



AccessLex
INSTITUTE®

EMPOWERING THE NEXT GENERATION OF LAWYERS®



It's *not* “teaching to the test” –creating pedagogically sound and empowering lessons that weave bar exam-based formative assessments into the law school curriculum

Sara Berman, Director, Programs for Academic and Bar Success



Integrate:

- 1. Awareness of the Bar Exam**
- 2. Exposure to Bar Testing Formats**



Exam formats

Performance Tests (MPTs)

Essays

MBEs



What is a PT?

Performance Tests are closed-universe lawyering simulations used on bar exams nationwide.

- Originated as experimental part of CA Bar in 1980, went national as “MPT” in 1997, now on bar in nearly every jurisdiction.
- So influential that even Bar Exams such as FL which do not include a PT are influenced by PT in the essay format.
- PTs are set in wide range of subjects including core subjects such as evidence, civil procedure, criminal law, criminal procedure, contracts, tort, but also elective subjects such as administrative law, entertainment law, sports law, and many others.
- Past PTs provide a treasure trove of simulation resources –especially the three hour PTs.



Example of PT-esque essay prompt

July 2003 FL Bar Exam essay question testing real property and ethics sets students in “realistic” context where client comes to “your law firm for advice” and asks students to “Prepare an opinion letter for Partner” to discuss various issues with client.



What is in a typical PT?

- Library = Typically cases and/or statutes but can include secondary authorities.
- File = original source documents, e.g. deposition transcripts, police reports, photographs, transcripts of or notes re: client and witness interviews, newspaper articles, memoranda from private investigators, etc.
- Instructions = synthesize/analyze facts and law, and draft documents such as legal memo, brief in support of a motion, client letter, client counseling plan, client interview, discovery plan, affidavit, memo evaluating the strengths and weaknesses of a client's case, memo proposing settlement plan, closing argument to a judge or jury, etc.



ABA Learning Outcomes Mirror PT Skills

ABA Standard 302, “LEARNING OUTCOMES A law school shall establish learning outcomes that shall, at a minimum, include competency in the following:

- (a) Knowledge and understanding of substantive and procedural law;
- (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;
- (c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and
- (d) Other professional skills needed for competent and ethical participation as a member of the legal profession.”



ABA standards enumerate skills that parallel skills that bar examinees are required to perform on PT, where applicant must:

“...(1) apply the relevant law to the relevant facts in a manner likely to resolve a client’s problem;

(2) identify and resolve ethical dilemmas, when present;

(3) communicate effectively in writing...”



Integrate PTs into Doctrinal, LRW, and Skills Courses

Seeding curriculum with PTs enhances:

- Student engagement
- Contextual learning
- Nuanced factual analysis
- Legal analysis skills (statutory and case analysis)
- Awareness of PR and problem solving skills
- Time management, critical reading, and writing
- Early & low stakes bar exam exposure



Simple Steps We Can all Take

Seeding law school curriculum with PTs is analogous to taking short walks or the stairs (instead of the elevator) in one's day-to-day – not a substitute for comprehensive exercise or dietary changes, but an easy way to get moving and add a healthy component in life.



Widespread Use of PTs Facilitates Weaving PR Discussions Throughout Law School

Standards 302(c) and (d): “Exercise of proper professional and ethical responsibilities to clients and the legal system; and [o]ther professional skills needed for competent and ethical participation as a member of the legal profession.”

- PTs can test applicants’ awareness of what constitutes actual violations of PR rules, and

- Actions that fall below highest practice standards.



In-Class or Homework: S, M, L (Grading optional)

Small -Include “experiential moment” in an existing lesson. Ask students to role-play a lawyer (junior associate) and write a response to a request from the Sr. Partner to do something unethical, e.g. not disclose contrary authority, reveal client confidence, “temporarily” spend trust funds...

Medium -Assign part or all of a 90 min PT as homework with self-assessment or in-class debrief; provide feedback as time permits.

Large –Assign 3 hr PT toward beginning of semester. Divide students into roles corresponding to “cast of characters” in PT: Sr. Partner, Junior Associate, Client, Witness, Private Investigator. Run assignments related to “case” throughout semester, for example change facts, add facts, discover new witnesses or discover contradictory evidence; have one party file a motion that must be argued; divide students into teams to draft settlement agreement or conduct closing arguments, etc.



Adapting PTs to LRW

With minimal adaptation, PTs provide springboard for teaching Standard 302(b) skills that are not part of existing PTs, such as legal research and oral communication. For example:

- Open up the otherwise closed universe PT library (either partially or fully) to train legal research skills in context.
- Train oral communication skills with students role-playing the characters in the PT and completing some oral task such as interviewing a client (with one student playing lawyer and the other client), giving directions to a junior lawyer, reporting findings to a senior lawyer, arguing a motion to a court (invite local judge to guest lecture!) or delivering a closing argument.



Dispelling Doubts

Integrating experiential simulations using PTs into curriculum is:

- Not too hard or time consuming,
- Not “teaching to the test”
- Not too early (bar isn’t until after graduation)
- Not too simplistic (you can add layers of sophistication)



The Responsibility Falls on Us all to Make Changes

Strategic Use of PTs in Law School Makes Sense.

Practice PTs help to graduate practice ready students who are prepared to pass the MPT portion of the bar exam.



Bar Essays

Exposure to Bar Essays without Teaching to the Test:

- **Roleplays with advocacy and/or fact gathering**
- **Critical reading –deconstructing and understanding**



Bar Essays

Info on MEE at <http://www.ncbex.org/exams/mee/>

Consult 2019 MEE Subject Matter Outline at

<http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F227>



Bar Essays –Examples for discussion

- Torts negligence with a civ pro twist
- Criminal law –crimes you don't always cover
- Defamation –torts you don't always cover



MBEs: Seven subjects to choose from

- Criminal Law & Procedure
- Torts
- Contracts
- Real Property
- Evidence
- Constitutional Law
- Civil Procedure

<http://www.ncbex.org/exams/mbe/>



- Exposure is key
- Critical reading and contextualizing questions
- Understanding terminology
- Creating practice test habits



MBEs –Examples for Discussion

A wife and her husband were having dinner at a restaurant when the wife excused herself to go to the bathroom. The restaurant was owned and operated by a chef. As the wife was walking past a table where another customer was seated, she slipped and fell on an egg roll that had been lying on the floor for quite some time, although the chef was unaware that it had fallen onto the floor. When she fell, her head struck a serving tray that was located in the aisle. The fall caused the wife to suffer a severe concussion. The customer knew that the egg roll was on the floor, and although he could have done so, he did not warn the wife.

If the wife asserts a claim against the chef for the injuries she suffered from the fall, what is the most likely outcome?

- (A) The wife will recover, because the egg roll on the floor constituted an unsafe condition of the premises.
- (B) The wife will recover, because the egg roll was on the floor for a substantial period of time before the accident.
- (C) The wife will not recover, because the chef did not know that the egg roll was on the floor.
- (D) The wife will not recover, because the customer could have prevented the injury by warning the wife of the presence of the egg roll.



MBEs –Examples for Discussion

H and W had Dinner at restaurant: Does it matter here that they are husband and wife? No. It might if she were choking, then he would have duty to rescue her. But that's not what happened. She slipped and fell on eggroll, and she (Wife) is suing Chef/Owner.

Ask students: what is key fact here? That Egg roll there for quite some time. –i.e. someone should have seen it. If it were fresh, then not a problem; there is no absolute duty. But there is a duty to inspect and make sense.

What is duty? Well, who is Wife? She is a customer! So, duty is to inspect and make safe; it is the duty of Chef/Owner.

So, let's look at answer choices:

A. A might look good at first blush. But generally an unsafe condition is like stairs that are loose, a bannister that is broken, etc.. An eggroll doesn't seem like an "unsafe" condition. But even it is not a bad answer, keep going and you'll quickly see that B is the best answer...

B. is precise, it goes to the duty. The duty is not absolute but it is to act within a reasonable amount of time. (As compared with Answer choice A again which would seem to imply a duty to act the second something fell on the ground.) But, by the time a substantial amount of time has passed then really the Chef/Owner should have had time to inspect and make safe which is his duty to Wife, a customer.

C. is wrong. It would be right if she were a licensee. Then the duty is only to warn of known dangers. But it's a higher duty to invitees. C is a trap. They are not licensees they are invitees. The duty is to inspect. Not enough that you Owner, were unaware, you should inspect and make safe

D. So what?!! Customer has no duty. Suit is by Wife against Chef/Owner. ... and the omission to act by a 3d party does not relieve the Chef/Owner of liability.

Therefore B is BEST answer



MBEs –Examples for Discussion

A pedestrian was walking in front of a hotel in the downtown area when a chair was thrown from an unidentified window. The chair struck the pedestrian on the head, knocking her unconscious. When the pedestrian recovered consciousness, she found herself in a nearby hospital with a doctor in attendance. An examination revealed that the pedestrian had suffered a concussion and severe head lacerations. A subsequent investigation revealed that the chair had, in fact, been thrown from a window at the hotel. None of the hotel's employees or guests, however, admitted culpability for the incident.

If the pedestrian asserts a claim against the hotel for negligence, will the doctrine of *res ipsa loquitur* enable her to recover?

- (A) Yes, because the chair was within the control of the hotel.
- (B) Yes, because a chair is not usually thrown from a window in the absence of someone's negligence.
- (C) No, because the chair was not within the control of the hotel at the time the pedestrian was injured.
- (D) No, because the hotel is not vicariously liable for the tortious conduct of its employees.



MBEs –Examples for Discussion

Pedestrian in front of hotel. Hotel's chair caused injury, yes, but cannot prove who did it. What should automatically come to mind for students? Res ipsa loquitor. Remember the cases –the one about flour barrel was in the exclusive control of the flour company and that sponge was in the exclusive control of the surgeon... When is res ipsa applicable? When the (1) injury does not occur absent someone's negligence, and (2) the instrumentality was within D's exclusive control?

With that context in mind, let's look at answer choices:

A is OK, but not great, because it's only one element of res ipsa.

B is also correct but not great answer for same reason as A –only one element.

C. C Looks good.

D. D is wrong because we do not know who threw this. It is as likely that it's a patron as that it's an employee.

So, the best answer is C.



Pick any exam format; tailor it to your teaching

Performance Tests (MPTs)

Essays

MBEs



It's *not* “teaching to the test” –creating pedagogically sound and empowering lessons that weave bar exam-based formative assessments into the law school curriculum

Sara Berman
sberman@accesslex.org