

MEE AND MPT TEST DEVELOPMENT: A WALK-THROUGH FROM FIRST DRAFT TO ADMINISTRATION

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As program director for the Multistate Essay Examination (MEE) and the Multistate Performance Test (MPT), which is one of my jobs at NCBE, I've been asked many times about what it takes to create these two exams. My short answer: a lot! My long answer: this article, which will provide an overview of the various steps in NCBE's MEE and MPT test development from first draft to administration. While there are some differences in test development between the MEE and the MPT, the development of both exams relies on the skill and knowledge of drafters, review by external experts and stakeholders, pretesting, and multiple rounds of editing.

BACKGROUND INFORMATION ON THE MEE AND THE MPT

The MEE is a six-question essay exam whose purpose is to test an examinee's ability to (1) identify legal issues raised by a hypothetical factual situation; (2) separate material which is relevant from that which is not; (3) present a reasoned analysis of the relevant issues in a clear, concise, and well-organized composition; and (4) demonstrate an understanding of the fundamental legal principles relevant to the probable solution of the issues raised by the factual situation. (Jurisdictions may administer fewer than six MEE questions if they choose; however, most jurisdictions, including all jurisdictions administering the Uniform Bar Examination, administer all six questions.) The primary distinction between the MEE and the Multistate Bar Examination (MBE) is that the MEE requires examinees to demonstrate an ability to communicate effectively in writing. Unlike the MPT,

the MEE requires an examinee to have studied substantive areas of law and respond to specific questions according to generally accepted fundamental legal principles. The MEE may cover any of 12 areas of law, which vary from exam to exam; some questions may include issues in more than one area of law.

The MPT is a closed-universe test consisting of two performance tasks designed to test an examinee's ability to use fundamental lawyering skills in a realistic situation. Each MPT item evaluates an examinee's ability to complete a task that a beginning lawyer should be able to accomplish. (Jurisdictions may administer one or two MPT items; however, most jurisdictions, including all jurisdictions administering the Uniform Bar Examination, administer two items.) The MPT is not a test of substantive knowledge. It requires examinees to (1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for applicable principles of law; (3) apply the relevant law to the relevant facts in a manner likely to resolve a client's problem; (4) identify and resolve ethical dilemmas, when present; (5) communicate effectively in writing; and (6) complete a lawyering task within time constraints.

The MEE and MPT are administered the day before the administration of the MBE. Thirty-three jurisdictions administer the MEE; 42 jurisdictions administer the MPT. Both tests are also components of the Uniform Bar Examination, which is administered in 16 jurisdictions. (These numbers include Kansas, which adds the MEE and the MPT with its first administration of the UBE in February 2016, and

New York, which adds the MEE with its first administration of the UBE in July 2016.)

All MEE and MPT questions (and grading materials) are subject to a rigorous development process that usually takes about two and a half years—a process with the requisite checks and balances to ensure that each item meets the requirements to be used as a licensing tool.

MEE AND MPT DRAFTING COMMITTEES

The MEE and MPT Drafting Committees, each consisting of between five and eight members, are composed of any or all of the following experts: law school professors, practicing attorneys, and judges. MEE drafters are experts in the subject matter fields covered by the MEE. The MPT Drafting Committee is unique among NCBE drafting committees in that it is heavily weighted toward law school clinical faculty, who teach both in clinics and in the classroom, and practicing attorneys. (NCBE has 10 drafting committees—one for the MEE, one for the MPT, one for each of the seven MBE content areas, and one for the Multistate Professional Responsibility Examination [MPRE].) Both the MEE and MPT committees meet twice a year to review and edit questions over the course of a weekend after the initial drafting of the questions has occurred. Members presently serving on the MEE and MPT Drafting Committees hail from 12 jurisdictions (the District of Columbia, Florida, Georgia, Illinois, Iowa, Minnesota, New Mexico, New York, North Carolina, Tennessee, Texas, and Vermont) and represent nine law schools.

Two full-time staff members—myself and Sonja Olson, a lawyer-editor—provide direct support to these committees. Additionally, many NCBE staff members provide administrative, technical, and editorial support for the MEE and MPT.

DEVELOPING THE MEE AND THE MPT: THE BASIC STEPS

Drafting and Editing

MEE questions and analyses are written by both MEE Drafting Committee members and outside item

writers who are professors from law schools across the country. (MEE analyses are illustrative of the discussions that might appear in excellent answers to the questions; they are provided to the user jurisdictions to assist graders in grading the MEE.) These item writers prepare MEE items and analyses in accordance with NCBE's MEE Item Writer's Guidelines, which detail length, style conventions, analysis content and format, guidelines for citing legal authorities, suggested grading percentages, etc. Drafters, whether they be committee members or outside writers, are given topics within each MEE subject matter area in which to craft a question (for example, from the MEE subject matter outline for Civil Procedure item I.A. Jurisdiction and venue—Federal subject matter jurisdiction [federal question, diversity, supplemental, and removal]) and are reminded that the exam is one of minimum competence, so the question must reflect that level of difficulty. After an item is submitted to NCBE, a staff member enters it into NCBE's question management database, which allows staff to track edits, make notes, and essentially chart the item's development course, including on which exam form it will appear (but that's way down the road).

MPT items and point sheets are written by MPT Drafting Committee members. (MPT point sheets describe the factual and legal points encompassed within the lawyering tasks to be completed and outline the possible issues and points that might be addressed by an examinee; they are provided to the user jurisdictions to assist graders in grading the MPT.) All ideas for MPTs are vetted through the drafters and NCBE staff before drafting occurs. The nature of the task, the audience (opposing counsel, supervising attorney, judge, client, etc.), the setting or context (the substantive legal area), and gradability are discussed and taken into account before a committee member submits his or her first draft for NCBE staff review and then full drafting committee review.

Both committees use a system that designates a "shepherd" (who is not the author) for each item; the author and the shepherd work together to get items into exam-ready shape. For both tests, the shepherd is

responsible for leading the discussion and editing of the item during the meeting and sometimes beyond. MEE shepherds are content experts in the question's subject matter area and usually remain constant throughout the development cycle for that particular item (to ensure content expertise). MPT shepherds, by contrast, change at each meeting, so any given MPT will have about four different shepherds in addition to the author. (Because the MPT, by nature, is focused on demonstrating skills rather than substantive knowledge, shepherds are instead selected with the goal of having as many drafters throughout the process get to know the item inside and out—rather than being selected based on expertise in a specific content area.) Shepherds and/or authors on both committees are also responsible for editing the items and grading materials before and after drafting committee meetings. So there is most definitely drafter homework!

Semiannual committee meetings are intense two-day sessions spent around a table with a laptop or two, a projector, and a screen (and a *lot* of coffee!) to facilitate discussion and editing. Each MEE or MPT item is first discussed conceptually; thereafter, the discussion moves into a line-by-line dissection of items and grading materials, with the whole committee participating. Work that cannot be done efficiently during the meeting is assigned to drafters/shepherds to complete outside the meeting. NCBE staff and drafters exchange all test materials using a secure server throughout the development process to maintain item confidentiality.

Outside Expert Review

Once an MEE or MPT item has undergone thorough review and editing by the drafting committee as a whole and by the item shepherd and/or author outside the meeting, the item (with its grading materials) is reviewed by outside content experts.

MEE reviewers are usually law professors but sometimes judges or practicing attorneys. Professor-reviewers come from dozens of law schools across the country. Reviewers are given the item, its grading materials, and guidelines to follow in preparing their review. The guidelines include questions for the

reviewer to answer about the materials. The reviewers are asked to evaluate the thoroughness, accuracy, and clarity of the grading materials. Reviewers are also asked to write an independent analysis for the question and compare that to the analysis prepared by the drafter.

MPT items and point sheets are reviewed by two reviewers—one practitioner and one law professor—who are both experts in the setting or context of the problem. For example, an MPT item that focuses on ethics will be reviewed by a professor who teaches ethics and a practitioner who might be ethics counsel in a law firm or for a state bar. (Even though the MPT is a skills test and does not test substantive knowledge of a particular subject area like the MEE, MPT tasks must have legal context, and review by experts in that legal context ensures that the context is realistic and legally accurate.) Reviewers are drawn from law schools across the country and from all professional settings: public interest lawyers; attorneys in private practice; government lawyers; and administrative, trial, and appellate judges. As with the MEE, reviewers are given guidelines to follow in preparing their review, which include questions to answer about the materials.

The questions that MEE and MPT reviewers are posed about the item and its grading materials include the following: Does the item pose a question that is appropriate for a test of minimal competence? Do the grading materials accurately state the law? Does the item present any bias against a particular group of people? In addition, MPT reviewers are asked the following questions specific to the MPT: Does the item test the lawyering skills it purports to test? Is the task appropriate for a newly licensed lawyer to complete? Is the setup of the item realistic? Communication with these outside expert reviewers is also done using a secure server to ensure that confidentiality of the materials is maintained.

Pretesting

At around the same time that the items are reviewed, they are also pretested by 10 newly licensed lawyers. Pretesters are identified and invited by bar

administrators across the country. Most MEE and MPT jurisdictions have participated in pretesting over the past decade. Pretesters are paid to take the MEE or MPT under exam-like conditions on laptops provided by NCBE. They record their start and stop times for reading and writing each item. After the pretest, they fill out a survey about each item, rating the items on clarity of facts and call of the question (or task for the MPT), difficulty, bias, and appropriateness in general for a bar exam. They also engage in a debriefing session about the pretest with the bar administrator from their jurisdiction, who then prepares a memo for the drafting committee to review at its upcoming meeting. Pretesters and expert reviewers sign confidentiality forms to ensure that the security of the items is not breached during these phases of test development.

Expert review and pretesting help the drafting committee members gauge if the items are test-ready. Typically, they're not quite ready, and items undergo further revising and editing by the drafting committee at its next meeting, during which the committee also reviews and edits other items in various development stages. Drafters are usually given assignments to complete shortly after the meeting.

Creating MEE and MPT Test Forms

Once the materials have passed the expert review and pretesting stage and have been subjected to further editing, a process that usually spans at least one year, they are designated as "test-ready," which means they will be placed on an upcoming exam form. The drafting committees and staff select the items, subject to MEE/MPT Policy Committee review and comment (as discussed below). (While there are separate drafting committees for the MEE and the MPT, there is one combined policy committee for both exams.)

Each drafting committee reviews a proposed test form (composed of two items for the MPT and six items for the MEE) for the first time roughly 15–16 months before administration. This is called the preliminary form review. Drafters consider how well the items in the proposed form complement each other. For the MPT, drafters ensure that the tasks

and contexts of the two items are distinct. The six MEE items are selected to balance content within one exam and also from exam to exam. (NCBE's question database helps us chart coverage of MEE topics on exams. Because we have a large question bank for both exams, it is possible for us to swap out items on a proposed test form if we have any reservations. While this is rare, it does happen, and we have test-ready alternatives to substitute.) Drafters may also identify additional changes to be made to the grading materials at this stage.

While committee members have seen the individual items several times before at past meetings, this preliminary review is important because it is the first time that the drafting committee members see the items placed on a test form. After the preliminary review, which typically takes a lot of committee meeting time, there is a penultimate drafting committee review about six to eight months before the exam, and a final review a few months before administration. These last two reviews are as intensive as the preliminary review, but by these stages in test development, the items and grading materials are in pretty good shape and require minimal substantive editing.

Final Stakeholder Review

Also at about 15–16 months prior to administration, the MEE/MPT Policy Committee reviews the proposed test form for the first time. The policy committee is composed of bar examiners and administrators from MEE and/or MPT user jurisdictions. The committee members either meet in person or are granted secure access to the exam forms and grading materials to comment on and discuss whether they deem the items appropriate for the bar exam and to share any concerns for the drafting committee members to consider at their penultimate review and editing of the exam form. If not meeting in person, the policy committee holds a conference call post-review to discuss comments.

Approximately four months before the bar exam, test materials are provided to the MEE and MPT user jurisdictions to review under secure conditions. Those

Sample MEE Question

While on routine patrol, a police officer observed a suspect driving erratically and pulled the suspect's car over to investigate. When he approached the suspect's car, the officer detected a strong odor of marijuana. The officer immediately arrested the suspect for driving under the influence of an intoxicant (DUI). While the officer was standing near the suspect's car placing handcuffs on the suspect, the officer observed burglary tools on the backseat.

The officer seized the burglary tools. He then took the suspect to the county jail, booked him for the DUI, and placed him in a holding cell. Later that day, the officer gave the tools he had found in the suspect's car to a detective who was investigating a number of recent burglaries in the neighborhood where the suspect had been arrested.

At the time of his DUI arrest, the suspect had a six-month-old aggravated assault charge pending against him and was being represented on the assault charge by a lawyer.

Early the next morning, upon learning of her client's arrest, the lawyer went to the jail. She arrived at 9:00 a.m., immediately identified herself to the jailer as the suspect's attorney, and demanded to speak with the suspect. The lawyer also told the jailer that she did not want the suspect questioned unless she was present. The jailer told the lawyer that she would need to wait one hour to see the suspect. After speaking with the lawyer, the jailer did not inform anyone of the lawyer's presence or her demands.

The detective, who had also arrived at the jail at 9:00 a.m., overheard the lawyer's conversation with the jailer. The detective then entered the windowless interview room in the jail where the suspect had been taken 30 minutes earlier. Without informing the suspect of the lawyer's presence or her demands, the detective read to the suspect full and accurate Miranda warnings. The detective then informed the suspect that he wanted to ask about the burglary tools found in his car and the recent burglaries in the neighborhood where he had been arrested. The suspect replied, "I think I want my lawyer here before I talk to you." The detective responded, "That's up to you."

After a few minutes of silence, the suspect said, "Well, unless there is anything else I need to know, let's not waste any time waiting for someone to call my attorney and having her drive here. I probably should keep my mouth shut, but I'm willing to talk to you for a while." The suspect then signed a Miranda waiver form and, after interrogation by the detective, made incriminating statements regarding five burglaries. The interview lasted from 9:15 a.m. to 10:00 a.m.

In addition to the DUI, the suspect has been charged with five counts of burglary.

The lawyer has filed a motion to suppress all statements made by the suspect to the detective in connection with the five burglaries.

The state supreme court follows federal constitutional principles in all cases interpreting a criminal defendant's rights.

1. Did the detective violate the suspect's Sixth Amendment right to counsel when he questioned the suspect in the absence of the lawyer? Explain.
2. Under Miranda, did the suspect effectively invoke his right to counsel? Explain.
3. Was the suspect's waiver of his Miranda rights valid? Explain.

jurisdictions that don't use all six MEE questions or both MPT items must select which MEE and MPT items they will administer.

Staff Proofing and Cite-Checking

We're almost done, but some important steps in MEE and MPT test development remain. A couple of months prior to administration, after all groups

have reviewed the materials, all MEE analyses are thoroughly cite-checked by NCBE lawyer-editors to ensure their accuracy and to verify that they're still good law. NCBE's editorial assistant proofreads the items and grading materials. Staff lawyer-editors do a couple of final, read-aloud proofings of the items and grading materials.

Summary of Sample MPT Item: *In re Harrison*

In this performance test item, examinees are associates at a law firm representing Daniel Harrison, who has purchased a tract of land in the City of Abbeville, Franklin. Although the land is currently zoned “R-1” (single-family residential), it had been used for over 35 years as a National Guard armory and vehicle storage facility; when he purchased the land, Harrison assumed that it was “grandfathered in” and not subject to the residential zoning ordinance because the National Guard’s use of the property predated the R-1 zoning change. Harrison wants to have the land rezoned so that it can be used for a commercial truck-driving school, but the City Council has denied his rezoning application. Harrison seeks the firm’s advice as to whether he can successfully pursue an inverse condemnation action against the City. Examinees’ task is to draft an objective memorandum identifying each of the inverse condemnation theories available under Franklin and federal law and analyzing whether Harrison might succeed against the City under each of those theories. The File contains the instructional memorandum from the supervising attorney, a summary of the client interview, a recent appraisal of the tract, and an email exchange between Harrison and a real estate agent. The Library contains the Franklin and federal constitutional “takings” clauses and two Franklin cases that discuss various regulatory takings theories.

The test forms are then uploaded via a secure server to our printer, who provides us with proofs, which, again, are read aloud and rechecked by NCBE’s editorial assistant. Finally, exam booklets are printed about six weeks before administration, and nonstandard materials for those requesting ADA accommodations (such as large-print booklets and Braille versions) are also prepared.

See pages 33 and 34 for a sample MEE question and a summary of a sample MPT item, both taken from recently administered exams.

EXAM ADMINISTRATION AND BEYOND

After exam day has come and gone, we distribute grading materials to graders in all user jurisdictions and prepare to train them at the grading workshop held at our NCBE headquarters in Madison, Wisconsin, the weekend following the bar exam. Graders participate in person, by conference call, or via on-demand streaming after the workshop. Each MEE and MPT item has a dedicated grading session led by an experienced drafter/grader. Examinee answers from MEE and MPT user jurisdictions are read and evaluated. About six weeks after the exam, when grading is either well under way or even concluded in some jurisdictions, we poll graders to find

out how the items have graded. It is a final check for us on how the items performed. Grader comments are shared with drafting committee members, who consider them in reviewing upcoming test forms and also in drafting new items.

As program director for these two exams, I cannot thank enough the drafting committee members, who mostly work on these two exams in anonymity to protect test security. They care deeply about the exams and about crafting high-quality licensure exam materials. You know who you are. A sincere thank-you to each and every one of you! 📄



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