

Incorporating Bar Pass Strategies into Routine Teaching Practices

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TABLE OF CONTENTS

I. HOW LEGAL EDUCATORS CAN ACCOMPLISH THIS GOAL	20
II. FOR STUDENTS PREPARING TO TAKE THE MPT	25
III. GETTING DOWN TO BUSINESS	27
IV. GETTING YOUR OUTLINE ORGANIZED	31
V. WRITING THE ASSIGNMENT	34
A. <i>Know These Specifics, if the Directions Ask to Provide Them</i>	35
1. Persuasive Point Headings	35
2. Writing Case Summaries	36
3. Using Case Analysis	37
VI. SUCCESS EQUALS PRACTICE	38
A. <i>Time is of the Essence</i>	38
VII. CONCLUSION	39

In answering Robert MacCrate's call for legal educators to promote the basic skills and values new lawyers need to acquire, no one would be more pleased with what the National Conference of Bar Examiners ("NCBE") have done than even Benjamin Franklin himself. The MacCrate Report¹ has had a tremendous impact on the legal community; his vision is as fundamental to the profession as Benjamin Franklin's was to the nation over two centuries ago—that the theoretical must be wedded to the practical to be useful and effective. Whether creating a lawyer who is capable of leadership and competence or molding a nation that is able to survive the competing forces of liberty and control, one must deal with the exigencies of the real world. Bar

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1. ABA SECTION OF LEGAL EDUC. AND 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) (commonly referred to as the MacCrate Report).

examiners have taken up this challenge and continued the American tradition of valuing the practical by implementing an exam that tests the technical skills and abilities a new attorney is presumed to possess.

Currently, twenty-seven states test lawyering skills, in addition to substantive legal knowledge, through the addition of the Multi-State Performance Test (the "MPT").² In July of 2001, New York State joined twenty-six other states in administering the MPT, the most substantive change to New York's bar exam in more than twenty years.³ There are other states that plan to add the MPT in the future⁴ and some have already adopted their own version of the MPT.⁵ Apparently, the trend toward making the bar exam a test of a candidate's "practical" lawyering skills is gaining momentum and even if it is not currently part of your own state's licensing exam, chances are that it will be in the near future.⁶

The NCBE describes the MPT as "designed to test an applicant's ability to use fundamental lawyering skills in a realistic situation."⁷ Consequently, "Each test evaluates an applicant's ability to complete a task which a beginning lawyer should be able to accomplish."⁸ Ostensibly, this task evaluates a candidate's strength in six critical skill areas: problem solving, identifying and formulating legal issues, analyzing facts, communicating effectively in writing,

2. NAT'L CONFERENCE OF BAR EXAM'RS, THE MULTISTATE PERFORMANCE TEST: 2001 INFORMATION BOOKLET 1 (2000) [hereinafter NCBE MPT BOOKLET] ("NCBE has published *February 1998 MPTs and Point Sheets*, *July 1998 MPTs and Point Sheets*, *July 1999 MPTs and Point Sheets*, and *February 2000 MPTs and Point Sheets*. To order these Publications, complete the MPT Study Aids Order Form at the end of [the MPT Information Booklet] or visit www.ncbex.org." (emphasis omitted)); Nat'l Conference of Bar Exam'rs, *Multistate Examination Use* (2001) [hereinafter NCBE Website] (listing which jurisdictions offer the MBE, MEE, MPRE and the MPT), at <http://www.ncbex.org/tests/jurtop.htm> (last visited Dec. 27, 2001).

3. N.Y. State Bd. of Law Exam'rs, *Multistate Performance Test*, at <http://www.nybarexam.org/MPT.htm> [hereinafter N.Y. Bar Website] (last visited Mar. 6, 2002).

4. NCBE Website, *supra* note 2. In July 2003, Alabama will require the MPT as part of its bar exam. *Id.* Idaho, Nevada and Oregon already require it. *Id.*

5. "California implemented its performance test 10 years before the National Conference of Bar Examiners (NCBE) introduced its Multi-State Performance Test (the MPT)." E-mail from Dean E. Barbieri, Director 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 *Gonzaga Law Review*). In July of 1980, the California bar concluded that important lawyering skills were not fully assessed by the MBE or essay portions of the bar. *Id.* This decision was made after thoroughly reviewing the results of experiments conducted with the July 1980 bar exam. *Id.* Both the NCBE and the California State Bar collaborate together to produce high quality performance tests. *Id.*

6. See Stella L. Smetanka, *The Multi-State Performance Test: A Measure of Law Schools' Competence to Prepare Lawyers*, 62 U. PITT. L. REV. 747, 751 (2001).

7. NCBE MPT BOOKLET, *supra* note 2, at 1.

8. *Id.*

managing time efficiently to complete a legal task, and recognizing and resolving ethical issues.⁹

But how do the bar examiners test these skills with the MPT? These skills are tested by setting forth an assignment in which the candidate is asked to review a “client file” consisting of instructions from the supervising attorney and by also examining assorted documents such as client notes, excerpts from deposition testimony, correspondence, police reports, and medical records.¹⁰ Candidates are also given a “Library” of the relevant law in the form of statutes, cases, and regulations that may or may not be relevant to completing the assigned task.¹¹ In the brief span of ninety minutes, the candidate must then sort the relevant from the irrelevant facts, analyze the law in the Library, apply the applicable law to the client’s problem, and complete the required task.¹² The assignment might be to draft an objective memorandum, a persuasive brief, a client letter, a closing argument, or provisions to a will.¹³

At first glance, this would appear to be an overwhelming, if not impossible task to complete in the allotted time. At the Touro Law Center, where I teach Legal Methods and bar preparation, most candidates for this past July’s New York bar exam certainly thought so and bemoaned their fate to graduate just when the MPT component happened to be added.¹⁴ However, in reviewing the previously administered MPT exams, I found carefully crafted issues, artfully constructed files and, perhaps most importantly, detailed instructions to the applicant as to the specific task to be performed. With adequate preparation and a plan, I found that even the most fearful test taker could proceed with confidence and hope to score well on test day.

Interestingly, in preparing students for the MPT, I realized that most of the skills tested could be incorporated almost seamlessly into what law professors already do in the classroom. The MPT tests the most basic and essential of the lawyering skills: the ability to read, organize information, think logically, extricate the relevant from the irrelevant, write clearly, and, above all, follow directions. As law professors we must seize every opportunity to cultivate these

9. *Id.* at 2-3. The skills tested on the MPT are described in great detail in *The Multistate Performance Test: 2001 Informational Booklet*. In addition to a discussion of the skills tested, the booklet includes the instructions for the exam and summaries of the types of problems and assigned tasks from previously administered exams. *See id.* at 4-11. Significant amounts of materials from the NCBE are available on the internet and for purchase. These products should be the candidate’s primary source of information about the contents of the MPT.

10. *Id.* at 1.

11. *Id.* at 1-2.

12. *See id.* at 4-5.

13. *Id.* at 2.

14. *See* N.Y. Bar Website, *supra* note 3.

skills in the course of our regular teaching activities. In so doing, we will be furthering our goal of better preparing our students for legal practice as well as to successfully pass the MPT.

I. HOW LEGAL EDUCATORS CAN ACCOMPLISH THIS GOAL

As legal educators, we teach our students how to dissect a judicial opinion. Yet this work we do with respect to teaching the “case brief” method is but a beginning. We must and can do more. We must not wait for students to make the connection between the cases they read for class discussion and how an attorney actually uses such cases to solve client problems; we must tell them. It is not enough for us to tell our students to read “actively”; we must show them how to do so. We must teach our students how to read with purpose and intent, with an eye toward the case’s usefulness. In short, we must show students how to interact with the materials. It should be the job of every law teacher to incorporate these skills into routine pedagogy. It is not sufficient to relegate this task to those who teach in academic support or assistance programs.¹⁵

This type of active, engaged reading is not unique to the law; it is simply how to read properly. Unfortunately, most students are not trained to be careful, thoughtful readers who question the contents and meaning of what they read. Indeed, it is no easier a task to read a novel by Fitzgerald¹⁶ or a story by

15. Much fine work is being done in such programs in the law schools across the nation. In *The Official Guide to U.S. Law Schools*, 164 member law schools reported having some type of academic assistance program. LAW SCH. ADMISSION COUNCIL, *THE OFFICIAL GUIDE TO U.S. LAW SCHOOLS* 40-49 (2000). Excellent examples of such programs and support professionals are found at UCLA School of Law with Kristine S. Knapland, Hastings College of Law at the University of California with Laurie Zimet, Santa Clara University School of Law with Rod Fong, University of Missouri–Kansas City with Barbara Glesner Fines, Brooklyn Law School with Linda Feldman, Pace University School of Law with Leslie Garfield and Kelly Koenig Levi, DePaul University College of Law with Ruta Stropus and Charlotte Taylor, and Louis D. Brandeis School of Law University of Louisville with Carole A. Wastog, Gonzaga University School of Law with Lisa Bradley, to name but a small few. The efforts of the people involved in academic support has been nothing short of phenomenal. They share a compassion and commitment to the study of law that is unrivaled. They also share generously of their time and resources and gladly mentor those new to the community. Considering that it was but a few short years ago, in 1995, when a group of academic support professionals petitioned the AALS to grant provisional status to a section on academic support programs, the work of this small but growing group is nothing short of extraordinary. However, if the goal of legal education is to teach every law student how to be the most effective attorney possible, then it is the job of every law teacher to inculcate the basic skills of the profession.

16. The following excerpt from Fitzgerald’s *The Great Gatsby* expresses a very important point about how we read—the care and attention required to “read right” whether

Hemingway than it is to read a judicial opinion. Sure, it might be more appealing to read Fitzgerald describe the ways of the wealthy in *The Great Gatsby* than to wade through Judge Posner's analysis of economics and the law, but the basic reading skills are the same. Reading is an ongoing dialogue between the writer and the reader and if the reader fails to respond to the cues in the conversation, its true meaning will be irretrievably lost.

The cultivation of solid reading skills extends well beyond the essentials of legal analysis to include such basics as reading directions and procedures, assignments and syllabi, and even exams on file in the library. How many of you have had the experience of a student coming to your office at the end of the semester and claiming that he or she had no idea of what you had expected during the semester or at the final exam? You then probably asked the student whether he or she had read the syllabus distributed the first day of class (and no doubt referred to throughout the semester). In all likelihood, that student never looked at the syllabus after that first day; herein lies that student's first mistake. And ours, if we failed to make the student understand (especially if it was a first year student) that this syllabus, with its list of topics and required reading assignments was the basic blueprint for the course. My fourteen years experience as a technical writer in high technology industries prior to attending

it is a novel or a case. This work is chosen because most, if not all of you, have had occasion to read this novel at one time or another, perhaps many times. Yet it would be surprising if you gave any thought to the selection you are about to read, and if you did not, how could you claim to have read *Gatsby*?

Nick Carraway is the narrator of the novel and everything we know about *Gatsby* we have learned from him. The following passage takes place shortly into the novel, at the conclusion of a party held at Tom Buchanan's apartment with his girlfriend, Myrtle.

Then Mr. McKee turned and continued on out the door. Taking my hat from the chandelier, I followed. [Nick Carraway is the "I"]

"Come to lunch some day," he suggested, as we groaned down in the elevator.

"Where?"

"Anywhere."

"Keep your hands off the lever," snapped the elevator boy.

"I beg your pardon," said Mr. McKee with dignity. "I didn't know I was touching it."

"All right," I agreed, "I'll be glad to."

. . . I was standing beside his bed and he was sitting up between the sheets, clad in his underwear, with a great portfolio in his hands.

"Beauty and the Beast . . . Loneliness . . . Old Grocery Horse . . . Brook'n Bridge. . ."

Then I was lying half asleep in the cold lower level of the Pennsylvania Station, staring at the morning *Tribune*, and waiting for the four o'clock train.

F. SCOTT FITZGERALD, *THE GREAT GATSBY* 32 (Ruth Prigozy ed., Oxford Univ. Press 1998) (1925).

law school likely influences my opinion, but the ability to read and follow directions is central to success in any endeavor.

While I do not wish to burden you with the specifics of my work history, a little background is in order because my years as a technical writer helped me to understand how people learn new material. In 1984, circumstances demanded that I master a whole new world of knowledge which I never thought would have been essential to my career, a background in science. During my college career, there were no courses in technical writing and I had never even remotely contemplated such a future. I learned on the job out of necessity, not out of choice.

I had been a history major in both undergraduate and graduate school and while history majors are not known for their technical expertise, we are recognized for our ability to think logically and critically, research and organize information, and find order in chaos. If there was a secret to be learned, it was to use common sense and trust my judgment. I realized the importance of asking questions and paying close attention to every detail.

Writing manuals, however, presented a different concern. My concern about a lack of suitable role models vanished when I realized that good writing is always good writing, whether writing a simple business letter, preparing a corporate business plan, documenting the procedures for a computer installation, or as I subsequently learned, drafting a legal brief. As a history student, I had written many papers and knew that there were almost as many ways of writing history as there were historians. There was no set formula; there was no one pattern. The style of writing was the author's own, adapted to the subject material. Each subject makes its own claim upon the writer, each demanding individual treatment. A style suitable for writing about the ideological origins of the American Revolution would not be a suitable style for a biography of Benjamin Franklin.

While technical writing is a specialized type of writing, my problem was no different than any other writer's. I took Hemingway's advice as my guide: "A writer's problem does not change. He himself changes, but his problem remains the same. It is always how to write truly and, having found what is true, to project it in such a way that it becomes a part of the experience of the person who reads it."¹⁷ So I began to write "truly" in my user guides, instruction manuals, sales materials, advertisements, brochures, and trade articles, and found that the essential requirements for the writing of history—integrity, industry, imagination, and vision—were the same for writing technical

17. Eirik Knutzen, *Hemingway: Life and Times Stacy Keach Plays the Part*, RECORD (N.J.), Apr. 24, 1988, at 40, available at 1988 WL 5616800 (quoting Ernest Hemingway, Speech at the American Writers Congress (1937)); see also Steve Neal, Editorial, *Hemingway a Giant*, CHI. SUN-TIMES, July 21, 1999, at 41, available at 1999 WL 6549066.

materials. Only the perspective was different: it was a “scientific” perspective.

What I learned in my years as a technical writer was invaluable when I arrived in law school where I was now to learn the “legal perspective.” I already knew the value of reading carefully, thinking critically, and writing clearly. These skills proved as essential to learning the law as they had been in studying history and mastering the ever-changing world of high technology.

My suggestion is that as legal educators we should inculcate in our students the value of all knowledge and how that knowledge informs the law. If we know that students tend to overlook obvious sources of information in their haste to read cases, then it is our job to point out that valuable information. It is our job as well to teach them to see beyond the immediate page and keep an openness of mind, spirit, knowledge, and understanding from all disciplines. In doing this, we teach our students how to be the very best they can be and “professionals” in the true sense of word.

Legal scholars recognize that reading is a fundamental skill and specifically, good reading skills are essential to a student’s success in law school.¹⁸ Despite my earlier statement that reading the law is not wholly unlike reading Hemingway,¹⁹ I surely recognize that the “stuff of legal reading” is far

18. Laurel Currie Oates, *Beating the Odds: Reading Strategies of Law Students Admitted Through Alternative Admissions Programs*, 83 IOWA L. REV. 139, 140 (1997). In this article, Ms. Oates, Director of Legal Writing at Seattle University School of Law, shares the results of her study of the differences in reading strategies of students admitted to law schools through alternative admissions programs. *Id.* at 140. While reading judicial opinions is a student’s primary task in law school, legal reading has rarely been the subject of scholarly work. *Id.* As of the date of Ms. Oates’ article, she found “only two studies and a handful of essays that have explored the ways in which legal readers read the law.” *Id.* In working with students admitted through alternative admissions programs, Ms. Oates began to see that the basic difference between the unsuccessful and successful students was that “the more successful students seem[ed] to read the assigned opinions differently.” *Id.* In short, her study found that successful students constructed meaning from the text or from the facts and rules in the text. *Id.* at 159. Further, these readers “read for a purpose and they underst[ood] that the interpretation given to a particular fact or text depend[ed] on the contexts in which the fact appear[ed] or the text [was] read.” *Id.* The author measured “success” in terms of the students’ first semester GPAs. *Id.* at 145. The students in the study entered law school with similar numbers in terms of LSAT scores and undergraduate GPAs, participated in the same orientation program, took the same classes with the same professors and generally participated in the same tutoring and review sessions. *Id.*

19. I nonetheless remain convinced that reading a work by Hemingway is no less challenging and requires no less mastery of background and context than reading the law. How else can we appreciate the words of the author himself with respect to how he wrote a story:

It was a very simple story called “Out of Season” and I had omitted the real end of it which was that the old man hanged himself. This was omitted on my new theory that you could omit anything if you knew that you omitted and the omitted part would strengthen the story and make people feel something more than they understood.

denser and requires the use of special knowledge. Professor Peter Dewitz in his article on reading law, identified the nature of legal reading quite correctly when he wrote that “[l]egal texts can be considered a genre, and success with legal texts is based on some general reading skills, as well as specific knowledge of that genre.”²⁰ What this should mean to us as legal educators is that we should use every occasion to provide that specific contextual knowledge to assist law students in reading for understanding and clarity. This translates into providing some of the background knowledge that is necessary to understand the cases before the actual reading assignment is discussed in class.²¹

Similarly, Laurel Currie Oates, in her work analyzing the reading strategies of law students, stressed the value of solid reading skills in achieving success in law school and the concomitant need for legal educators to provide a solid contextual framework for their students’ reading of case materials.²² Consequently, she called on “law schools . . . to ‘teach’ legal reading by familiarizing students with the ways in which lawyers read opinions.”²³ She suggested that instead of simply asking students to give the facts of the case, “professors [should] . . . think aloud for their students as they read opinions, demonstrating when and how they use [different reading strategies] and how they . . . question and evaluate the texts that they read.”²⁴ She further urged professors “to adopt teaching methodologies that provide students with the opportunity to read judicial opinions in context and for a specific purpose,” perhaps by placing the student the role of a judge or a lawyer with a client.²⁵

If we follow the advice of such scholars as Professor Dewitz and Ms. Oates, we will be building a strong foundation in our students of how to read the law in its proper context.²⁶ Also, we will have taught them the primary skill for success on the MPT.

In addition to cultivating strong reading skills, we must stress the value of

ERNEST HEMINGWAY, *A MOVEABLE FEAST* 75 (1964). Clearly, if one attempts to read Hemingway without understanding how he conceives of and writes a story, then one cannot truly understand what one is reading.

20. Peter Dewitz, *Reading Law: Three Suggestions for Legal Education*, 27 U. TOL. L. REV. 657, 657 (1996).

21. *Id.* at 666 (providing suggestions for how legal educators can assist the novice law student in reading and understanding cases).

22. *See* Oates, *supra* note 18, at 160.

23. *Id.*

24. *Id.*

25. *Id.*

26. In analyzing the data from her study, Ms. Oates made the following hypotheses: that the successful readers “brought more knowledge to their reading,” that they “read with a much stronger sense of purpose” and “perhaps most importantly, . . . [they] appear[ed] to share similar beliefs about the way in which meaning is attached to particular texts.” *Id.* at 158-59.

good writing skills in all courses. While we must, and in fact, do teach IRAC, we must strive as well to instill in our students the value of language and the need for their work to adopt the proper tone, style and language for their audience. We must not relegate this task solely to the efforts of legal writing professors, for if writing is left to the domain of but one course, the tendency of students is to believe that it is the only place it is valued. We know that this is not true but it is nonetheless the thinking of most students. As a legal methods professor, I see how happy students are to complete their memorandums and appellate briefs, falsely believing that the need to write is now safely behind them. Of course, they realize that they must “write” their exam essays but somehow they do not equate this type of “writing” with the same skills involved in writing a brief or memorandum. What they have yet to learn is that good writing is always good writing, no matter the form and that good legal writing is possible, despite the almost formulaic nature of it all. Teaching our students to write well must be a shared task, where the synergy of our joint efforts will translate to a success far greater than any one of us could achieve working alone.

The job of turning a law student into a lawyer is not an easy one. It is a difficult journey for both student and teacher. But if we do more to provide the essential framework and explain how each individual skill fits into the larger picture, then the experience will be more meaningful and less arduous. And most assuredly, it will help students in their efforts to prepare for practice, the bar exam, and specifically, the MPT.

The following document is the result of my work with students in the summer of 2001 in preparing for New York’s MPT. In thinking of how best to approach its vast amount of material, I conceived of a strategy for students to follow in approaching the exam. You may read it to familiarize yourself with the MPT and use what I have written as an outline of the practical skills you might consider addressing in your teaching. You may also consider sharing it with students preparing for the MPT. Whatever you choose to do, I hope that you learn as much as I have in what is needed to best prepare our students for the practice of law.

II. FOR STUDENTS PREPARING TO TAKE THE MPT

Theoretically, the sum total of your law school experience has prepared you for this moment. It just does so in a way that “looks” different because the MPT puts all the elements together in a manner that is new to students who have not yet had the opportunity to work with case files and clients. However, having worked with case files and clients, I can assure you there is no mystery to it nor any substitute for proficiency in the most basic of skills: the ability to read, organize information, think logically, extricate the relevant from the irrelevant,

write clearly, and above all, follow directions. These are the skills you have developed in the course of your legal education and they are the ones the bar examiners are seeking to test in the MPT.

First, you will be called upon to read. But there is a very real difference between the type of reading you have engaged in for your law school classes and the type of reading you will do for the MPT. Here you must read proactively, with a critical eye toward solving a specific problem rather than answering a professor's questions in class. You must read carefully and quickly, all the while searching for useful information and answers to the particular issue you have been asked to resolve.

Second, you must organize your time and the materials effectively to complete the required task in the time allowed. The MPT is extremely time-sensitive, perhaps even more so than the essay or multiple choice components of the bar exam in that the candidate has but 90 minutes in which to read and analyze an assortment of unfamiliar materials and compose any one of the following written assignments—a memorandum of law, a letter to a client, a persuasive brief (including point headings), a contract provision, a will, a proposal for settlement, a discovery plan, or a closing argument, to list but a few of the possibilities.²⁷

Third, you must be able to write concisely, coherently, and in a tone and manner consistent with the nature of the assignment. In short, you must demonstrate your mastery of the language of the law and provide the bar examiners with more than “a scintilla of evidence” that you have attended law school. In short, you must “sound” like an attorney ready to begin the practice of law.

Fourth, you must be able to follow directions. It sounds so simple and basic but it is often ignored in the haste to begin writing. The MPT is task-specific: you must perform the task identified to receive credit. If you are instructed to write a letter to a client in which you evaluate various courses of action and instead write a persuasive brief, you will have done nothing but demonstrate to the bar examiners your inability to read and follow simple directions.

The directions on the MPT are important for yet another, even more compelling reason: they may ask you to identify *additional* facts that would strengthen or, alternatively, weaken a party's position. Since adding facts to a professor's hypothetical is a basic law school “no-no,” you would never think to do such a thing—not unless you had read the directions. The ability to follow directions closely will save you time and energy, both on the bar exam and in practice generally.

27. See NCBE MPT BOOKLET, *supra* note 2, at 2, 4.

III. GETTING DOWN TO BUSINESS

Having described the skills you need to perform on test day, now I will tell you how to develop them. It is very simple: you practice. Not quite a revelation, is it? During your law school career, most of you studied from your professors' sample exams. When you study from past exams, you get a sense of the type of questions asked and what is expected of you. Moreover, you get familiar with the style of the exam. The MPT is no different. Once again, you must study from past exams.

Still, preparation for the MPT is unlike preparation for the other parts of the bar exam. Here you are not tested so much on your knowledge of black letter law as you are on your ability to extract legal principles from cases and statutes and apply these principles to solve a specific client problem. The commercial bar preparation courses that most, if not all of you will take, provide a comprehensive review of the substantive law. Unfortunately, such courses are not designed to cultivate the analytical and writing skills you need on the MPT. These are the skills you should have developed in law school and these are the skills you must fine tune on your own.

Reprints of the MPT questions and a discussion of the issues and suggested resolutions of the problems as contemplated by the drafters of the MPT are available from the National Conference of Bar Examiners ("NCBE").²⁸ The examiners have selected prepared grading sheets, which describe the issues the candidate should discuss, and the grading guidelines, which allow candidates to review the guidelines they will be graded against.²⁹

Your first task is to acquire every available MPT and only then are you ready to begin. Next, select an exam packet. The back cover of each test contains the basic instructions for taking the exam. **Read them now while you practice.** Do not waste time during the exam by rereading that which is available to you now. At the exam, you will only need to peruse the instructions to ensure that nothing has changed.

In addition to describing the materials in the exam packet, the directions will advise you that your problem takes place "in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States."³⁰ You are also advised

28. See Nat'l Conference of Bar Exam'rs, *Study Aids*, at <http://www.ncbex.org/pubs/studyaids.htm> (last visited Mar. 5, 2002). The 1998-2001 MPT's and point sheets are available for purchase from NCBE. See *id.*

29. See, e.g., NAT'L CONFERENCE OF BAR EXAM'RS, THE MULTISTATE PERFORMANCE TEST: FEBRUARY 1998 POINT SHEETS 1-12 (1998) (discussing *Piccolo v. Dobbs* and *In re Gardenton Board of Education*), available at http://www.ncbex.org/tests/mpt/pdf/MPT_1998_Point_Sheets.pdf (last visited Mar. 16, 2002).

30. NCBE MPT BOOKLET, *supra* note 2, at 4.

of the Franklin state court structure.³¹ Note how this should shape your reading of the problem to determine the authority of the various court decisions in your Library.

When you have completed reading the instructions, you are ready to examine the File and the Library. At this point, I would suggest that you consider using the following strategy. In working with students to prepare for the July 2001 MPT, I put together a set of guidelines that students found helpful and subsequently used as a blueprint to guide them through the problems during practice sessions and on the actual test day. Following this plan saves time and prevents panic: if you know what you are going to do, and practice the routine sufficiently, it will become second nature to you by test day.

First, review the table of contents.³² It identifies the types of materials in your File and the nature of your Library. You will want to know whether you are faced with a statutory problem or a common law problem. If you have a common law problem (which will be obvious when all you have are cases in your Library), then it is likely that you will have more work to do; typically, you will have to synthesize from the cases the applicable rule to be applied to your problem. Also, by perusing the table of contents, you can often identify the area of the law in controversy and thus immediately begin to inform your subsequent reading of the File.

Second, read the office memorandum directed to you, the MPT applicant.³³ This is the single most important piece of paper in the File because it contains your directions: it is your mission statement and it introduces your problem and identifies your task. After reading this memorandum, you will know whether you are to write an objective memorandum, a persuasive brief, a client letter, or any one of a number of other possibilities. In reviewing the 26 available MPTs,³⁴ candidates have been asked to perform the following tasks:

Task	Number of Times
Write a memorandum	13
Write a persuasive brief	7
Draft a client letter	1
Draft a letter to opposing counsel	1

31. *Id.*

32. *See, e.g.*, NAT'L CONFERENCE OF BAR EXAM'RS, THE MULTISTATE PERFORMANCE TEST: *IN RE HAYWORTH AND WEXLER*, at i (1997) [hereinafter *HAYWORTH*] (Feb., Test 2), available at http://www.ncbex.org/tests/mpt/pdf/MPT_2-97_Test_2.pdf (last visited Mar. 6, 2002).

33. *See, e.g., id.* at 1-2.

34. Nat'l Conference of Bar Exam'rs, *Multistate Performance Sample Tests* [hereinafter *Sample Tests*] (summarizing MPT tests from 1997-2001), at <http://www.ncbex.org/tests/mpt/sample.htm> (last visited Mar. 5, 2002).

Draft interrogatories	1
Draft persuasive mediation statements	1
Draft clauses for a will	1
Draft an opinion letter	1

While it appears that writing a memorandum is the preferred task, the precise nature of the memo varies and, once again, you are urged to read carefully. The bar examiners may request that you do more than simply analyze the facts in light of the relevant law and write an objective evaluation; they may request that you identify additional facts that would strengthen a party's position,³⁵ state the most persuasive arguments that can be made to support a given position,³⁶ or identify likely outcomes.³⁷

Also, from the directions, you can identify the tone you are required to adopt in your writing. Whether you are to write an objective evaluation or a persuasive argument determines how you will approach the materials in your File. Knowing your task as you read is critical. If you know you must write a persuasive brief with point headings, you will be reading the cases with an eye toward formulating them.

The memo also reveals the precise issue you are asked to resolve. It may appear in the form of the questions you are asked to address in a client letter,³⁸ in the argument you need to make in a brief,³⁹ or even a supervising attorney's theory of the case.⁴⁰ Read this memo twice to be certain you have identified your task and the issue to be resolved. Write the issue on your scratch paper so that you do not lose sight of it as you proceed.

Third, it is my experience that reading the Library before you read the File will be very instructive. By reading the law first, your subsequent reading of the client file will be formed by your knowledge of the controlling statutes and case

35. See, e.g., NAT'L CONFERENCE OF BAR EXAM'RS, THE MULTISTATE PERFORMANCE TEST: *IN RE GARDENTON BOARD OF EDUCATION* 1 (1998) (Feb., Test 2), available at http://www.ncbex.org/tests/mpt/pdf/MPT02-1998_Test_2.pdf (last visited Mar. 24, 2002).

36. See, e.g., NAT'L CONFERENCE OF BAR EXAM'RS, THE MULTISTATE PERFORMANCE TEST: *ALEXANDER V. BTI AND BELL* 1 (1997) [hereinafter *ALEXANDER*] (Feb., Test 1), available at http://www.ncbex.org/tests/mpt/pdf/MPT_2-97_Test_1.pdf (last visited Mar. 8, 2002).

37. See, e.g., NAT'L CONFERENCE OF BAR EXAM'RS, THE MULTISTATE PERFORMANCE TEST: *STATE V. DEVINE* 1-2 (1997) [hereinafter *DEVINE*] (July, Test 2), available at http://www.ncbex.org/tests/mpt/pdf/MPT_7-97_Test_2.pdf (last visited Mar. 8, 2002).

38. See, e.g., NAT'L CONFERENCE OF BAR EXAM'RS, THE MULTISTATE PERFORMANCE TEST: *IN RE KIDDIE-GYM SYSTEMS, INC.* 1 (1997) [hereinafter *KIDDIE-GYM*] (July, Test 1), available at http://www.ncbex.org/tests/mpt/pdf/MPT_7-97_Test_1.pdf (last visited Mar. 8, 2002).

39. See, e.g., *ALEXANDER*, *supra* note 36, at 1.

40. See, e.g., *HAYWORTH*, *supra* note 32, at 2.

law. On the other hand, if you read the File first, with its various excerpts from depositions,⁴¹ client communications,⁴² and attorney notes,⁴³ it will be more difficult, if not impossible, to sift relevant from irrelevant information. You simply cannot know which facts are “relevant” until you know the law and how the cases in your jurisdiction have interpreted that law. While reading the Library first does not guarantee you will not have to review it again, it will make your subsequent reading of the client file meaningful and immediately productive.

When working in the Library, read the statutes and code provisions first.⁴⁴ Not only are they shorter than cases, but they immediately identify the area of law in which you will be working and provide the basic elements for the rule you will have to analyze. Additionally, pay close attention to any “official comments” in a given statute or code provision.⁴⁵ Including such comments are a means for the bar examiners to highlight an issue, draw your attention to a counterargument, or signal a legal distinction. Be aware, however, that there may be some authorities in the Library that are irrelevant. Clearly, you will not know what is not relevant to your analysis at this point, but you must necessarily wait to make that judgment until you read the client file. Once again, it will be your job to discern the relevant from the irrelevant based on your analysis of the law and its application to your facts.

Next to the actual writing of the assignment, reading the cases is the most time consuming portion of the MPT, but there is a strategy you can use to make each minute productive. First, remember that the bar examiners have carefully crafted or selected each case. This means that each one has something specific to tell you and is designed to be of use in your particular task. A case may give you the rule, provide an exception to the rule, or furnish you with a factual distinction from your problem. While being cognizant of your issue from the introductory memo, and, therefore, of the type of argument you will need to make, ask yourself these questions as you read each case: 1) “Why is this case in my library?” and 2) “How do I use this case?” Furthermore, do not ignore footnotes. If there is a footnote in a case, it is most likely there intentionally. While you might not know its significance at this point, be sure to keep it in mind when you subsequently read the File.

Often, the Library will include a case that articulates a rule in the course of its analysis.⁴⁶ Sometimes, the bar examiners will be so blunt as to have the court

41. See, e.g., ALEXANDER, *supra* note 36, at 4-6.

42. See, e.g., KIDDIE-GYM, *supra* note 38, at 5-8.

43. See, e.g., *id.* at 3-4.

44. See, e.g., *id.* at 9-11; HAYWORTH, *supra* note 32, at 11-15.

45. See, e.g., HAYWORTH, *supra* note 32, at 11-15.

46. See, e.g., *id.* at 7.

state something like, “During the past 30 years, we have developed a two-pronged analysis for evaluating the validity of a premarital agreement.”⁴⁷ Such a statement is truly a “gift”—it gives you the rule and its two elements. Sometimes, your gift will not appear in the form of a rule with “prongs.” In such cases, you must find your elements somewhere else. Often you will find them in a statute from your jurisdiction.⁴⁸ Simply break the statute into its component elements and proceed accordingly.

However, for any gift to have its greatest impact, the donee must use it well. On the MPT, this means adapting the court’s analysis to form your “mini working outline.” The outline is then in place as you read the rest of the Library. You can add to and refine your understanding of the rule as well as add any exceptions or limitations to the rule you learn from the other cases. Then when you read your File, you can add your “facts” to correspond with each element of the rule, thus providing the first steps for your subsequent legal analysis.

IV. GETTING YOUR OUTLINE ORGANIZED

Now let’s see how it’s done. For example, if we look at Test 2 of the February 1997, MPT, *In re Hayworth and Wexler*,⁴⁹ we find the full articulation of the rule that I referred to earlier. The Supreme Court of Franklin stated,

During the past 30 years, we have developed a two-pronged analysis for evaluating the validity of a premarital agreement. Under the first prong, the court must decide whether the agreement provides a fair and reasonable provision for the party not seeking enforcement of the agreement. If the court makes this finding, then the analysis ends and the agreement may be validated. If the agreement is not fair, the court must invoke the second prong and decide: (A) whether full disclosure has been made by the parties of the amount, character, and value of the property involved, and (B) whether the agreement was entered into intelligently and voluntarily on independent advice and with full knowledge by both spouses of their rights.⁵⁰

Your job is to use this rule to create an outline similar to the one shown below:

47. *Id.*

48. *See, e.g.,* KIDDIE-GYM, *supra* note 38, at 9-11, 14-15.

49. HAYWORTH, *supra* note 32, at 1-15.

50. *Id.* at 7.

- I. The agreement must be fair and reasonable for the party not seeking enforcement of the agreement.

Facts from the Library case:⁵¹ agreement found to be grossly disproportionate, denied common law and statutory rights, prevented claim against or rights against separate property.

If fair, then the analysis is complete.

- II. If the agreement is not fair, then ask:
 - A. Was there full disclosure of the **amount, character, and value** of the property involved
and
 - B. Was the agreement entered into **intelligently and voluntarily** on **independent advice** and with **full knowledge by both spouses of their rights.**

Facts from Library case:⁵²

- A. Husband disclosed the nature and extent of his assets; wife disclosed her limited resources
- B. Attorney never advised wife he was only representing husband

Facts from my case:

- I.
- II.
 - A.
 - B.

As you can see, the first thing you will do is break down the rule from the text of the case into its component elements. Then you will note the specific facts from the case that the court relied upon to come to its decision. You must also create a *parallel set of point headings* where you will note the facts from your case that correspond to each of the elements of the rule. This is your working outline of the rule. It need not be any longer or wordier than this. You should underline or highlight the key words as I have done to help you remember them and inform your reading of the File. Now you know what you must look for when you read the materials in the File. If you create this outline when you first find the rule, you will have already prepared the foundation for writing your memo or brief.

This outline will prove invaluable to you. It will help to ensure that you do not leave out any elements of the rule when you begin your analysis, an

51. *Id.* at 7-8.

52. *Id.* at 8-9.

oversight that is quite easy to make under the extreme pressure of exam writing. Actually, I devised this technique when one of the students I worked with this past summer failed to include the first prong of the rule in his analysis of this problem. It seems that in his eagerness to write his answer, he overlooked the first part of the rule and referred only to subparts A and B in his analysis. He told me that he had trouble making sense of the problem but when he reviewed the case, he saw that it was supposed to be a two-part rule and, in his haste, erroneously thought that parts A and B were the two parts. That is when he realized the value of an outline. And, so will you.

After you have completed reading the cases and materials in the Library, you are ready to proceed to the File. Do not be surprised if you find yourself reading a fair amount of material that you believe will be irrelevant to your actual analysis of the problem. As you may recall from writing your Statement of Facts in legal memos and briefs, you need to include more than the “bare bones” in your factual statement to provide the reader with the necessary background information. Consequently, you will be faced with what seems like an avalanche of information as you proceed in the File. It will be more manageable if you take the following advice.

First, identify the parties and your client, but not just by their names—note their legal relationship. For example, the relationship could be that of buyer and seller, teacher and student, husband and wife, and employer and employee, to name a few. By thinking of the parties in terms of their legal relationship to each other, you will be more alert to the legal significance of the facts contained in the depositions, transcripts, and correspondence. Second, refine the issue in your problem to further inform your reading. For example, in Test 1 of the February 1997, MPT, *Alexander v. BTI and Bell*,⁵³ you might have identified the issue from the applicant memo as something like: “whether Bell was a co-participant in the warm-up practice period with Alexander so that he owed no duty to her beyond avoiding reckless and intentionally harmful behavior.”⁵⁴

Write this issue above your outline of the rule. Your task as you read the File is to find those facts which will allow you to argue that Bell was a “co-participant.” By reading the File with this issue in place, you can more easily identify the legally relevant facts from the sea of material in front of you. As you proceed to read the materials in the File, add the critical facts to the parallel set of point headings in your outline. By now you should have a clear picture of the problem and how you can resolve it.

53. ALEXANDER, *supra* note 36, at 1-14.

54. *See id.* at 1.

V. WRITING THE ASSIGNMENT

After completing your reading of the Library and File, you are ready to begin the task of writing. Quickly check the applicant memo once again to verify your task.⁵⁵ This is critical. You must adopt the tone required by your assigned task. For example, if you are asked to write a client letter, you must adapt your writing style accordingly.⁵⁶ This means that you recognize your reader is a layperson and if you use any legal terms in your letter (as you are sure to do), you explain such terms in a manner that an ordinary citizen would comprehend. Also, you will want your assignment to resemble a letter so you will include a mock letterhead and begin something like the following which is based on Test 1 of the July 1997, MPT, *In re Kiddie-Gym Systems, Inc.*:⁵⁷

Jerome A. Martin, President
Kiddie-Gym Systems, Inc.
4722 Industrial Way
Bradley Center, FN 33087

RE: Playground Equipment at Bradley Center Shopping Mall

Dear Mr. Martin,

As promised in our meeting of July 29, 1997, I have reviewed your file and the applicable law and am prepared to give you the firm's opinion with respect to the issues we discussed.

The first issue we discussed is whether your company, KGS, or Cornet bears the risk of loss for the playground equipment destroyed in the fire at Cornet's Bradley Center Shopping Mall. It is our opinion that Cornet would be held responsible for the risk of loss for the playground equipment given that it was destroyed by fire after installation had been timely completed and there was no contrary provision in your contract.

Similarly, if you are asked to write an objective memorandum of law,⁵⁸ you will assume a neutral tone and carefully, objectively evaluate the facts in light of the applicable law. Alternatively, if you are asked to write a legal brief or any form of argument,⁵⁹ you will adopt the tone of an advocate and use forceful and persuasive language.

To assist you in this effort and ensure that you are clear as to what the bar

55. See, e.g., KIDDIE-GYM, *supra* note 38, at 1-2.

56. See, e.g., *id.*

57. *Id.* at 1-17.

58. See *Sample Tests*, *supra* note 34 (summarizing NAT'L CONFERENCE OF BAR EXAM'RS, THE MULTISTATE PERFORMANCE TEST: *IN RE MARINA MARTIN* (1999) (Feb., Test 3)).

59. See, e.g., ALEXANDER, *supra* note 36, at 1-2.

examiners expect from your response, they include a memo in your packet that gives specific guidelines in writing your assignment. There are guidelines for opinion letters, persuasive briefs, memorandums, etc. Each memo will tell you exactly what to include (and sometimes what *not* to include) in your paper.⁶⁰ Be sure to follow these guidelines to the letter. An important part of your preparation for the MPT is to read these memos now and be completely familiar with them so that on test day you need spend only a few precious moments reviewing them before proceeding.

Sometimes you will be asked to write a Statement of Facts in addition to a persuasive brief.⁶¹ The memo will advise you when this is required and when it is not. Check this very carefully. You do not want to leave out a section if it is requested and, conversely, you do not want to waste valuable time if it is not. If you are required to include a Statement of Facts, be sure to include citations to the Record. The citation need be no more than “(R.6)” at the end of the sentence containing the relevant fact. But once again, you have demonstrated to the grader that you are aware of the need to cite to authority and familiar with the proper form of legal documentation.

A. *Know These Specifics, if the Directions
Ask to Provide Them*

1. Persuasive Point Headings

Perhaps the most challenging and difficult task for candidates is when they are asked to include persuasive point headings in their argument.⁶² Most students have not had the opportunity or the need to write point headings since their first year of law school in their appellate briefs. And if you are like most students, you struggled through it and promptly forget about it. Unfortunately, commercial bar preparation courses are not going to teach you how to do this because there is not time and quite simply, it is not their job. Still, you have the opportunity to rack up considerable points with just a few sentences. Also, bar examiners are inclined to look more favorably upon a paper that immediately sets forth the proper tone and may be disposed to view your entire paper in a favorable light.

The key to writing an effective point heading is simple: *state the legal conclusion you want the court to read and the factual basis on which it can do so*. The following point headings are illustrations based on Test 2 of the July

60. See, e.g., *id.* at 2.

61. See, e.g., *id.*

62. See, e.g., *id.* at 2.

1997, MPT, *State v. Devine*.⁶³ They correspond to the two issues you need to address in the brief:

- I. DETECTIVE RIPKA'S TESTIMONY THAT HE OBSERVED THE DEFENDANT SELLING WHAT APPEARED TO BE COCAINE TWO DAYS BEFORE THE DEFENDANT'S ARREST FOR COCAINE POSSESSION IS RELEVANT BECAUSE IT SHOWS THE DEFENDANT'S STATE OF MIND.
- II. OFFICER FUSCO'S TESTIMONY AS TO THE DEFENDANT'S PRIOR CONVICTION FOR THE POSSESSION OF HEROIN WITH THE INTENT TO DISTRIBUTE BUT EIGHTEEN MONTHS AGO AND RELEASE FROM JAIL JUST SIX MONTHS AGO SHOULD BE ADMISSIBLE TO SHOW INTENT.

Whether you include sub-points is dependent on the nature of your problem and the applicable law. Remember, the purpose of point headings is to provide the reader with an outline and summary of your argument. Each point heading or sub-heading is written as a conclusory statement that combines the law with the relevant facts. It should be a coherent, logical, and persuasive thesis sentence. Do not state abstract principles of law. Do not write objective, neutral statements. If your adversary would agree with your statement, then you haven't written it right. The good news is that if you practice writing point headings now as you prepare from the practice MPTs, they will not be much of an obstacle on test day.

2. Writing Case Summaries

Another important skill to review and practice before test day is writing case summaries. This is where you reduce a case to its core facts, holding, and reasoning. Typically, you have not written case analyses for your law school exams and unless you have had the opportunity to write a paper or worked on one of your school's journals, chances are that your only exposure to writing such summaries was in your first year legal writing class. Your goal on the MPT, however, is not to write a case brief or even a lengthy analysis but to concisely state the holding and facts of the Library case and then compare that case to the facts of your case.

When working with the Library, the most common error is to include long passages and quotations from the cases in your text. *Do not do this!* It adds nothing to your legal argument (and no points) but adds tremendously to your writing time. Instead, write something like this: "In *Milford v. State*, the court

63. DEVINE, *supra* note 37, at 1-16.

found that evidence of an offense committed by the defendant but two days before the current one was so linked in time and circumstances as to show state of mind that it was admissible.” Here, in one sentence, you have provided the holding in the case and the factual basis the court relied upon to reach that decision.

3. Using Case Analysis

Equally important is to give adequate treatment to the cases in the Library. The bar examiners expect you to apply the rule from these cases to the specific facts in your case. For example, in Test 1 of the July 1997, MPT, *In re Kiddie-Gym Systems, Inc.*,⁶⁴ where you are asked to write a client letter explaining a client’s position in light of certain events,⁶⁵ you might consider statements like the following:

In *Hughes v. Al Green, Inc.*, the court of appeals held that title is relevant only if the parties provide that risk of loss depends upon who holds the title. Therefore, unless the contract specifically provides that risk of loss depends upon who actually holds title, it is irrelevant where title resides. In our case, the specific act of delivering and installing the playground system passed the risk of loss to Cornet and it does not matter that the contract provision did not convey title until some future event.

Additionally, you must provide more than a superficial analysis. Do not hesitate to develop your argument by synthesizing the applicable law and the facts from your case:

Case law in this jurisdiction supports the claim that a “material alteration” is one that would cause undue surprise or hardship if made part of the agreement without the express awareness by the other party. *Album Graphics, Inc. v. Craig Adhesive Co.* While this case referred to a manufacturer’s unilateral disclaimer of basic warranties as resulting in “surprise or hardship,” a sudden price increase of 10% would similarly cause surprise and hardship. Indeed, you have explained that this additional \$2500 would cause you a substantial financial hardship in that KGS stands to barely break even on this deal and might even lose money on it. Further, you mentioned that had you been informed of such a charge, you could easily have made arrangement to pick up the system with your own driver at no additional expense. Second, we could insist that the price term in our purchase order specifying the price as “all-inclusive” was an effective notification of objection to any changes in the price term and that Poly-

64. KIDDIE-GYM, *supra* note 38.

65. *See id.* at 1-2.

Cast's adding to the price of the units by imposing shipping charges amounting to an additional 10% was known to be objectionable.⁶⁶

Unlike the essay portion of the New York State bar exam where sample responses to the essays have been released for your review, the MPT does not provide sample answers from previous exams. Instead, the MPTs work with point sheets and grading guidelines where the main issues and facts are identified. New York has chosen to provide model responses for the MPT just as it does for its essay questions. While the point sheets are very helpful in identifying the issues you need to address in your answer and their corresponding point allocation, the point sheets do not provide the words themselves. And for many students, the overriding concern is just how to get started: how to write the opening sentence, the point headings, and the case summaries.

VI. SUCCESS EQUALS PRACTICE

Once again, the key to your success will be practice. Now that you know what is expected of you, go back to your first year legal brief and review your professor's comments. Strangely enough, it will come back to you quickly. After all, legal writing is essentially the same whether you are writing an exam, essay or a legal memorandum. You are solving a problem by applying the relevant law to the facts. In one way or another, it is always IRAC. You identify the issue, state the rule, and provide analysis through application of the facts. You know how to do this. You just have to adapt to a somewhat different format. Your goal during practice sessions, therefore, is to spend this time reacquainting yourself with the mechanics of legal writing and the various forms of legal expression so that you do not do waste time on test day familiarizing yourself with such fundamentals.

A. *Time is of the Essence*

While time allocation is the last topic to be discussed, it may well be the most important one. Clearly, you must complete the assignment to maximize the points you receive. The bar examiners suggest that you allot forty-five minutes to reading the materials and forty-five minutes to organizing and writing your response.⁶⁷ This is sound advice. Moreover, if you follow the suggestions outlined in this Article, you will be organizing your response while you are

66. See *id.* at 16-17 (displaying the library case entitled *Alum Graphics, Inc. v. Craig Adhesive Co.*).

67. NCBE MPT BOOKLET, *supra* note 2, at 4.

reading and digesting the materials, thereby maximizing your productivity. Of course, you can have no real idea how long any of this will take unless and until you have done it. Therefore, after you have read through one or two of the MPTs to get a sense of what they are all about, select another one and just read the materials, practicing the techniques you have just learned. Note how long it takes you to do this. This is your baseline *reading* time. Then, proceed to writing the response. Once again, time yourself. This is your baseline *writing* time. Do not be surprised or disheartened if it seems to take several hours to get through the materials. This is normal the first time you approach new material. Still, the experience will be somewhat different for everyone. Some read faster than others; others have difficulty writing. You need to learn how long it takes you to perform each of these tasks. Once you have established your reading and writing baselines, you can concentrate on improving your time. Learning how to allocate your time is a challenging but not insurmountable task. You can do it with practice.

VII. CONCLUSION

Hopefully, this discussion has demystified the MPT for you and at the same time provided you with a solid work plan to follow as you prepare for the bar exam. As in any venture, the key to success is planning and practice. If you seize the opportunity to practice from previous MPTs, you will be in a most favorable position on test day. Good luck.

