

# The Multistate Performance Test (MPT)

## Primer

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### INTRODUCTION TO WRITING THE MULTISTATE PERFORMANCE TEST PORTION OF THE UBE

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38 Jurisdictions require the MPT. On the Uniform Bar exam, you will have two 90-minute performance tests that is designed to simulate the tasks a first-year attorney might be asked to perform. It is extremely important to take this portion seriously. Even students who have been relatively successful in law school can have problems on the performance tests if they fail to adequately prepare for this portion. The student has no way of knowing what specific issues will appear on the performance test, and this can be a good thing. Even if you did know the specific issues tested, it would be of no use since the bar examiners give you the law you are supposed to use. They do this to avoid giving an advantage to students with any familiarity with that area of law. So, students often ask, how can I prepare for the performance tests? The answer is simple: PRACTICE!

For each performance test, you will have a **Task Memo, Library and File**.

**Task Memo:** this is the single most important document in the MPT, as it identified the issues to be addresses (or not addressed) and provides an overview of the facts. It also established the audience, tone and organization of your document.

**File:** In addition to the instructions and the task memo, you will receive a series of documents that simulate a client file. This will consist of such documents as transcripts of a client interview, trial transcripts, letters and/or motions from opposing counsel, and possibly documentary evidence such as an evidence log or maintenance records. Collectively, this client file will give you all the facts you need to write your performance test, and it is these facts to which you will refer when analyzing how the law applies in your client's case. Let us stress that again: the client file will give you ALL the facts you need. Use them. Love them. Do NOT make up new ones or disregard facts that are given to you.

**Library:** This may contain statutes applicable to the client problem, and it will contain one or more cases that shed light on the law applicable to the case. It is possible these cases may look like other cases you have read in law school. If so, do NOT assume that the cases are the same as the ones you are familiar with! The bar examiners will often use real cases but change the law in subtle but significant ways. Again, please let us stress— this is ALL the law you need. Do not bring in outside law — it will not help you. And, conversely, do not disregard this law. The bar examiners have given you law for a reason. Please do not frustrate them by disregarding it.

While the bar examiners might ask you to prepare a variety of documents, the bar examiners have almost exclusively asked for one of three documents: an office memo, a brief (usually referred to as

a “memorandum of points and authorities”), or a letter. In most cases, one of the two performance tests you get will ask you to write objectively, and the other will ask you to write persuasively. Also See the Frequency Chart on page \_\_\_\_\_ to see what documents have been tested when. We will talk more specifically about the type of documents you will be drafting further in this document.

## **WHY IS THE PERFORMANCE TEST ON THE UBE?**

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The performance test is a skills test covering the tasks a first-year associate might be commonly asked to complete. The bar examiners are testing your ability to read, analyze, organize, and write in a limited amount of time. In short, they want to know that you will be a good lawyer, and that you have the skills to take a case file and do what lawyers do on a daily basis. The performance test provides a reliable means of measuring important lawyering skills that are not assessed fully by the traditional essay and multiple-choice portions of the examination. The performance test answers are graded on the applicant’s responsiveness to instructions and on the content, thoroughness, organization and persuasiveness of written tasks.

While this portion requires the ability to think, organize, and write quickly and succinctly, it does not require outside knowledge. Yes, we said that before, but it bears repeating (though YOU should not be repetitive on the performance test!). **DO NOT BRING IN OUTSIDE KNOWLEDGE.** Ever. Even if you think it is brilliant outside knowledge.

### Guidelines for the Performance Test

Read the task memo very, very carefully and follow its directions exactly. (Bar graders routinely cite “failure to follow directions” as the key reason students receive failing scores on the performance test portion of the bar exam.)

Answer the questions asked in detail, but do not ramble or discuss irrelevant information. There are enough **RELEVANT** issues to discuss. And remember, they are looking to see if you can be a good attorney. No one wants to hire an attorney that charges them for rambling on about irrelevant stuff.

Stick to a basic IRAC or CREAC formula. This means bringing in rule statements from the library, facts from the case file, and explaining how they work together. Do not deviate from the basic formula.

Draft the document requested. Again, this means you need to read the task memo carefully and also keep in mind whether your fictional audience is the judge, the senior partner, a client, an opposing attorney, etc. Make sure your tone fits the audience, and do not be overly casual. For instance, what you write to a judge could be vastly different than a client letter.

Use the law from the library and the facts from the file. The information you’ve been given is there for a reason.

## **SKILLS NEEDED FOR THE PERFORMANCE TEST**

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### Legal Analysis and Reasoning

Just like in law school, here you need to show the bar examiners that you have the ability to identify and formulate legal issues, analyze the relevant legal rules and principles, and apply the RELEVANT (let me stress RELEVANT) facts. This could be in the form of a memo to a supervising attorney, a persuasive memo or brief, a letter to a client, a letter to an opposing counsel, or a letter to an administrative agency.

This includes fact gathering and fact analysis. This means you need to investigate and gather all favorable AND unfavorable facts. Part of your task is to filter out the irrelevant facts in the file and focus only on the things that you need. This is being tested because it is a much-needed skill for a lawyer to have. A client comes into your office and tells you a story — it is up to you to determine what is relevant. Trust us, not everything a client tells you is relevant to the case at hand. You also have to analyze and use the facts — apply them to the relevant statutes and case law available in the library. Often this means that you should compare and contrast cases with your available facts.

### Communication

One of the most important skills that the performance test tests is your ability to communicate; that is, how well can you express your ideas to a client, senior partner, judge, or opposing counsel? A good attorney is able not only to know and analyze the law but also to effectively convey the law and to explain how it pertains to relevant facts. This means you should be precise and clear and write to your intended audience. How you write to a client is much different than how you would write to a senior partner or a judge.

### Organization

The examiners are testing you on how well you are able to organize your thoughts and analysis in the requested legal document. Can you effectively manage your time and resources? Are you spending the appropriate amount of time on the right issues and rules? Organization is key.

### Answering the Question Asked

Be sure to answer the question(s) being asked and ONLY the question(s) being asked. This is key for both your essays AND the performance test. The bar examiners want to know that you will not waste your time delving into irrelevant issues. This is not the time to write a dissertation on the law you know or think you know.

## **TYPES OF DOCUMENTS YOU MAY BE ASKED TO PREPARE ON THE CALIFORNIA PERFORMANCE TEST**

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### Office Memorandum

This is almost always an objective analysis of the client's case. Typically, you are advising a senior attorney at the firm on the strengths and weaknesses of your client's case. Remember that when you prepare a document such as this, you will want to reach a conclusion that is not wishy-washy. Try to find arguments that favor the client's position, but do not ignore or minimize negative facts or law. Remember, in real life when a senior attorney asks for something like this, she is going to use it to prepare her arguments in court. If you don't tell her about a crucial counterargument and things go badly in court, she's going to be heading back to the office ready to tear some junior

attorney a new one. (Or get you fired, which would be awful when you have not yet even passed the bar!) Thus, office memos are both a summary of the client's argument and a CYA memo for a junior attorney. Bar graders know all of this, so they'll expect the tone of what you write to be appropriate.

While some MPTs provide specific drafting guidelines or templates, memo MPTs usually don't, although the task memo may remind you not to spend time restating the facts. Don't waste time pondering how to organize your MPT memo. Be prepared to use a default organization consisting of a heading (To/From/Date/Re), Introduction (state the question you were asked, your conclusion, and briefly explain the rationale), and Discussion (CREAC or IRAC each issue; separate the issues with subheadings).

### Persuasive Brief

Here, you need to be persuasive and not concede crucial points to the other side. Don't leave out unfavorable facts or law (because to do so in real life would be unethical), but ALWAYS spin everything so that the client's argument appears in the strongest light possible. Start with your good points and move on to those that are less persuasive. If you are responding to an opposing motion in the file, don't just follow the structure the opposition uses; make your own outline starting with the client's strongest points. And remember above all else: this is supposed to be PERSUASIVE. Which means your goal is to persuade.

Many MPTs requesting briefs provide drafting guidelines. Pay particular attention to the sample headings that are often included. A well written heading succinctly refers to both the rule of law and the determinative facts. You should be able to draft effective headings while you're taking notes, prior to actually drafting your answer. The task memo has identified the issues; you've extracted the rules from the Library; you've noted key facts from the File. Put the pieces together to construct your headings and organize your answer. But don't waste time here. If you're struggling to draft a persuasive heading, do the best you can – a weak heading is better than none at all. Then move on to the body of the argument, where more points will be allocated.

### Letter

The third most common MPT task is the letter. While the audience and tone are consistent for memos (attorney, objective) and briefs (judge, persuasive), these may vary considerably for letters.

Know your audience and tone. Be alert for a description of the recipient, including her level of legal knowledge, and the purpose of the letter, which may be to inform, predict, or persuade. You'll be expected to tailor your tone and style appropriately.

Organize your answer. Some letters provide drafting guidelines, but some do not. Be prepared to follow a standard structure: salutation; body of the letter, featuring a IRAC or CREAC of each issue, separated by subheadings; and closing.

### Counseling/Opinion Letter

This is a letter written to the client advising him or her about the strength of his or her case. This should be an objective letter, outlining both the case's strengths and its weaknesses. In this way, it is very much like an office memo, but keep in mind that when your audience is a lay person, the expectation is that you will tone down the legal jargon and explain things very clearly. (In reality, this is a good idea in an office memo as well but pay particular attention to it in a letter to the client.)

### Demand Letter

This is a persuasive letter written to the opposing counsel. The general statements above about persuasive briefs apply here as well, but also remember to keep your tone respectful. Don't use hostile words such as "ridiculous" or "frivolous." A judge once told us that demand letters almost always end up in court, so do not use language you would not want a judge to see. Or, for that matter, your mother.

### Other Documents

Wildcard. The final MPT possibility is a "Wildcard" – a unique document or task, which may include review or revision of a sample document. Take a deep breath and stay calm. Wildcards typically include drafting guidelines. Follow them precisely. You're simply being asked to demonstrate the same skills of legal and factual analysis you'd apply in a memo, brief, or letter in an unfamiliar context. Rely on your skills, follow the guidelines, and don't panic! While they have not yet tested on drafting a Will, Interrogatories or a Closing Argument, they have tested on drafting other types of documents. It is possible they will ask you to draft something unusual. If so, remember that they always give you a sample of anything unusual they ask you to prepare. (The sample will be located in the file immediately following the task memo.) If you get an unusual request from them, take a deep breath, relax, look at the sample, and organize your answer to look like the sample you've been given.

## **THE TIME FACTOR**

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You should only spend half your time writing. I will say it again. You should only spend half your time writing. Yes, that is only 45 minutes, and you are given 90 minutes. Why on earth would you spend the other 45 minutes doing stuff that your bar examiner will never see? Because the bar examiner will know whether or not you actually took the time to think and organize before you started writing.

Read Task Memo Carefully — 2-3 Minutes. At the outset, there are three things you need to get from the task memo: (1) the general subject matter of the case (e.g., clients being evicted from their apartment because they had a kid and now exceed the occupant limit); (2) the document you are being to prepare; and (3) whether you will be writing objectively or persuasively.

Read File — 7-9 Minutes. Now you'll go through the file, again carefully noting key facts that seem to fit the law discussed in your library.

Read Library — 12-15 Minutes. At first, you'll want to skim any statutes — the statutes should be used as reference materials, just as they are in real life. Then read each case in the library carefully, taking special care to look for any rules of law. Since you're reading the library before the file, you won't yet know which specific rules apply to your case, but you'll want to carefully keep track of the rules that arise from each case. If the bar examiners give you some kind of five-factor test in one of the cases, that means they want you to USE it in your answer.

Outline Answer— 18-24 Minutes. Now you'll need to put together your organizational map, including any case law and relevant facts that need to be discussed. This is also when you'll go back to the library and pick up any relevant statutes that need to be discussed.

Write— 45 Minutes. Now you're ready to roll, with a well-written, well-reasoned argument that will make the best possible case for your fictional client.

So go knock your MPT(s) out of the park!

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