

**IN THE SUPREME COURT OF FLORIDA**

**Florida Board of Bar Examiners re** )  
**Consideration of the Final Report** )  
**of the Testing Commission** )  
\_\_\_\_\_)

The Florida Board of Bar Examiners (Board) files this response concerning the Board’s consideration of the Final Report of the Testing Commission.

**Background**

By his June 2008 administrative order, Chief Justice R. Fred Lewis of the Supreme Court of Florida convened the Testing Commission (Commission). The Commission reviewed previously gathered data on Florida’s bar examination, gathered additional information, and made recommendations pertaining to the areas that should be tested on Florida’s bar examination. The Commission submitted its report to the Court on March 11, 2009.

The Florida Bar Examination consists of the General Bar Examination and the Multistate Professional Responsibility Examination. The General Bar Examination consists of two parts. Part A is developed by the Board and consists of a combination of essay and multiple choice questions. Part B is the Multistate Bar Examination (MBE) and is developed by the National

Conference of Bar Examiners (NCBE). The General Bar Examination is administered by the Board during the last Tuesday and Wednesday of February and July of each year.

Part A of the General Bar Examination consists of six segments. One segment must test on the Florida Rules of Civil and Criminal Procedure. The remaining segments come from the following subjects: Florida Constitutional Law, Federal Constitutional Law, Business Entities, Wills and Administration of Estates, Trusts, Real Property, Evidence, Torts, Criminal Law, Contracts, Family Law, and Chapters 4 and 5 of the Rules Regulating The Florida Bar.

### **Board's Response**

The Board has considered the Commission's report and recommendations. The Board commends the Commission for its painstaking evaluation of the data and for its well thought-out recommendations pertaining to Florida's bar examination. The Board endorses each of the following recommendations of the Commission:

As to the area of Test Subjects:

1) The Commission recommends that Articles 3 and 9 of the Uniform Commercial Code be added as test subjects. The Commission defers to the board on implementation of this recommendation.

2) The Commission recommends that “Criminal Law” be renamed “Criminal Law and Constitutional Criminal Procedure.”

Testing Commission, Final Report to Supreme Court of Florida (March 2009) at 7 (report available on the Court’s website at [http://www.floridasupremecourt.org/pub\\_info/documents/2009\\_FBBE\\_Testing\\_Report.pdf](http://www.floridasupremecourt.org/pub_info/documents/2009_FBBE_Testing_Report.pdf))

As to the area of Test Specifications:

1) The Commission recommends that the Board adopt the recommended test specifications regarding the areas of law tested on Part A of the Exam as shown in Appendix 3.

2) The Commission recommends that the Board make the test specifications available to the item drafters for guidance in the development of new test questions and that from these test specifications the Board produce a condensed version of the specifications to be provided to bar applicants and the general public for their use in preparation for the Exam.

3) The Commission recommends that the Board continue to select the manner in which the areas of law be tested, whether by essay question or multiple-choice question.

4) The Commission encourages the Board to continue to review testing options, such as performance testing, that may provide for an even more reliable and valid examination.

*Id.* at 8.

### **Renaming of test subject**

In addition to the Commission’s recommendation, the Board proposes that the currently listed test subject of “business entities including corporations and partnerships” be renamed to “business entities.” In making this proposal, the Board concluded that no particular types of business entity in Florida should be highlighted.

The proposed change will allow the Board to test other business entities, like limited liability companies, without fear of misleading bar applicants that the only entities being tested will be corporations and partnerships. The publicly released test specifications (see section below) will notify bar applicants of the specific types of business entities that will be covered under the test subject of business entities.

### **Release of Test Specifications**

As to the Commission's recommendation to release a condensed version of the test specifications to the public, the Board plans to work with Mary M. Sandifer, Ph. D., to accomplish this task. Dr. Sandifer is a testing consultant who previously held positions as the Deputy Director of Testing for the National Conference of Bar Examiners and the Assistant Director of ACT's Professional Assessment Services Division. In 2003, the Board selected Dr. Sandifer to assist the Board in its test specifications project. The Commission relied on the data produced by the test specifications project in making its recommendations to the Court. Commission's Final Report, *supra*, at 11-12.

### **MPT Task Force**

As to the Commission's last recommendation, the Board created the MPT Task Force in 2008 to study the issue of performance testing including

the use of the Multistate Performance Test (MPT) offered by NCBE. The MPT is administered by participating jurisdictions on the Tuesday before the last Wednesday in February and July of each year. The NCBE offers two 90-minute MPT questions.

The NCBE offers the following description of the MPT:

The Multistate Performance Test is designed to test an applicant's ability to use fundamental lawyering skills in a realistic situation. Each test evaluates an applicant's ability to complete a task which a beginning lawyer should be able to accomplish.

The materials for each MPT include a File and a Library. The File consists of source documents containing all the facts of the case. The specific assignment the applicant is to complete is described in a memorandum from a supervising attorney. The File might also include transcripts of interviews, depositions, hearings or trials, pleadings, correspondence, client documents, contracts, newspaper articles, medical records, police reports, or lawyer's notes. Relevant as well as irrelevant facts are included. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or a supervising attorney's version of events may be incomplete or unreliable. Applicants are expected to recognize when facts are inconsistent or missing and are expected to identify potential sources of additional facts.

The Library may contain cases, statutes, regulations or rules, some of which may not be relevant to the assigned lawyering task. The applicant is expected to extract from the Library the legal principles necessary to analyze the problem and perform the task. The MPT is not a test of substantive law; the Library materials provide sufficient substantive information to complete the task.

The MPT requires applicants 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.

These skills will be tested by requiring applicants to perform one of a variety of lawyering tasks. For example, applicants might be instructed to complete any of the following: a memorandum to a supervising attorney; a letter to a client; a persuasive memorandum or brief; a statement of facts; a contract provision; a will; a counseling plan; a proposal for settlement or agreement; a discovery plan; a witness examination plan; a closing argument.

The MPT 2009 Information Booklet (booklet available on the NCBE's website at [http://www.ncbex.org/uploads/user\\_docrepos/MPT\\_IB\\_01.pdf](http://www.ncbex.org/uploads/user_docrepos/MPT_IB_01.pdf))

The task force reviewed information pertaining to performance testing including the Board's prior studies of this issue in 1997 and again in 1998. The task force considered the logistics of adding the MPT to the current General Bar Examination in Florida. One option would keep the current format but add one-half day of testing consisting of the two 90-minute MPT questions.

The task force also considered the option of not expanding the length of the bar examination. The task force explored the possibility of using one 90-minute MPT question by reformatting and reducing the number of essay questions or by reducing the number of Florida multiple-choice questions.

The task force also received input from Chad Buckendahl, Ph.D., the Board's test and measurement consultant. Dr. Buckendahl advised the task force that the Board's current examination provides a valid and reliable measure of the technical competence of applicants seeking to practice law in Florida.

Dr. Buckendahl also stated that the Board's essay questions compare favorably to the MPT questions offered by the NCBE. Dr. Buckendahl explained:

Although the Board currently labels their constructed response questions as essays, the judgments and abilities being demonstrated (i.e., analysis, evaluation, communicating) are very similar to what would be demonstrated on a PT question. The only difference is that a PT question as discussed by the Task Force would include reference resources/materials that a candidate can use as part of their demonstration of the skills.

As both essay questions and MPT questions require a constructed response, Dr. Buckendahl was not convinced that adding the MPT would provide any assistance in identifying applicants with the desired skill set of a new Florida attorney. Dr. Buckendahl suggested that Board's essay questions could be drafted to be even more "performance like" and he recommended the development of templates for both the drafting and scoring of essay questions.

After a thorough study of the issue, the task force recommended the following:

- The MPT not be used at this time due to cost and the loss of testing on Florida law.
- Continue to use essay questions under Part A of the General Bar Examination.
- Develop and implement templates for the drafting and grading of essay questions to ensure that the quality of essay questions will remain constant for each administration of the General Bar Examination.
- Do not preclude the adding of a performance test to the General Bar Examination in the future but, instead, defer any further consideration of a Florida performance test until the templates for essay questions have been developed and evaluated.

The full Board subsequently adopted the recommendations of the task force.

The Board will continue to remain open to other testing options, such as performance testing, to ensure a reliable and fair examination. For example, due to advances in technology, computer testing for professional licensure has now become a reality in the testing of professionals in other

fields. Thus, the development of a computer adaptive version of the bar examination may be an option for the Board's consideration in the future.

The Board will especially continue to review the testing products offered by the NCBE. Of the four products offered by the NCBE, the Board currently uses the MPRE and the MBE. As discussed above, the Board just completed an in-depth review of the MPT. The Board has elected not to use the fourth product, the Multistate Essay Examination (MEE). Instead, the Board develops its own essay questions that test on Florida law.

On June 20, 2009, the Board's Chair and Executive Director attended a meeting sponsored by the NCBE. The meeting addressed the concept of a uniform bar examination. The uniform bar examination, as is currently being developed, would consist of the MEE, the MBE, and the MPT. There are a number of jurisdictions that are already administering all three of these NCBE test products. As with computer adaptive and performance testing, the Board will continue to monitor the progress of this uniform bar examination initiative.

Although the Board does not support the adding of the MPT to the General Bar Examination as this time, the Board has set forth proposed rule amendments implementing the adding of the MPT at **Attachment 1** of this response should the Court wish to consider further this issue.

## Conclusions

The Board approves each of the recommendations of the Commission. By a separate pleading, the Board will petition the Court to adopt proposed rule amendments that will implement the recommendations of the Commission.

As to the development and release of the condensed public version of the test specifications, the Board plans to work with Dr. Sandifer to accomplish the Commission's recommendation.

As to the recommendation of considering other testing options, the Board created a task force that specifically addressed the option of adding the MPT offered by the NCBE. The Board approved the recommendation of the task force that performance testing not be added to the General Bar Examination at this time. The Board, however, will continue to consider new testing products so as to maintain the quality of the Florida's bar examination.

DATED this 12<sup>th</sup> day of August, 2009.

Respectfully submitted,

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# Attachment 1

Proposed rule amendments in legislative format adding the MPT as a component of Florida's General Bar Examination. *Option A* would add two 90-minute MPT questions and increase the bar examination by one-half day. *Option B* would maintain the bar examination at the current length of two days and would add one 90-minute MPT question to Part A of the General Bar Examination.

## *Option A*

**4-14 Dates of Administration.** The General Bar Examination will be administered on the last Tuesday, ~~and Wednesday,~~ and Thursday morning of February and July of each calendar year. The Multistate Professional Responsibility Examination is administered in March, August, and November of each year.

**4-20 General Bar Examination.** A portion of the General Bar Examination will consist of questions in the form of hypothetical fact problems requiring essay answers. Essay questions may not be labeled as to subject matter. Questions may be designed to require answers based on Florida case or statutory law of substantial importance. The General Bar

Examination will consist of ~~2 parts (A and B)~~ 3 parts (A, B, and C). Part A will be a combination of essay and multiple-choice questions, ~~and~~ Part B will be the Multistate Bar Examination (MBE), and Part C will be the Multistate Performance Test (MPT).

**4-22.5 Part C.** Part C will be the Multistate Performance Examination (MPT) offered to each jurisdiction by the National Conference of Bar Examiners.

*Option B*

**4-20 General Bar Examination.** A portion of the General Bar Examination will consist of questions in the form of hypothetical fact problems requiring essay answers. Essay questions may not be labeled as to subject matter. Questions may be designed to require answers based on Florida case or statutory law of substantial importance. The General Bar Examination will consist of 2 parts (A and B). Part A will be a combination of essay and multiple-choice questions and Part B will be the Multistate Bar Examination (MBE).

**4-22 Part A.** Part A will consist of 6 ~~one-hour segments~~hours. One segment will include the subject of Florida Rules of Civil and Criminal Procedure and the Florida Rules of Judicial Administration 2.051, 2.060, and

2.160. One segment will consist of a 90-minute question from the Multistate Performance Test offered by the National Conference of Bar Examiners.

The remaining 5 segments, each of which will include no more than 2 subjects, will be selected from the following subjects including their equitable aspects:

- (a) Florida constitutional law;
- (b) federal constitutional law;
- (c) business entities including corporations and partnerships;
- (d) wills and administration of estates;
- (e) trusts;
- (f) real property;
- (g) evidence;
- (h) torts;
- (i) criminal law;
- (j) contracts;
- (k) family law;
- (l) Chapter 4, Rules of Professional Conduct of the Rules Regulating The Florida Bar; and
- (m) Chapter 5, Rules Regulating Trust Accounts of the Rules Regulating The Florida Bar.