provided in the Files. Bar takers will often notice this on their own after taking several MPTs, but a professor can help them see and make use of this tailoring. There are usually minor legal or factual issues that are irrelevant to the task at hand, but bar takers can use the legal issues addressed in the Library to double-check and revisit the significant factual issues, and vice versa. For example, bar takers can learn that, if an authority in the Library covers an issue in depth or at relative length, they should look closely for a corresponding factual issue,<sup>182</sup> even if on their first read, they had not seen one. Thus, knowing that the MPTs are narrowly tailored can help bar takers make efficient use of the MPTs and their time.

These rich teaching opportunities provided by this practice—be it for developing legal writing skills or test-taking strategies—help bar takers develop their quick-thinking skills for the MPT. The more bar takers learn about their work processes and practice these legal writing and test-taking strategies and techniques, the more they will move these processes into the faster intuitive thinking with fewer errors.<sup>183</sup> They are learning connections and having skills become more automated and intrinsic, which will help them on the bar exam and beyond—as well as on many other fronts.

Nevertheless, no amount of thoughtful teaching can fix a bigger problem, which lies in the nature of the MPT itself along with the relatively low scoring weight accorded it

## V. Serving Suggestions: Making the MPT Better

The MPT without reform will always be a Turducken. The turkey test layer is as essential as the chicken practice layer. And no matter

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<sup>181</sup> See *Everyday Chicken: Decent Legal Writing Assignment*, *supra*, at Section II.A.

<sup>182</sup> Consider, for instance, in MPT-2 for February 2009, *Ronald v. Department of Motor Vehicles*, in *February 2009 MPTs and Points Sheets*, NAT'L CONF. OF B. EXAM'RS *supra*, note 91 (and on file with the authors), one of the three cases provided in the Library was devoted to the issue of whether a blood alcohol report was valid, and therefore admissible as evidence, when it was not clear whether a forensic blood analysis was conducted by the proper person in the scope of that person's work. Only on a close reading of the actual signature on the forensic blood alcohol test in the MPT's client File, would a bar taker see that someone other than the Forensic Alcohol Analyst signed for the Forensic Alcohol Analyst, calling into question the validity of the report at issue. However, seeing that there is a full case devoted to this issue can cue the bar taker to look more closely at the facts and factual evidence in the File.

<sup>183</sup> See, e.g., Ashwin, *supra* note 133.

how rich the duck is between the two, it will always fill the gap between succeeding on a test and succeeding in lawyering. Perhaps this is the brine that infuses the rest of the Turducken: the salty truth that the legal licensing—and to some extent legal education—values and promotes minimal competence under time pressure. At a time when the general relevancy of the bar exam is under heightened scrutiny,<sup>184</sup> the MPT emerges as the assessment most closely aligned with the skills necessary to practice law. Despite this alignment, however, the MPT receives the lowest scoring weight of the three portions of the Uniform Bar Exam: only 20% of the final score.<sup>185</sup> And as discussed above, it subverts the very skills it aims at assessing. Left as is, the MPT will continue to perpetuate the overvaluing of speed, favoring those who can process and type quickly, rather than more appropriately and accurately assessing bar takers' knowledge and lawyering abilities. But it can be better.

This Serving Suggestions section builds on current scholarship advocating for building a better bar exam and contributes to the conversation by offering concrete suggestions for how the MPT could be improved. First, the MPT would be better if it reflected a more clearly defined understanding of minimal competency and the skills and knowledge needed for practice. Second, the time allotted to

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<sup>184</sup> Bar exam abolition is beyond the scope of this paper, *but see, e.g.*, Jessica Williams, *Abolish the Bar Exam*, CAL. L. REV. (online) (Oct. 2020), <https://www.californialawreview.org/abolish-the-bar-exam/> [<https://perma.cc/WJB7-DEAF>]; Joe Patrice, *The Bar Exam Doesn't Hold Law Schools Accountable, It Covers Their Failures*, Above the Law (May 2021), <https://abovethelaw.com/2021/05/the-bar-exam-doesnt-hold-law-schools-accountable-it-covers-their-failures/> [<https://perma.cc/72KL-BRKA>]; Pilar Margarita Hernández Escontrías, *The Pandemic Is Proving the Bar Exam Is Unjust and Unnecessary*, Slate (July 2020), <https://slate.com/news-and-politics/2020/07/pandemic-bar-exam-inequality.html> [<https://perma.cc/YQ8G-VY9G>]; *see also* Deborah Jones Merritt, Carol L. Chomsky, Claudia Angelos, and Joan W. Howarth, Bloomberg Law, *Racial Disparities in Bar Exam Results—Causes and Remedies* (Jul. 2021), <https://news.bloomberglaw.com/privacy-and-data-security/racial-disparities-in-bar-exam-results-causes-and-remedies> [<https://perma.cc/A3Z3-SC9A>] (discussing how some states like New Hampshire and Oregon are contemplating or implementing alternatives to the bar exam).

<sup>185</sup> *See* NCBE Uniform Bar Exam, UBE Scores, <https://www.ncbex.org/exams/ube/> [<https://perma.cc/3AHB-D9XL>]; *see also* Ben Bratman, *Why More States Should Not Jump on the Uniform Bar Exam Bandwagon*, JD Journal (2015), <https://www.jdjournal.com/2015/06/17/opinion-why-more-states-should-not-jump-on-the-uniform-bar-exam-bandwagon/> [<https://perma.cc/6KN7-RQAB>] (“The presence of the MPT redeems the UBE to a limited extent, as the MPT does not test substantive knowledge of law but rather evaluates only lawyering skills. However, the MPT evaluates a narrow range of skills and . . . receives the lowest scoring weight among the three UBE components.”) (internal citations omitted).

complete the MPT should be reevaluated and lengthened. Third, the performance test portion of the bar exam should be expanded to include more robust problem sets, opportunities for reflection, and clear and consistent guidance to bar takers and bar graders about expectations for lawyerly communication.

### A. Define Minimal Competency

Although bar exams, including the MPT portion, are designed to measure the minimal competency<sup>186</sup> necessary to practice law, there has not been, until recently, “any serious attempt to define the minimum competence that [the] exams [have] purported to measure.”<sup>187</sup> Historically, bar exams have “tracked the required law school curriculum” and “scores [on the MPT] correlated with both law school grades and LSAT scores”; however, these have not been “empirically tied to minimum competence for practice.”<sup>188</sup> Nor can

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<sup>186</sup> See American Bar Association, Bar Admissions Basic Overview (Jun. 26, 2018),

[https://www.americanbar.org/groups/legal\\_education/resources/bar\\_admissions/basic\\_overview/](https://www.americanbar.org/groups/legal_education/resources/bar_admissions/basic_overview/) [<https://perma.cc/5AUR-A86X>]; National Conference of Bar Examiners and American Bar Association Section of Legal Education and Bar Admissions, *Comprehensive Guide to Bar Admission Requirements 2019* vii (2019) (acknowledging that licensure requires minimal competency and a character and fitness worthy of trust to protect the public interest), <https://www.ncbex.org/assets/BarAdmissionGuide/NCBE-CompGuide-2019.pdf> [<https://perma.cc/ZAD8-JFHG>]. Just how well the bar exam measures minimal competency has been a long-time debate. See, e.g., Jarvis, *supra* note 1, at 374 (citing among others Erwin N. Griswold, *In Praise of Bar Examinations*, 60 A.B.A. J. 81 (1974); Ken Myers, *Bar Examinations under Examination as Dean Decries Wasted Time*, NAT'L L. J. (Oct. 17, 1994)). Generally, the current consensus, as even the NCBE's own Testing Task Force reports, is that it does not. See National Conference of Bar Examiners: Test Taking Taskforce, Overview of Preliminary Recommendations for the Next Generation of the Bar Examination (2020) (“NCBE Test Taking Taskforce”), <https://nextgenbarexam.ncbex.org/> [<https://perma.cc/85XF-3PRP>]. Moreover, as is discussed in the rest of this Section, what minimal competency is was not defined until recently. See, e.g., Merritt & Cornett, *supra* note 29 (noting that the bar exam's purpose is to “distinguish minimally competent lawyers from incompetent ones” but that “although the bar exam has existed for more than a century, there has never been an agreed-upon, evidence-based definition of minimum competence”).

<sup>187</sup> Merritt & Cornett, *supra* note 29, at 5 (internal citations omitted).

<sup>188</sup> See cf. Marsha Griggs, *Building a Better Bar Exam*, 7 TEX. A&M L. REV. 1, 56 (2019) (arguing that the bar exam does not track along with what is taught in law schools but that law professors often teach to the test and that “bar examiners essentially dictate to law students what they must know to pass the bar exam”).

the legal profession “claim that the system for licensing lawyers protects the public from incompetent legal representation.”<sup>189</sup>

In trying to define minimal competence, the Institute for the Advancement of the American Legal System (IAALS) surveyed fifty practitioner focus groups and analyzed the results, “asking for more detail about the knowledge and skills that new lawyers used during their first year of practice” and exploring “how they obtained those competencies.”<sup>190</sup> Recognizing that competencies evolve significantly in the first few years of practice, this study identified twelve building blocks that should comprise minimal competence, emphasizing that new practitioners who had these twelve building blocks were “able to represent clients with little or no supervision.”<sup>191</sup>

Some of the twelve building blocks may be “difficult to assess through conventional licensing exams,”<sup>192</sup> but the following ones should be goals of any written performance test:

- (1) The ability to act professionally and in accordance with the rules of professional conduct;
- (2) An understanding of legal processes;
- (3) The ability to interpret legal materials;
- (4) The ability to identify legal issues;
- (5) The ability to conduct research;
- (6) The ability to communicate as a lawyer;
- (7) The ability to manage a law-related workload responsibly;  
and
- (8) The ability to pursue self-directed learning.<sup>193</sup>

While these may parallel what the MPT already claims to assess,<sup>194</sup> having a clear definition of minimal competency and articulating that to the bar graders would help ensure that the skills the MPT purports to be testing are in fact being tested. However, a better and clearer understanding of minimal competency would be meaningless if no additional time were given to complete the MPT.

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<sup>189</sup> Merritt & Cornett, *supra* note 29, at 5.

<sup>190</sup> Merritt & Cornett, *supra* note 29, at 5.

<sup>191</sup> Merritt & Cornett, *supra* note 29, at 30 (explaining that while “conventional vision of minimum competence imagines a bucket of memorized legal rules accompanied by a few skills that new lawyers use to scoop and serve those rules” their research suggested that minimal competence was much more complex).

<sup>192</sup> Merritt & Cornett, *supra* note 29, at 30 (noting that some of the twelve building blocks might be better assessed “through educational requirements, supervised practice in clinics or workplaces, portfolios, simulations, and other means” and that a “serious licensing system, one focused on protecting the public, cannot omit essential competencies simply because they are difficult to test”).

<sup>193</sup> Merritt & Cornett, *supra* note 29, at 31-62.

<sup>194</sup> See discussion, *supra*, in Section II.A; see also The MPT Skills Tested, *supra* note 36.

## B. Give Bar Takers More Time

The current time constraint of the MPT not only subverts and compromises the very skills it claims to test, but it also invalidates the MPT as an assessment of minimal competency to practice law and best serve clients. Rather than stand out as the portion of the exam actually testing lawyering skills, the MPT, because of the strict time constraint, is essentially “another way of testing the same skills tested by other portions of the exam.”<sup>195</sup> Indeed, the tight time constraint on the MPT means that, like the other bar exam portions, one of the main abilities being tested is a bar taker’s ability to “act quickly as they read and digest the material, recall the applicable law, and apply that law to the given test question.”<sup>196</sup> Bar takers are not being accurately assessed on their knowledge and skills but on their ability to take a test under timed conditions. Although this speed component is often justified as relating to the need for a lawyer to act quickly in a fast-paced world, “the bar exam does not purport to test one’s ability to do that and there is no evidence that test-taking speed is related to lawyering skill.”<sup>197</sup> Nor is it clear that “the need for efficiency in some (but not all) aspects of effective lawyering” is accurately measured by the time pressured MPT.<sup>198</sup> Moreover, as discussed in Section II.B, speed is overvalued in the profession.

Unquestionably, attorneys must be able to manage their time, but responsibly. In the IAALS empirical study, supervising attorneys acknowledged that “some new lawyers ‘rush through things and that’s where the mistakes are made’” and that they wanted “new lawyers to ‘slow down’ to ensure quality work.”<sup>199</sup> They further noted that “[c]ompetent law practice . . . requires investigation, reflection, and research. Experienced lawyers sometimes offer immediate advice to clients, but new lawyers should hesitate to do so.”<sup>200</sup>

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<sup>195</sup> Curcio, *supra* note 26, at 379 n.68 (“The NCBE’s own study of the MPT confirmed that it mainly tests skills already tested elsewhere in the exam. The study found that legal and factual analysis accounted for 84-88% of the content of the tasks. The study also found that while the MPT did a good job of testing the applicant’s legal analytical ability and ability to identify and apply the facts, it was not a good measure of the applicant’s problem-solving ability.”) (citing Marcia A. Kuechenmeister, *A Performance Test of Lawyering Skills: A Study of Content Validity*, B. EXAM’R, May 1995, at 23, 27).

<sup>196</sup> Curcio, Chomsky & Kaufman, *supra* note 132, at 235.

<sup>197</sup> *Id.* at 238; *see also* Bratman, *supra* note 16, at 594-95 (noting that if the MPT was truly trying to assess bar takers’ ability to complete a task under a time constraint, it could give a score for completion, such as three out of four sub-parts, and a separate score for substantive analysis).

<sup>198</sup> Curcio, Chomsky & Kaufman, *supra* note 132, at 238 (citing Henderson, *supra* note 96, at 1035-38).

<sup>199</sup> Merritt & Cornett, *supra* note 29, at 58.

<sup>200</sup> *Id.* at 64, 73.

This evidence counters the rationale that the time constraint in the MPT is justified because lawyers must respond quickly to clients' questions or that speed by itself is a lawyerly skill. Numerous attorneys surveyed in the IAALS focus groups remarked that with only ninety minutes to read and digest material on a client matter, the supervisor would likely only expect a quick email answer and that providing an answer in ninety minutes would amount to malpractice, noting that "[c]lients are at risk when lawyers hurry."<sup>201</sup> The premium placed on speed by the bar exam is misplaced. "Instead, new lawyers should take the time to gather appropriate information, consult sources or peers, and formulate an answer."<sup>202</sup> While bar graders may account for the tight time constraint or have this perspective of what would be realistic to expect of a new attorney in mind as they grade the MPT, the time constraint undermines the MPT as an assessment of lawyering skills.<sup>203</sup>

To better assess the key skills needed for competent practice and to preserve the useful and practical aspect of the MPT, more time should be allotted for each MPT.<sup>204</sup> More time would allow more bar takers to demonstrate their competency and readiness for practice with realistic parameters. As the IAALS study reports, "bar examiners should develop time limits that encourage thoughtful responses."<sup>205</sup>

Allotting more time to the MPT "could arguably justify more explicit evaluation of an applicant's precision in writing and structure."<sup>206</sup> This would give bar takers an opportunity not only to

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<sup>201</sup> *Id.* at 66, 73.

<sup>202</sup> *Id.* at 64 (emphasizing that a "time-pressured bar exam . . . 'is not a measure of who's smart. It's who can type fast or who can read fast.' In the real world of practice . . . 'a lawyer who is thorough will "chew up and spit out" one who relies on speed"").

<sup>203</sup> Anecdotally, bar graders report that they consider the time constraint and what may be realistic as they grade and, accordingly, grade generously in light of that constraint. This seems to be evidence that a lot of time and resources are wasted in maintaining the fiction that the bar exam is a valid licensing tool. Bar takers spend tons of time, money, and mental and emotional anguish preparing for the bar exam, which then is ultimately more about their ability to take a test than to practice law and which the bar graders recognize and then spend time and mental resources trying to accommodate. There must be a better way.

<sup>204</sup> *See, e.g.,* Bratman, *supra* note 16, at 595. ("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>205</sup> Merritt & Cornett, *supra* note 29, at 73 ("Careful pretesting with junior lawyers may help establish those more reasonable timeframes. That pretesting should include lawyers with disabilities to assure that time limits are consistent with universal design.").

<sup>206</sup> *See* Bratman, *supra* note 16, at 605.

complete the task but also to focus on their writing and organization, allowing them to demonstrate the skills that the MPT is designed to assess, including legal writing, which it currently does not.<sup>207</sup> For example, previously bar takers taking the California bar exam had three hours for the performance test portion—which allowed for a “more in-depth skills evaluation”<sup>208</sup>—now they have ninety minutes.<sup>209</sup>

More time could be added to work through the MPT packet and write an answer on the exam day, following the current model but with more time allotted. Alternatively, more time could be added by sharing the facts or the law (or both) in advance of the exam day. For example, sharing the facts in advance would allow the bar takers to become familiar with the facts before coming into the exam and then have the time to home in on the law and on organizing and writing the answer effectively during the exam.<sup>210</sup> The facts could also be a bit more robust, making the clients and their problems more multi-dimensional.

Similarly, providing the law in advance without the facts would allow bar takers to digest and begin to synthesize the law before being in the time-pressured exam space. It would also allow bar examiners to move away from having such tightly edited packets of law, which would better simulate legal research in practice. Giving both the facts and the law—the task memo could be withheld (or not)—would ensure that the focus of the assessment remained on the skills being assessed and not on a bar taker’s ability to take a timed test. In this regard, giving any part of the MPT in advance would also eliminate some of the inequities that arise with a timed test for bar takers who more slowly type or process information.

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<sup>207</sup> *See id.* at 594 (“On balance, it would appear that bar exams currently evaluate writing skill only minimally or not at all. While taking steps toward grading the quality of writing must be carefully thought out, writing is simply far too important of a skill not to be evaluated on its own merits on the legal profession’s licensing examination.”) (internal citations omitted).

<sup>208</sup> Bratman, *supra* note 185, at 10.

<sup>209</sup> The California State Bar changed its bar exam in 2017, reducing it from three days to two and requiring only one ninety-minute performance test instead of two three-hour ones. *See* California Desert Trial Academy College of Law, Bar Exam Basics: The Performance Test, <https://cdtalaw.com/tag/performance-test/> [https://perma.cc/R6R6-2LMG].

<sup>210</sup> *See* Smetanka, *supra* note 14, at 757 (discussing John Marshall’s study with volunteers taking the California Bar Exam performance test portion and how much a difference there was in the answers when the students had the facts prior to the two-hour exam time).



### C. Expand the Performance Test

Given that the MPT and other performance tests are the assessments most aligned with what new attorneys need to be able to do in practice, these portions of the bar exam should be expanded. Allotting more time to them, providing more of them, or otherwise increasing the weight of their score<sup>211</sup> in the overall exam would all help make the bar exam more equitable and a more valid assessment of necessary licensing skills.

Some of the recommendations for expanding the role that performance tests have in the bar exam include covering skills like client counseling and relations, negotiations, and other transactional skills.<sup>212</sup> Some of these skills and others identified in the IAALS study as being important for practice may not be easily assessed with a written performance test. They may thus require other types of performance tests or curricular additions, like live-client clinics.<sup>213</sup> Because this Article focuses on the MPT as a legal writing assessment, it limits suggestions for improving the bar exam and expanding the performance test portions to written performance tests. It does not address other recommendations for bar reform,<sup>214</sup> including the one

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<sup>211</sup> See Bratman, *supra* note 16, at 607-08 (arguing for the weight of the score of the MPT, which is prescribed by the NCBE for the UBE at 20% of the overall score, be raised even if the current structure of the UBE is retained); see also Bratman, *supra* note 185, at 8 (asking why “[n]early 20 years after the MPT was introduced, and after considerable movement in legal education toward greater and more varied skills training, what is the current basis for still giving lesser weight to performance test questions than to essay questions?”).

<sup>212</sup> See Merritt & Cornett, *supra* note 29, at 66, 72; see also Bratman, *supra* note 16, at 597-98 (discussing how client counseling, negotiation, alternative dispute resolution, and other important skills could be tested).

<sup>213</sup> See Merritt & Cornett, *supra* note 29, at 72-76.

<sup>214</sup> Without proposing specific reforms for other than the written performance test, the authors hope that principles of equity and accessibility are at the forefront of any bar reform. As many have criticized, “[s]tark racial disparities mark the legal profession’s licensing process” and the exam, in its current form, is more of a test of resources than a test of minimal competency. See, e.g., Merritt, Chomsky, Angelos & Howarth, *supra* note 184 (discussing the AccessLex Institute study analyzing first-time bar takers on the UBE in New York and noting that resources and stereotype threat both contributed to racial disparities in passage rates); AccessLex Institute, *supra* note 45. Additionally, as a result of the COVID-19 pandemic, many states offered remote bar exams. These, too, raised equity issues—and accessibility challenges. One such issue was how the MPT problem was loaded to the remote exam software as a PDF and how it could be navigated and viewed. Taking the steps to ensure that the test is equitable and accessible should be of the utmost importance in any future administrations and reforms.

that the entire bar exam should be a performance test<sup>215</sup> or that in expanding the written performance test, bar essays should be eliminated.<sup>216</sup>

The authors are rather asserting that expanding the written performance test, provided that the time allotted for it is increased, would enable bar examiners to provide more robust problem sets. Whether or not the facts or law were given in advance, the MPT packet could give the client more dimensions and provide a fuller set of authorities, like rules that would address the procedural posture of the case or allow bar takers to extract and articulate implicit rules. A more robust MPT could also allow bar takers to engage in more significant legal research, including assessing authorities or perhaps even finding authorities.<sup>217</sup> With more time and a more robust File or Library—or both—bar takers would be better able to showcase their legal writing and lawyering skills, allowing a more effective assessment of the minimal competencies needed for the practice of law.

An expanded performance test could also better encompass ethical dilemmas and social justice issues. Currently, the MPT only occasionally tests how an attorney navigates an ethical dilemma: most significantly, when it includes a problem centered on the substantive analysis of the rules of professional conduct.<sup>218</sup> But navigating ethical

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<sup>215</sup> See generally Charles R. Splawn, *Going All-in on an All-MPT Bar Exam: A Better Measure of Competence to Practice Law?*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3572166&download=yes](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3572166&download=yes) [<https://perma.cc/4SUG-34ER>].

<sup>216</sup> The authors agree that to avoid having bar takers sit for an exam longer than two days, eliminating either the essays or some of the multiple-choice questions would be worthy and logical ways to improve the bar exam. The authors also agree that the MPT is the “most valid testing instrument on the bar exam, evaluating more lawyering skills than essay questions do while not requiring recall of memorized law.” See Bratman, *supra* note 185, at 8 (noting that while the essay questions traditionally tested local law, but that with local law now being covered through “supplemental state CLE courses or tests (a premise of the UBE that actually makes sense)” the essay questions may not be necessary) (internal citations omitted); see also Merritt & Cornett, *supra* note 29, at 66, 72 (“Performance tests allow assessment of multiple building blocks, including an understanding of legal processes and sources of law, the ability to interpret legal materials, familiarity with the rules of professional conduct, an understanding of threshold concepts, and effective written expression. . . . Essay questions, in contrast, add little to assessment. The writing style and format do not parallel the written forms that examinees use in practice; nor do these questions improve reliability or efficiency in grading.”).

<sup>217</sup> See, e.g., Bratman, *supra* note 16, 599-601 (discussing how legal research might be tested in more depth, including research methodology through short-answer questions).

<sup>218</sup> See Bratman, *supra* note 16, 596-97 (2015) (noting that professionalism may be difficult to test and that the rules of professional conduct are usually

dilemmas could be tested by having bar takers note questions that they would want to investigate further or by writing a memo on the pros and cons of a particular action. Similarly, the MPT could include issues that would highlight how a lawyer not only represents clients but also “serves as ‘an officer of the legal system’ and as ‘a public citizen having special responsibility for the quality of justice.’”<sup>219</sup>

Just as it is not enough for new attorneys to know the black-letter rules of professional conduct but rather to have “the *ability to act* professionally and in accordance with the rules of professional conduct[,]” new attorneys, now more than ever, need to be able to understand and engage in a discussion about the “nature of justice in the United States.”<sup>220</sup> Expanding the MPT to include these questions and reflections would help reinforce that ethical law practice is more than knowing the rules.

In addition to adding reflections on ethical dilemmas or the nature of justice, the MPT or other performance tests would provide a better assessment of a new attorney’s competency by incorporating other reflection prompts or portions. For example, even if the ninety-minute time were preserved for a single MPT, bar takers could have additional time to write what questions they had for a supervising attorney,<sup>221</sup> what they would like to have done with more time, what other research they would have done, what other issues they spotted, or how they would revise the answer if they could. They could also be asked to review someone else’s memo—like a sample memo from a colleague in the MPT’s simulated firm—and identify and describe the errors in that memo and how to correct them, demonstrating their legal writing abilities in a different way.

Furthermore, expanding the MPT to include in its instructions and Point Sheets greater clarity and consistency for how the skills it seeks to test would be assessed would also improve the MPT. This is

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testing through other means, like the Multistate Professional Responsibility Exam (MPRE)).

<sup>219</sup> Merritt & Cornett, *supra* note 29, at 33-34 (quoting the Model Rules of Prof'l Conduct Preamble (Am. Bar Ass'n 2020)).

<sup>220</sup> See Merritt & Cornett, *supra* note 29, at 33-34. As the authors of this Article, we are aware that the nature of justice and systemic inequities have too often been afterthoughts in legal education and in many practices, as though the practice of law or the rule of law is separate from pursuing justice. The renewed national attention to and discussion of racial and social inequalities and the nature of justice in our country, in the wake of George Floyd’s and so many other murders, the violence against Asian Americans, and the vast inequities exacerbated and brought to light during the COVID-19 pandemic, have made this ability to engage in this discussion imperative for attorneys. Legal education and the profession have an opportunity to rise to this moment—and the bar has an opportunity to reflect this commitment.

<sup>221</sup> See Bratman, *supra* note 16, at 590 (“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.”).

not to suggest that a rubric be required but instead that additional and consistent guidance as to legal writing principles would benefit both bar taker and bar grader. As is noted above in Section II.B,<sup>222</sup> the MPT often instructs only that bar takers should “communicate effectively” but not what “communicating effectively” means or how their legal writing will be evaluated. Some task memos in the MPTs give some guidance, like what kind of headings to include, but many MPTs include no guidance whatsoever.

This Article provides many legal writing best practices that could be incorporated into the MPT instructions or assigning memos and Point Sheets, but, at a minimum, they could include instructions to explain the law before applying it, have headings that assert conclusions and blend law and fact, present rule statements from broad to narrow, use specific facts in the application, and guide a reader with transitions, topic sentences, and road maps. Expanding the MPT in this way would help instill best practices but also allow for a more accurate assessment of essential legal writing and lawyering skills.

Based on the preliminary recommendations for the next generation bar exam by the 2020 Testing Taskforce of the National Conference of Bar Examiners (NCBE),<sup>223</sup> future bar exams seem poised to expand the performance portions of the test. Instead of having discrete components like the MPT, multiple choices questions, and bar essays, the future bar exam will be “an integrated examination that assesses both knowledge and skills holistically, using both stand-alone questions and item sets, as well as a combination of item formats (e.g., selected-response, short-answer, and extended constructed-response items).”<sup>224</sup> The item sets will include questions or prompts performance tasks or some combination, and each item set will center on a “single scenario or stimulus.”<sup>225</sup> The NCBE promises that the item sets will include “real-world types of legal problems that newly licensed lawyers encounter in practice and [will provide] an authentic assessment of lawyering skills.”<sup>226</sup> The NCBE recommends that the bar examination assess the following skills: legal research, legal writing, issue spotting and analysis, investigation and evaluation, client counseling and advising, negotiation and dispute resolution, and client relationship and management.<sup>227</sup> The list of skills to be assessed, along with foundational concepts and principles, suggest that the next generation bar examination will better assess the knowledge and skills necessary for law practice and

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<sup>222</sup> See *The Trouble with Turkey*, *supra*, Section II.B.4.

<sup>223</sup> NCBE Test Taking Taskforce, *supra* note 186.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

will be better aimed at assessing what is legitimately minimal competency.

How well the next generation bar exam implements these reforms without repeating or perpetuating the same inequities and biases remains to be seen. But a better bar exam appears to be on the horizon. Let us hope that this progress and reform with the bar exam is less glacial than it has been in the past.<sup>228</sup>

### Conclusion

At a time when the general relevance of the bar exam is under heightened scrutiny, the MPT emerges as the assessment most closely aligned with what is necessary to practice law. However, it also risks undermining the very skills it aims at assessing and is unrealistic in its time constraint. Further developing and expanding the MPT and giving bar takers more time for it are important steps in creating a better bar exam and more valid assessment of one's lawyering skills and ability to practice. Nevertheless, there are rich teaching opportunities in the MPT even in its current form and bar takers will benefit from understanding how layers of the MPT—the genre wrapped in genre wrapped in genre—work together and how they can use them to be most successful not only on the bar exam but also in practice.

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<sup>228</sup> See Bratman, *supra* note 185, at 10 (quoting the Executive Director of the NCBE as saying in 2012 that “any reforms to the exam will be ‘more glacial than volcanic’” and citing to Erica Moeser, President’s Page, B. Exam’r, Mar. 2012, at 4, 5, [https://thebarexaminer.org/wp-content/uploads/PDFs/810412\\_be\\_PresidentsPage.pdf](https://thebarexaminer.org/wp-content/uploads/PDFs/810412_be_PresidentsPage.pdf)) [<https://perma.cc/Y4VP-AHNC>].