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## **Integrating Performance Tests into Doctrinal Courses, Skills Courses, and Institutional Benchmark Testing: A Simple Way to Enhance Student Engagement While Furthering Assessment, Bar Passage, and Other ABA Accreditation Objectives**

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# INTEGRATING PERFORMANCE TESTS INTO DOCTRINAL COURSES, SKILLS COURSES, AND INSTITUTIONAL BENCHMARK TESTING: A SIMPLE WAY TO ENHANCE STUDENT ENGAGEMENT WHILE FURTHERING ASSESSMENT, BAR PASSAGE, AND OTHER ABA ACCREDITATION OBJECTIVES

*Sara J. Berman\**

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## I. INTRODUCTION

Performance tests are closed-universe, practical-lawyering skills exams that form one of the testing components, along with essays and multiple-choice questions, of most of bar exams nationwide.<sup>1</sup> The first time I

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embedded a Performance Test (PT) into a doctrinal course, many years ago, I did so in “necessity is the mother of invention” fashion.<sup>2</sup> At the proverbial “eleventh hour,” I learned I had to miss a criminal procedure class. Rather than rescheduling class, I assigned a PT, an active learning task that students could complete productively, sans professor. I chose a PT that centered on a *Miranda* issue—a timely contextual fit. The students completed the exam as a mandatory, non-graded assignment in a proctored setting. The following week, I provided feedback on their answers. We debriefed the PT during the next class session, resulting in a more lively and impactful discussion than I could have ever imagined. It was clear, from both their written answers and in-class comments, that this group of second year law students, who had never seen a PT, threw themselves fully into this simulation. They enjoyed the opportunity to *use* the law—law that had previously only lived in a two-dimensional casebook—to argue facts. “It finally felt real,” many said.

Some students enjoyed the PT exam so much that they expressed a desire to pursue careers as public defenders or prosecutors. Others expressed frustration at the time constraints, noting they had not been able to finish the assignment. All appreciated encountering this challenge in the low-stakes classroom environment first, rather than at the exam with the highest stakes of all: the bar exam.

Though perspectives on the practice exam experience differed, all students were engaged. They sat on the edges of their chairs, eyes wide open; everyone had an opinion. Many wanted to know more, prompting a

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1. *Preparing for the MPT*, NAT’L CONF. OF BAR EXAM’RS, <http://www.ncbex.org/exams/mpt/preparing/> (last visited Jan. 17, 2018) [hereinafter NCBE].

2. Inspiration for considering PTs as teaching tools came from the author’s own early exposure to these exams in courses taught by University of California at Los Angeles (UCLA) law professors, David Binder, Paul Bergman (who both contributed to the first performance tests in the early 1980s), and Professor Carrie Menkel-Meadow (who still uses PTs for instructional purposes in counseling and negotiation courses at University of California at Irvine School of Law). These pioneers of clinical legal education predicted the future of legal education by seamlessly fusing skills training and doctrinal teaching. The author is also deeply indebted to the following colleagues from Nova Southeastern’s Shepard Broad College of Law for their support and inspiration to publish this piece: Dean Jon Garon, Professor Olympia Duhart, Professor Florence Shu-Acquaye, and Senior Associate Director of the law library, Becka Rich. A special thank you as well to the Honorable Mark Juhas for a recent PT team-teaching collaboration described *infra* in this article.

spirited round of “what ifs”<sup>3</sup> that eventually led to creating “spin-off” exercises as teaching tools.<sup>4</sup> The level of student engagement was so inspiring that I have incorporated PT-based lessons into my doctrinal courses ever since.<sup>5</sup> And, I routinely hear from graduates that the performance test portion of the bar exam was easier because of this early exposure during law school.

This article explores ways to weave performance tests into the law school curriculum to enhance student engagement and active learning, and to further ABA-mandated assessment and accreditation objectives. Some options include using them as discrete simulation exercises in doctrinal courses, as content for certain dedicated skills courses, or as possible institutional benchmark testing. Section II provides an overview of PTs, suggesting how they can be effective teaching tools. Section III demonstrates how integrating PTs into the law school curriculum, at both the course and institutional levels, may help law schools comply with numerous ABA Standards, including those regarding assessment and bar passage—without undue time or costs. Lastly, Section IV of this article exposes and addresses certain objections to the use of performance tests in law schools.

## II. OVERVIEW OF PTS AS LAW SCHOOL TEACHING TOOLS

The Performance Test, a closed-universe, lawyering-simulation exam, originated as an experimental part of the California Bar Exam in 1980<sup>6</sup> and

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3. One student asked, “What if the court wants to hear oral argument on the motion to suppress, what questions would the judge ask? How would we respond? What would the other side say?” Another student inquired, “What if the case goes to trial, what sorts of jury instructions would jurors receive about the underlying criminal offenses? What would our closing argument sound like? What would opposing counsel’s sound like? How would we draft an opening statement and how would that differ from our closing argument?” Another student queried, “What if the defendant were offered a plea deal, should he take it?”

4. Sara J. Berman, *Getting Extra Practical Training out of Performance Tests with Spin-Off Exercises*, THE LEARNING CURVE, Sept. 2015, at 13.

5. The author has incorporated performance tests as teaching tools in doctrinal courses including Criminal Procedure, Criminal Law, Corporations, Contracts, Torts, Remedies, and Community Property. For discussion of attitudes toward performance testing in its initial iterations, see Stella L. Smetanka, *The Multi-State Performance Test: A Measure of Law School’s Competence to Prepare Lawyers*, 62 U. PITT. L. REV. 747, 751, note 14 (2000-2001) (citing Alan Ogden, *Performance Testing in Colorado*, THE BAR EXAM’R, Nov. 1989, at 19, 21, which refers to a study by P. Karawanny & P. Schoner, *Applicant Attitudes Toward the Performance Test on the February 1984 Bar Exam*, Report Prepared for the Committee of Bar Examiners of the State of California [Sept. 28, 1984]); see also Charles S. Kunce & Scott E. Arbet, *A Performance Test of Lawyering Skills: Candidate Perceptions*, THE BAR EXAM’R, May 1995, at 43, 44.

6. Stephen P. Klein, *Measuring Legal Research Skills on a Bar Examinations*, THE RAND CORP. (May 1983), <https://www.rand.org/content/dam/rand/pubs/papers/2009/P6879.pdf>.

became a regular part of the California Bar Exam in 1983.<sup>7</sup> In 1997, the National Conference of Bar Examiners (NCBE) launched the multistate performance test (MPT).<sup>8</sup> The popularity of performance tests is evident; at the time of the writing of this article, they appear on bar exams in all but seven states.<sup>9</sup>

All jurisdictions that currently require PTs include either one or two 90-minute PTs.<sup>10</sup> However, from approximately 1983-2016, the California Bar Exam included two 3-hour PTs.<sup>11</sup> This library of more than three decades of 3-hour PTs provides a treasure trove of law school teaching tools.<sup>12</sup> The first regularly administered California Performance Tests were 3.5-hour exams, and the 1983-1984 California PTs included multiple choice questions as well as drafting exercises.<sup>13</sup> California eliminated multiple choice questions from its PTs by 1985, and multiple-choice questions were never part of the MPT.

Performance tests do not measure the ability to memorize. They are “open book” in the sense that the bar taker is given a library, file, and instructions.<sup>14</sup> Today’s lawyers have ready access to hand-held devices and are rarely called upon to reference rules from memory. Precisely because the PT tests skills rather than memory, this exam more closely mirrors law practice than other bar exam testing formats. A question that merits further study is whether law students may be more pre-disposed to take more seriously, and thus learn from engaging in significant practice with, a form of testing that feels more real and less contrived.

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7. Stephen P. Klein, *History of General Bar Examination Structure and Pass/Fail Rules*, THE STATE BAR OF CAL. 3 (July 9, 2011), <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000009450.pdf>. See also Jane Peterson Smith, *Performance Testing in California, 1983-89*, THE BAR EXAM’R, Aug. 1989, at 17.

8. Judith A. Gundersen, *Happy Birthday, MPT!*, THE BAR EXAM’R, Nov. 2007, at 18, 20, available at [http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia\\_files%2FBar-Examiner%2Farticles%2F2007%2F760407\\_Gundersen.pdf](http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia_files%2FBar-Examiner%2Farticles%2F2007%2F760407_Gundersen.pdf); see also NCBE, *2015 Statistics*, THE BAR EXAM’R, Mar. 2016, at 38, available at [http://www.ncbex.org/assets/media\\_files/Bar-Examiner/articles/2016/BE-March2016-2015Statistics.pdf](http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2016/BE-March2016-2015Statistics.pdf).

9. NCBE, *Jurisdictions Administering the MPT*, THE NAT’L CONF. OF BAR EXAM’RS, [http://www.ncbex.org/exams/mpt\\_](http://www.ncbex.org/exams/mpt_) (last visited Mar. 9, 2018) (showing only nine states that do not administer the MPT. Two states, California and Pennsylvania, administer their own PTs).

10. *Id.*; see also *Tests and Topics Tested*, PA. BD. OF L. EXAM’RS, <http://www.pabarexam.org/> (last visited Jan. 5, 2018); see *Examinations*, THE STATE BAR OF CAL., <http://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination> (last visited Jan. 5, 2018).

11. See Patrick R. Dixon & Alan S. Yochelson, *Shhh . . . California Examinees May Be Sleeping In After Day Two of the Bar Exam*, THE BAR EXAM’R, June 2017 (providing a brief history of the California Bar Exam).

12. See discussion *infra* in Section IV on why 3-hour PTs may be better teaching tools than their 90-minute counterparts.

13. Having taught many students with these early tests, the multiple choice component provides a useful tool, particularly in assessing students’ ability to read critically and understand case law.

14. See NCBE, *supra* note 1.

As noted above, PT instructions direct examinees to complete a task or tasks using a closed-universe library and file.<sup>15</sup> A PT library of legal authorities typically includes cases and statutes.<sup>16</sup> A PT fact file contains information about the client's situation in the form of original source documents such as deposition transcripts, police reports, photographs, transcripts of notes regarding client and witness interviews, newspaper articles, and memoranda from private investigators.<sup>17</sup> PT instructions direct examinees to draft a document or documents based upon an analysis and synthesis of the facts and law provided. Past PTs have directed bar takers to draft documents such as a brief in support of a motion, a client letter, a client counseling plan, a discovery plan, an appellate brief, a letter proposing settlement to opposing counsel, internal memoranda evaluating the strengths and weaknesses of a client's case, or a closing argument to a judge or jury.<sup>18</sup>

It is critical to note that bar examiners deem these tasks to be those that a beginning lawyer would be able to draft. Yet, unless a law student has taken a clinical course or worked in a law office (neither of which is required to fulfill ABA experiential course requirements), he or she may be wholly unfamiliar with how to even begin, let alone complete such a task.<sup>19</sup> If law schools incorporated PTs into the law school curriculum, students might well graduate more prepared to effectively complete this portion of the bar exam.

Another important reason for exposure to PTs during law school is the different way in which facts are presented—again, more realistically in PTs than in traditional bar exam or law school testing. Students are taught not to “fight the facts” on most traditional law school exams, bar exam essays, and bar exam multiple-choice questions—the facts are “frozen,” meaning students must accept the stated facts as true and analyze the legal result by applying memorized law to those facts. Credibility of essay and multiple choice exam facts may not be questioned, and rarely are there irrelevant facts. How different from the “real world,” where lawyers routinely obtain

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15. See NCBE, *supra* note 1. For a discussion of what PTs test, see Lawrence M. Grosberg, *Should We Test for Interpersonal Lawyering Skills*, 2 CLINICAL L. REV. 349, 366-367 (1995-1996); see also, Steven D. Jamar, *Using the Multistate Performance Test in an LRW Course*, PERSPECTIVES: TEACHING L. RESEARCH & WRITING (Feb. 10, 2015), <https://info.legalsolutions.thomsonreuters.com/pdf/perspec/2000-spring/2000-spring-4.pdf>.

16. *Id.*; see also Diane F. Bosse, *The MPT: Assessment Opportunities Beyond the Traditional Essay*, THE BAR EXAM’R, Dec. 2011.

17. *Id.*

18. *Id.*

19. *MPT Skills Tested*, THE NAT’L CONF. OF BAR EXAM’RS, <http://www.ncbex.org/pdfviewer/?file=%2Fdocsdocument%2F54> (last visited Jan. 5, 2018); see also, Bosse, *supra*, note 16 (noting, “The MPT tests a candidate’s ability to complete a task that a beginning lawyer should be able to accomplish.”). See also ABA Standard 303, *infra*, note 34.

mountains of unreliable or irrelevant facts! Clients tell partially accurate stories at best, witnesses are biased, and so on. As such, attorneys generally encounter far more “hot” or malleable facts than frozen facts, unless they are appellate lawyers. Assimilating facts from original source documents in PT files, as opposed to pre-digested fact patterns in essay or multiple-choice testing, exposes law students to at least some of the nuances of factual analysis.<sup>20</sup>

Student engagement, contextual learning, nuanced factual analysis, and early, low-stakes bar exam exposures are just some of the many “selling points” for teaching with PTs. The argument for using PTs generally as a law school teaching tool is far from a novel one.<sup>21</sup> What may present a new perspective is considering just how aligned teaching with PTs can be with current ABA accreditation standards. Law school deans, by simply urging doctrinal, skills, and academic support faculty to use PTs (or use them more robustly if already in use), can likely assist their institutions with compliance efforts under numerous standards.<sup>22</sup> Note that the word “simply” in the preceding sentence and the recommendation to include PTs throughout the law school curriculum in no way suggest that this alone will ensure compliance with any one ABA Standard, nor will it fix the greater problems facing legal education. Many have been and continue to thoughtfully study and address the critical need for comprehensive change.<sup>23</sup> This article intends no such wholesale proposal. Rather, the “simple” ideas proposed here, of seeding the law school curriculum with PTs, can be analogized to including regular short walks and stairs in one’s

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20. For thorough treatment of teaching factual analysis, see David A. Binder and Paul Bergman, *Fact Investigation: From Hypothesis to Proof* (West Publishing 1984); see generally Grosberg, *supra* note 15 for discussion of skills tested in PTs, and see Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 L. & SOC. INQUIRY 620, 630 (2011).

21. As noted, *supra* note 3, the author’s own law professors incorporated PTs into curriculum at UCLA Law School in the 1980s. See also, Alice Noble-Allgire, *Desegregating the Law School Curriculum: How to Integrate More of the Skills and Values Identified by the MacCrate Report Into a Doctrinal Course*, 3 NEV. L.J. (2002); Benjamin H. Barton, *A Tale of Two Case Methods*, 75 TENN. L. REV. 233, 241 (2008) (noting that using the MPT provides a similar method to the business school type case method the author proposes); Suzanne Darrow Kleinhaus, *infra* note 40.

22. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS §§ 302, 303(a)(3), 314, 315, 316 (2017-2018).

23. See Judith Welch Wegner, *The Carnegie Foundation’s Educating Lawyers: Four Questions for Bar Examiners*, THE BAR EXAM’R, June 2011, notes 2, 3, and 5 (describing a century of major studies about the need for change in legal education). Following a long line of ABA groups assembled to study legal education, the ABA Commission of the Future of Legal Education, convened in 2017, stated, “The Commission on the Future of Legal Education will take a leadership role in anticipating, articulating and influencing what will be dramatic changes in the legal profession in the next decade and beyond.” *Commission on the Future of Legal Education*, AM. BAR ASS’N, [https://www.americanbar.org/groups/leadership/office\\_of\\_the\\_president/futureoflegaleducation.html](https://www.americanbar.org/groups/leadership/office_of_the_president/futureoflegaleducation.html) (last visited Apr. 2, 2018); see also Carrie Menkel-Meadow, *Crisis in Legal education or the Other Things Law Students Should be Learning and Doing*, 45 MCGEORGE L. REV. 133 (2013).

day-to-day routine—not a substitute for comprehensive exercise or dietary changes, but an easy way to get moving and add a healthy component to one's lifestyle.

Adding PTs into legal education is also a way of keeping students focused on their own professional identity, and on clients. Repeated exposure to PTs during law school would keep professional identity in the forefront of a student's consideration because the PT requires the student to role play as a lawyer and step into his or her future professional shoes. Students might become more aware of clients generally, because, in every PT, the examinee "represents" a person or entity with identifiable problems or concerns.<sup>24</sup>

### III. PTs AS LAW SCHOOL TEACHING AND ASSESSMENT TOOLS: USING PERFORMANCE TESTS TO HELP SATISFY STANDARDS AND ACCOMPLISH GOALS IMPLICATED WITHIN CHAPTER 3 OF THE ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS

Performance tests are effective teaching tools for the reasons discussed earlier, and because they provide experiential learning opportunities. They also serve as useful assessment tools to measure student competency in basic lawyering skills while elevating student engagement and preparing students for success on the bar exam. Each of these purposes ties to one or more of the ABA Standards 302, 303(a)(3), 314, 315, and 316, as discussed below.<sup>25</sup>

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24. At a UCLA Law School event on October 26, 2012, that the author attended honoring "The Pioneers of Clinical Legal Education," it was noted by panelists and audience members alike that the word "client" was rarely heard in law school classes before the clinical education movement. "Client" is still not a frequently uttered word in many doctrinal courses despite the fact that because of performance tests on bar examinations, basic competence in client-centered lawyering skills is now an integral component of what is considered necessary to be licensed to practice law in the overwhelming majority of jurisdictions.

25. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS §§ 302, 303(a)(3), 314, 315, 316 (2017-2018); see also Dannebohm & Lamparello, *The Death of Academic Support: Creating a Truly Experiential, Integrated, Assessment-Drive Academic Success and Bar Preparation Program*, 42 MITCHELL HAMLINE L. REV. 1, 110 (2016) for a thoughtful and thorough discussion of comprehensively integrating a wide variety of skills and other academic success pieces throughout the law school curriculum.



A. *ABA Standard 302: Learning Outcomes*<sup>26</sup>

The learning outcomes listed in Standard 302 dovetail nearly identically with the skills tested on performance tests. This is not surprising given the heavy influence of the MacCrate Report, which, more than twenty years ago, highlighted the need for skills training in law schools.<sup>27</sup>

ABA Standard 302(b) references, "Legal analysis and reasoning, ... problem-solving, and written ... communication in the legal context ..."<sup>28</sup> paralleling those skills examinees must perform on the MPT, which require an applicant to, inter alia, "... (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; [and] (5) communicate effectively in writing ...."<sup>29</sup> It is hard to imagine a testing format that would be more symbiotic with ABA Standard 302(b) on learning outcomes than the PT.

With minimal adaptation, the PT also provides a suitable springboard for teaching Standard 302(b) skills that are not part of existing PTs, such as legal research and oral communication. A professor need only open a closed-universe PT library (partially or fully) to train legal research skills in context. Additionally, it need not be onerous or time-consuming to adapt PTs as simulation springboards for mock court arguments or client interviews, helping students to develop oral communication skills.<sup>30</sup>

26. ABA Standard 302. LEARNING OUTCOMES states:

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 AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS § 302 (2017-2018).

27. *MPT Skills Tested*, *supra* note 19. The following note appears at the top of the NCBE's *MPT Skills Tested* document:

The Multistate Performance Test examines six fundamental lawyering skills that are required for the performance of many lawyering tasks. The following description of these skills is based in part on the 'Statement of Fundamental Lawyering Skills' from *Legal Education and Professional Development: An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, known as the MacCrate Report (ABA 1992).

28. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS § 302 (2017-2018).

29. NCBE, *supra* note 1.

30. The author recently collaborated with the Honorable Mark Juhas, a Los Angeles Superior Court judge, to bring practical family law lessons to life in an online format, using performance tests as springboards, in a Community Property course. In this program, "The Courtroom Comes to the Classroom" discussed *infra*, the judge and professor adapted facts and instruction portions of existing PTs and required students to role-play as counsel for divorcing spouses. Students negotiated settlement agreements and drafted and argued motions (using live online technology) before the "court." Bringing the judge to the "classroom" via live online technology allowed him to participate from chambers, without having to take time to commute to a physical location.

Teaching with PTs may also help address the outcomes in 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.”<sup>31</sup> A number of past PTs focused specifically on ethics, with library authorities consisting of rules of professional responsibility, while others included discrete ethical issues.<sup>32</sup> Placing students in role-play situations, where they must grapple with professional responsibility obligations in context, provides highly powerful “teachable moments.”<sup>33</sup>

Teaching skills, reinforcing a law school’s efforts to graduate students with competency in these Standard 302 outcomes, does not have to be the exclusive province of dedicated skills courses. Professors teaching doctrinal courses seeking a relatively quick way to incorporate skills lessons into a casebook course can do so by embedding a PT-based exercise into the syllabus—as homework or class work.<sup>34</sup>

### B. ABA Standard 303: Curriculum

PTs could serve as all or part of the content for an experiential course described in ABA Standard 303 (a)(3)<sup>35</sup>—a “simulation course” that is

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31. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS § 302 (2017-2018).

32. In a single California PT, *In re: Deale* (a 3-hour exam used as a springboard in the professional responsibility chapter of *Bar Exam MPT Preparation & Experiential Learning for Law Students: Interactive Performance Test Training*, AM. BAR ASS’N (2017)), students grappled with ethical duties when an attorney in their own firm allegedly breached a client’s confidence, represented multiple clients with potential conflicts of interest, and whose behavior raised issues with respect to fees and candor.

33. The power of simulations in law school teaching has been touted for a half century, if not longer, see Michael Botein, *Simulation and Roleplaying in Administrative Law*, 26 J. LEGAL EDUC. 234 (1974); see also Noble, *supra* note 21, at 48-50, where the author discusses the power of simulations, particularly when teaching professional responsibility issues. Professor Noble demonstrates how much easier it is for students to “spot” ethical issues than to address them in an active role-play.

34. A single PT in an area related to course coverage could be given as homework and debriefed in an assigned reading or online video, thereby taking no class time whatsoever. The exam could be completed as homework and debriefed quickly in person, taking only a small amount of class time. Or, one or more entire class sessions could be devoted to a PT—with students role-playing the parts of lawyers, clients, witnesses, investigators, and others from the PT file or in related “spin off” exercises. See Berman, *supra* note 4. PTs assigned in doctrinal classes can be non-graded, thus providing very low stakes practice opportunities or graded, pass/fail, or assigned as extra credit. Law professors teaching in ten core law school courses (Criminal Law, Criminal Procedure, Torts, Contracts, Civil Procedure, Evidence, Constitutional Law, Professional Responsibility, Real Property, and Family Law) will find ready-made experiential exercises described in the Appendix section of this article.

35. Standard 303 CURRICULUM states in relevant part:

(a) A law school shall offer a curriculum that requires each student to satisfactorily complete at least the following: ... (3) one or more experiential course(s) totaling at least six credit hours. An experiential course must be a simulation course, a law clinic, or a field placement. To satisfy this requirement, a course must be primarily experiential in nature and must: (i) integrate doctrine, theory, skills, and legal ethics, and engage students in performance of one

“primarily experiential in nature” and “integrate[s] doctrine, theory, skills, and legal ethics, and engage[s] students in performance of one or more of the professional skills identified in Standard 302 . . . .”<sup>36</sup> If constructed as a robust experiential simulation opportunity, such a course could potentially satisfy all of the subsections of Standard 303(a)(3).<sup>37</sup>

### C. ABA Standard 306: Distance Education

Discrete practical lessons within doctrinal courses or entire dedicated PT courses can be set in a distance learning format so as to comply with ABA Standard 306.<sup>38</sup> With attention to detail, knowledge of skills pedagogy and learning science, and ample technological resources to provide a robust educational atmosphere, teaching a PT course online is likely to be effective and comply with ABA Standard 306.<sup>39</sup> Online and/or blended learning formats, if sufficiently thoughtful, can be particularly helpful in providing low stakes high value learning environments.<sup>40</sup>

or more of the professional skills identified in Standard 302; (ii) develop the concepts underlying the professional skills being taught; (iii) provide multiple opportunities for performance; and (iv) provide opportunities for self-evaluation.

ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS § 303 (2017-2018).

36. *Id.*

37. *Id.* The subsections of Standard 303(a)(3) include: “(ii) develop the concepts underlying the professional skills being taught; (iii) provide multiple opportunities for performance; and (iv) provide opportunities for self-evaluation.” *Id.* See also, on file with the author, syllabi for a 3-credit and a 1-credit dedicated PT courses that could be expanded to satisfy this standard.

38. Standard 306 DISTANCE EDUCATION states:

(a) A distance education course is one in which students are separated from the faculty member or each other for more than one-third of the instruction and the instruction involves the use of technology to support regular and substantive interaction among students and between the students and the faculty member, either synchronously or asynchronously.

(b) Credit for a distance education course shall be awarded only if the academic content, the method of course delivery, and the method of evaluating student performance are approved as part of the school’s regular curriculum approval process.

(c) A law school shall have the technological capacity, staff, information resources, and facilities necessary to assure the educational quality of distance education.

(d) A law school may award credit for distance education and may count that credit toward the 64 credit hours of regularly scheduled classroom sessions or direct faculty instruction required by Standard 311(b) if:

(1) there is opportunity for regular and substantive interaction between faculty member and student and among students;

(2) there is regular monitoring of student effort by the faculty member and opportunity for communication about that effort; and

(3) the learning outcomes for the course are consistent with Standard 302.

ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS § 306 (2017-2018).

39. More on distance learning and bar exam related courses in Sara J. Berman, *Pass the Bar Exam: Teacher’s Edition* (ABA Publishing 2014).

40. The author, who served for more than a decade as a full faculty member and assistant dean in an online law school and served in 2018 as an ABA fact finder regarding an online legal education matter, has observed that struggling students may use recorded materials to review as many times as

Dedicated performance test skills courses can be successful in a flipped or entirely online classroom format because much of the work that students complete in such courses is independent practice writing. Exams, sample answers, and grading rubrics can all be posted in an online classroom. Student exam answers can be critiqued and graded online, then returned to students via an online learning management system. Exam debriefing can be accomplished with written comments or handouts, or PowerPoints and video explanations (posted for the entire class online or sent individually to students). Beyond these basics, such classes may include interactive student learning with exercises such as requiring students to negotiate agreements with classmates and make simulated “court” appearances in mock telephonic hearings or webinar settings, mirroring the extensive use of technology in today’s practice of law.<sup>41</sup>

In collaboration with a family court judge, I recently created a practical skills unit (22.5-hours of instruction) integrating PT teaching tools, within a 3-credit doctrinal community property course. Both the course and the embedded skills unit were fully online. We team-taught the modules which we called, “The Courtroom Comes to the Classroom.” Law school community property courses generally focus on property distribution following a death or divorce. The practical skills unit focused more broadly on both community property and family law. All sessions were recorded and posted online. The unit began with introductory segments about family law and about the performance test generally, after which, students completed their first 3-hour PT. Students self-assessed their answers using both a rubric and by comparing and contrasting their answers to sample passing answers, and watching a video debriefing recorded by the professor to highlight exam strategies and pitfalls.

The next segment included robust dialogues between the judge and professor, each accompanied by reading assignments and independent skills exercises, on the following sub-topics: (1) a lawyer’s need to know her/his audience and tailor work product to fit the case; (2) process v.

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they wish without having to ask a professor to repeat something, which some students find embarrassing. Students may also experience less stigma and feel more free to seek help where that can be done without their peers “seeing” them. Much study has been done regarding the efficacy of online learning in non-law fields, but more is necessary, particularly in the legal education space. See generally *The Effectiveness of Blended Learning in Health Professions: Systematic Review and Meta-Analysis*, J. MED. INTERNET RES. (Jan. 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4717286/> (last visited on March 12, 2018) (providing a meta-analysis of 56 studies of medical education from 2004 to 2014 in which the authors compared blended to no intervention (that is, blended to traditional) and blended to nonblended (which includes both traditional and strictly online e-learning) with the following conclusion, “Blended learning appears to have a consistent positive effect in comparison with no intervention, and to be more effective than or at least as effective as nonblended instruction for knowledge acquisition in health professions. Due to the large heterogeneity, the conclusion should be treated with caution.”).

41. Jamar, *supra* note 15.

results and a comparison of law school exams and law practice; (3) fact gathering and factual analysis; (4) mediation and other alternative dispute resolution models; and (5) ethics and civility. Interspersed between these pre-recorded sessions were live online interactive “hearings” where students argued motions they had drafted and “filed” (submitted) to the “court.” Toward the end of the unit, students completed a second 3-hour PT to determine how their skills had improved, again with extensive, guided self-assessment to enhance learning and advance bar exam preparation. The unit closed with interviews and commentary from the professor, judge, and alumni practicing in related fields—effectively tying the PT, and accordingly the bar exam, to the students’ futures as lawyers. Student feedback from these sessions overwhelmingly showed that they felt engaged with the material, confident about the PT portion of the bar exam, and inspired by their role-playing about their professional futures.

#### *D. ABA Standard 314: Assessment of Student Learning*<sup>42</sup>

PTs and PT-type exercises can be used effectively as both formative and summative assessment tools, in conjunction with doctrinal courses, as separate experiential or bar preparation courses, or at a school-wide level.<sup>43</sup> PTs serve as useful assessment tools to measure student learning and mastery of basic lawyering skills.<sup>44</sup> As such, PT related assessments can assist in compliance with ABA Standard 314.

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42. Standard 314. ASSESSMENT OF STUDENT LEARNING states: “A law school shall utilize both formative and summative assessment methods in its curriculum to measure and improve student learning and provide meaningful feedback to students.” ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS § 314 (2017-2018).

43. See Shaw & VanZandt, *Student Learning Outcomes and Law School Assessment: A Practical Guide to Measuring Institutional Effectiveness* (Carolina Academic Press 2015), for a comprehensive treatment on how to include assessment in law schools. See also Andrea Susnir Funk, *The Art of Assessment: Making Outcomes Assessment Accessible, Sustainable, and Meaningful* (Carolina Academic Press 2017), noting that for many, the mere word “assessment” may be off-putting, let alone the requirement to include this in law schools, but it need not be. Engaging in simple forms of assessment can be quite flexibly woven into the law school curriculum in a manner that is malleable and meets the needs of individual faculty members as well as the institution.

44. Doctrinal faculty might create or adapt PT-type files and use assigned cases as “library authorities” in order to test students’ understanding of how to apply and contextualize the relevant law. Giving such PTs as quizzes or interim exams can help professors determine the level of understanding students have so as to intervene with students who do not demonstrate competence in a timely, meaningful way. Deans might suggest that academic support faculty assign PTs as formative skills assessments—providing extensive feedback and using thoughtful self-reflection exercises—to help ensure that 1Ls and at-risk students have mastered basic legal analysis (critical reading and briefing of cases and statutes, and effective communication), and again, to intervene early and help underperforming students.

*E. ABA Standard 315: Evaluation of Program of Legal Education, Learning Outcomes, and Assessment Methods*

PTs can also be used in portfolios, capstone courses,<sup>45</sup> and benchmark testing to help in the evaluation of a school's program of learning outcomes and assessment methods as required in ABA Standard 315.<sup>46</sup>

A step that law school deans and other administrators may take toward this sort of assessment would be to administer three benchmark performance tests to every law student at the end of 1L, 2L, and during 3L (or 4L in part-time programs). These three exams would measure competency in fundamental legal and factual analysis skills, effective written communication, and time management skills. These same exams might also form one component of a student portfolio.<sup>47</sup>

A law school-wide 1L PT might include a diagnostic component to help measure and assess basic competencies and determine interventions to assist in achieving competency by graduation. As an initial benchmark assessment, a law school might employ a 3-hour PT that emphasizes basic legal analysis and includes a library with a number of cases to brief and synthesize.<sup>48</sup> At the end of 2L, a school might again assess, but this time with a 90-minute exam to create "buy in" from students so that they take this portion of the benchmark exam seriously. This would also help determine whether students (two-thirds of the way through their formal legal education), have achieved competency in fundamental lawyering skills including legal analysis, fact analysis, and clear and effective

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45. For more on using performance testing for program assessment, see Andrea Susnir Funk & Kelley Murphey Mauerman, *Starting from the Top: Using a Capstone Course to Begin Program Assessment in Legal Education*, 37 OKLA. CITY U.L. REV 477 (2012).

46. Under Standard 315. EVALUATION OF PROGRAM OF LEGAL EDUCATION, LEARNING OUTCOMES, AND ASSESSMENT METHODS: "The dean and the faculty of a law school shall conduct ongoing evaluation of the law school's program of legal education, learning outcomes, and assessment methods; and shall use the results of this evaluation to determine the degree of student attainment of competency in the learning outcomes and to make appropriate changes to improve the curriculum." ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS § 315 (2017-2018).

47. This portfolio might also include a number of other documents including legal writing memos, PTs completed in doctrinal courses and/or academic success courses and other institutionally administered diagnostic tests, a signed professionalism oath taken at orientation, a resume, cover letter, career or business plan, and annually updated writing samples. See also John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST. J. ON DISP. RESOL. 247, 291 (2010).

48. One possible PT for this purpose is Carleton vs. Mid-Central Shipping (see Torts chapter at 125 of Sara Berman, *Bar Exam MPT Preparation & Experiential Learning for Law Students: Interactive Performance Test Training*, because of its emphasis on basic legal analysis (including case-briefing) skills and its look at preliminary factual analysis skills. Additionally, this was one of the rare PTs that included a multiple-choice component which tested students' understanding of and application of library authorities. Adding such multiple choice questions to any PT would be useful in a 1L diagnostic benchmark. Sara J. Berman, *Bar Exam MPT Preparation & Experiential Learning for Law Students: Interactive Performance Test Training* 125 (ABA Publishing 2017).

writing.<sup>49</sup> During 3L or 4L, the law school might administer a PT with a heavy professional responsibility component, re-testing mastery of basic competencies while continuing to cultivate professional identity, with an awareness of professional responsibility and professionalism generally.<sup>50</sup>

Administering three such performance tests as benchmarks at these three critical junctures would provide key measures to assess progress in skills mastery throughout law school and evaluate student competency in certain learning outcomes. Academic success (ASP) workshops could be developed around these examinations to review, discuss, debrief, and provide rubrics for and feedback on the exams so that they become formative assessment tools. Faculty members who teach Professional Responsibility might collaborate with ASP faculty and others to meet individually or in small groups with students who did not see or appropriately comment on ethical issues in the 3L assessment. After this sort of intensive review and intervention process, students might not only become more aware of their future ethical obligations but more prepared for the Multistate Professional Responsibility Exam ("MPRE") and to respond sufficiently to professional responsibility issues on a bar exam essay or PT.<sup>51</sup>

#### F. ABA Standard 316: Bar Passage

Last but certainly not least, in terms of ABA standards, incorporating performance tests into the law school curriculum is likely to help improve bar passage rates, fostering compliance with ABA Standard 316.<sup>52</sup> In the

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49. A possibility for this 2L benchmark is a PT called *Piccolo v. Dobbs*. See Berman, *supra* note 48.

50. A suggestion for this third benchmark assessment is *In re Deale*, a professional responsibility based PT, which requires students to role-play as an attorney handling a matter where another lawyer in the firm has engaged in numerous incidents of unethical conduct. See *id.*

51. As noted in "*Say It in Your Own Words: Translate and Reverse Engineer Legal Jargon to Read More Effectively*," "I have found it more effective to use role-play examples rather than lecturing when trying to prove to law students why it is necessary to be as precise and professional as possible and to work to always 'get it right.' Sometimes, I ask them to imagine themselves boarding an airplane and hearing the following as the pilot's announcement: 'Welcome aboard Flight 111. My name is Captain Trieshard. I will be serving as your pilot this morning, and I wanted to let you all know that I have a pretty good flight record. About 60-65% of my flights have landed safely.'" The point is usually crystal clear: a professional aiming for average is *not* okay. I, of course, understand that 65-70% (and in some cases less) is enough to pass many bar exams. But the bar exam is a gateway to practice where the stakes are much higher. After passing the bar, they will be responsible for real peoples' lives and livelihoods. Understanding this, by picturing themselves as professionals, can help law students to "own" the process of striving for continuous improvement, to make it an essential part of developing their professional identities." Sara Berman, *Say it in Your Own Words: Translate and Reverse Engineer Legal Jargon to Read More Effectively*, THE LEARNING CURVE, Sept. 2017, at 8.

52. The following are relevant excerpts from Standard 316 BAR PASSAGE:

decades of experience with bar review and teaching in law schools with performance tests, it has become clear that early exposure to PTs not only has positive implications for scores on that one piece of the bar exam,<sup>53</sup> but reduces anxiety and improves student confidence overall leading to greater improvements in pass rates generally.<sup>54</sup>

It appears that under ABA Standard 316, law schools are not required or expected to “fix” all problems immediately.<sup>55</sup> If there were quick fixes, every school would have made them already. Rather, especially for schools that are or risk becoming out of compliance, what appears to be required is careful reflection, study, and willingness to take action, along with actually taking such action. Consider specifically Standard 316(c)(3) which reads, “Actions by the law school to address bar passage, particularly the law school’s academic rigor and the demonstrated value and effectiveness of its academic support and bar preparation programs: value-added, effective, sustained and pervasive *actions* to address bar passage problems will be considered in the law school’s favor ....”<sup>56</sup> Weaving performance tests as

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(a) A law school’s bar passage rate shall be sufficient, for purposes of Standard 301(a), if the school demonstrates that it meets any one of the following tests . . . A school shall be out of compliance with this Standard if it is unable to demonstrate that it meets the requirements of paragraph (a)(1) or (2). (c) A school found out of compliance under paragraph (b) and that has not been able to come into compliance within the two-year period specified in Rule 14(b) of the Rules of Procedure for Approval of Law Schools, may seek to demonstrate good cause for extending the period the law school has to demonstrate compliance by submitting evidence of . . . (3) Actions by the law school to address bar passage, particularly the law school’s academic rigor and the demonstrated value and effectiveness of its academic support and bar preparation programs: value-added, effective, sustained and pervasive actions to address bar passage problems will be considered in the law school’s favor; ineffective or only marginally effective programs or limited action by the law school against it ....

ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS § 316 (2017-2018).

53. Exposing students early and repeatedly to performance tests throughout law school may also help improve scores on these parts of the bar by harnessing the metacognitive power of spaced repetition. See Sean H. K. Kang

*Spaced Repetition Promotes Efficient and Effective Learning: Policy Implications for Instruction*, 3 POLICY INSIGHTS FROM THE BEHAVIORAL & BRAIN SCIENCES 12-19 (2016), available at [https://www.dartmouth.edu/~cogedlab/pubs/Kang\(2016,PIBBS\).pdf](https://www.dartmouth.edu/~cogedlab/pubs/Kang(2016,PIBBS).pdf).

54. Making the psychological transition from student to professional is empowering for many. Anecdotal experience suggests that law students who see themselves as “nearly lawyers” tend to pass the bar in greater numbers than those who feel like they are still “just students.” As lawyering simulations, PTs require students to see themselves as competent professionals—a powerful professional identity tool that, if harnessed, can encourage a sense of empowerment that translates into greater success on other portions of the bar. In addition, many of the skills necessary for drafting effective PT answers, such as critical reading and logical analysis, are directly transferable to the essay portion of the bar exam; improving performance on one written portion thus can improve performance on another written portion. All points in this note are ripe questions for empirical study, as we look to the future of what a re-imagined bar exam should include. See Hon. Rebecca White Berch, *Letter from the Chair*, THE BAR EXAM’R (Winter 2017-2018) at 1-3.

55. See Funk, *supra* note 45.

56. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS § 316 (2017-2018) (emphasis added).



teaching, learning, and assessment tools throughout the curriculum, including in doctrinal and academic support courses and co-curricular programs, might well be deemed just the sort of action suggested in Standard 316(c)(3).

Additionally, PTs are skills-based and do not depend on memory. Drafting PT answers is like learning to ride a bike. Once students master the skills of effectively answering PTs under timed conditions, that skill stays with them. Because this portion of the exam does not require memory, becoming skilled at this part of the exam during law school is a powerful bar passage strategy. Early PT work frees up critical time after graduation for memorization, which is required for other parts of bar exams. In today's world, students do not have the same memory training that pre-smart phone generations had. Today's students thus need every moment in the two months prior to the bar exam to focus on Essays and MBEs which do require memorization. On many bar exams, each PT is worth a greater percentage of total points than each individual essay.<sup>57</sup> Positioning a student to pick up extra points on PTs can thus be invaluable, especially on this open-book portion where one cannot "forget" the rule.

#### IV. CRITIQUES AND LIMITATIONS OF PTs

While some criticize the performance test itself and while there is clearly room to improve the PT, many recognize it as a form of testing that more closely resembles actual lawyering skills than essays or multiple-choice questions.<sup>58</sup>

As to the use of PTs during law school, the loudest criticism of including anything bar exam related in the law school curriculum is the cry that law schools will become "bar mills," engaged not in the intellectual pursuit of serious legal study but in simply "teaching to the test." This inflammatory phrase suggests images of elementary and middle school teachers, pressured to produce high standardized test scores, giving rote practice exams for the sole purpose of getting students to bubble in correct answers *without learning to think*. But PTs are, quite simply, lawyering simulations. The fact that they happen to also be testing components on

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57. See *Exams*, THE NAT'L CONF. OF BAR EXAM'RS, <http://www.ncbex.org/exams> (last visited Jan. 31, 2018).

58. Ben Bratman, *Improving the Performance of the Performance Test: The Key to Meaningful Bar Exam Reform*, 83 UMKC 565 (2015). Again, one need only consider the number of jurisdictions that have adopted the PT for evidence that PT proponents far outnumber their critiques. See NCBE, *Jurisdictions Administering the MPT*, THE NAT'L CONF. OF BAR EXAM'RS, <http://www.ncbex.org/exams/mpt> (last visited Mar. 9, 2018); see also Bosse, *supra* note 16 (describing reaction of longtime bar grader after grading a PT, "[f]or the first time, I felt I knew whether or not a candidate was going to be a good lawyer."); Grosberg, *supra* note 15 (citing studies regarding the reliability of performance testing at note 60).

many bar exams does not invalidate them as teaching tools.<sup>59</sup> As noted above, simulations have been well accepted as legitimate law school teaching method for more than four decades.<sup>60</sup>

Another critique is that PTs are “light weight,” shallow and contrived mini-versions of “real” client matters. The concern here seems to be that PTs “dumb down” and/or mislead students into thinking that the practice of law is easy and that complex problems are resolvable in a 90-minutes. Of course, bar exam PTs include artificial time pressures; being closed universe testing tools, they are necessarily answerable within the allotted time. However, just because an illustration may be “simple” does not make it less worthy. And, clearly, given pass rates on these exams, they are not as simple as some may think they are. More important, for law school purposes, a professor can use a PT as is, or as a base to springboard from and tailor to the professor’s own teaching goals, integrating complexity if desired while still capturing the engagement and active learning benefits of simulations and providing early exposure to bar-tested skills. Further, 3-hour PTs may provide better teaching tools than 90-minute PTs, for law school purposes.<sup>61</sup>

Three-hour exams are richer than their 90-minute counterparts. They include a greater number of legal authorities, as well as more extensive and more nuanced facts. Just as law school essays tend to test more complex issues (and in a more in-depth manner) than many bar exam essays, so might performance tests used in law schools be more intricate than bar exam PTs. Three-hour PTs essentially include twice as much material with which to train legal analysis and factual analysis skills. The presence of more facts allows for greater training in, and assessing of, students’ abilities to sort relevant from irrelevant facts and to marshal relevant facts to establish or refute elements of causes of action or legal theories. Longer PTs also provide students greater opportunity to immerse themselves in a lawyering role-play, providing professors more material to teach a wider variety of critical lawyering skills—including skills that are often given

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59. See Alice M. Noble-Allgire, *supra* note 21, at 40 (stating that “[s]ome may argue that law schools should not be in the business of teaching students how to pass the MPT, just as grade schools and high schools should not conform their curriculum to standardized tests. This argument, however, fails to recognize that the MPT is testing skills that every new lawyer should have.”). See also Suzanne Darrow Kleinhaus, *Incorporating Bar Pass Strategies Into Routine Teaching Practices*, 37 GONZ. L. REV. (2001-2002).

60. Philip Schrag, *The Serpent Strikes: Simulation In a Large First-Year Course*, 39 J. LEG. EDUC. 555 (Dec. 1989) (stating that, “Once confined to moot court exercises and trial practice offerings, simulation is now accepted in principle, as a legitimate method of instruction in many types of courses.”).

61. Anecdotal evidence suggests that early exposure to 3-hour PTs during law school makes the PT portion of the bar exam seem “easier,” in turn having a positive impact on overall bar passage. The effect on bar passage of early and repeated exposure to PTs during law school is a topic that is ripe for empirical research.

short shrift such as awareness of professional responsibility, factual analysis, problem solving, cultural competency, and demonstrating empathy for clients. Students exposed to 3-hour PTs during law school are likely to find their 90-minute bar exam PTs easier, both because they tend to be less complex and because they require less stamina. Training to focus for three hours also helps prepare students for the focus that will be required in the three-hour testing blocks that most bar exams include.<sup>62</sup> And, employing 3-hour PTs during law school will diminish the risk of exam duplication during bar review.

A final criticism is that embedding simulations in doctrinal courses will take time away for content coverage. While quantity of coverage is critical, it is also important to delve deeper into particular areas, and doing so with a simulation exercise may well make up in student engagement what is sacrificed in subject coverage. Further, professors can still include PT simulation exercises as homework without taking any class or coverage time.

## V. CONCLUSION

In sum, embedding even a single performance test into doctrinal courses, making performance tests the foundation of certain dedicated lawyering skills courses, and/or integrating performance tests into benchmark testing for institutional assessment can serve the multiple purposes of assisting in compliance with ABA standards, improving student engagement, and quite possibly boosting bar passage rates. This is not a cure-all for legal education but a step in the right direction. And, it is not “teaching to the test.” This is simply *helping* to train law students to become legal “triple threats”—(1) contextual thinkers and clear communicators, who are (2) skilled in legal analysis and factual analysis, and (3) responsible professionals.<sup>63</sup>

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62. The Multistate Bar Exam (MBE) includes two 3-hour blocks with 100 multiple-choice questions each, and many state bars include 3-hour writing components—some include three 1-hour essays or six 30-minute essays, and many include two 90-minute PTs that must be completed in a single sitting.

63. This phrase is inspired by musical theatre students who strive to become “triple threats,” meaning those who excel in acting, singing, and dancing; the performer who soars in all three disciplines presumably is a “threat” to others who “only” have mastered one or two of these three fine arts. Because completing performance tests throughout law school could boost competency in a dozen or more of the factors identified by Shultz and Zedek as predictors for successful lawyering, the use of PTs throughout the law school curriculum along with other comprehensive changes might well create far more formidable contenders than even “triple threats” on the legal employment stage. See Dixon & Yochelson, *supra* note 13; Marjorie M. Shultz & Sheldon Zedek, FINAL RESEARCH REPORT: IDENTIFICATION, DEVELOPMENT, AND VALIDATION OF PREDICTORS FOR SUCCESSFUL LAWYERING (2008).

APPENDIX: TEN PTS TO EMBED IN DOCTRINAL COURSES<sup>64</sup>

## CRIMINAL LAW

State v. Burke, (CA Feb. 1987) centers on crimes not covered in many criminal law classes: statutory offenses of criminal trespass and assault with a deadly weapon. As such, the material in the problem will not likely conflict with or contradict what you are teaching your students. That said, the problem provides a good vehicle to add an experiential learning component to your course.

The PT requires students to assume the role of a prosecutor (a junior level attorney in the D.A.'s office), so encourages students to see themselves in a lawyering role. The tasks emphasize element-by-element organization, stressing that every element in a criminal offense must be proven beyond a reasonable doubt. Your students of course know this, but this role-play forces them to test the credibility of evidence and question vigorously whether enough evidence exists to prosecute. I find this exam helps students to remember when completing essay questions to analyze every element of every applicable crime or defense theory. The political pressure on the D.A. in this fact pattern also provides for interesting class discussion about the charging function of prosecutors generally. If you have little in-class time to spare for discussion, you can assign this exam as homework and allow students to debrief the exam independently by reading of the corresponding chapter in *Bar Exam MPT Preparation & Experiential Learning for Law Students* and studying sample answers after completing the tasks.

## CRIMINAL PROCEDURE

People v. Duncan, (CA Feb. 2008) is a perfect problem to include during or after your class has studied *Miranda* and related cases. It forces students to take a hard look at what constitutes “custody” for purposes of “custodial interrogation.” Students role-play prosecutors in a murder case where the police interrogated the defendant for five hours, giving him *Miranda* warnings only at the end of that lengthy “interview.” Students write a brief opposing the defendant’s motion to dismiss statements he made during the course of that interrogation. Students must argue

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64. Appendix summarizes ten PTs set respectively in the context of Criminal Law, Criminal Procedure, Torts, Contracts, Civil Procedure, Evidence, Constitutional Law, Professional Responsibility, Real Property, and Family Law –each of which is debriefed in corresponding chapters of Sara Berman, *Bar Exam MPT Preparation & Experiential Learning for Law Students: Interactive Performance Test Training* (ABA Publishing 2017).

persuasively that the defendant was not “in custody” at the time he was questioned, weighing and measuring the relevant factors. The exam requires students to pull key facts out of interview transcripts and show how they relate to the custody factors. It thus tests legal analysis and factual analysis competencies. It also requires that students argue facts persuasively but not misrepresent them, a springboard for interesting class discussion or exercises about the ethical obligations of lawyers generally and prosecutors in particular.

### TORTS

Carelton v. Mid-Central Shipping, (CA July 1983), uses negligence in general and landowner liability specifically, as a backdrop. This PT could be used in a first year torts course. To effectively answer this PT, students must demonstrate the ability to analogize and distinguish facts from their client’s case with facts from the case law. With six cases in its Library, this PT might also be a good choice for a 1L institutional diagnostic to assess your school’s learning outcomes and highlight the importance of reading and briefing cases generally. In the chapter debriefing this exam, (in *Bar Exam MPT Preparation & Experiential Learning for Law Students*), one of the many points stressed is a real-life vs. law school difference in the usage of facts. The first assignment in this PT is a legal memo, but the second is a fact-gathering document asking the student to consider what further facts or proof problems the plaintiff might have. This gives professors a chance to explain that on most law essay exams, students must not fight or even question the facts; the facts are presented in a certain way to see how students use those facts in legal analysis. But, in law practice, facts are often contested, witnesses are biased and/or forget things, and that which appears at first blush “clear” often is the opposite. This provides a useful tool for discussion to establish certain lawyering basics for 1Ls.

Another interesting point for beginning law students is that this exam asks student to write an analytical memorandum about theories of liability. Students immediately assume this means intentional tort, negligence, and/or strict liability. It becomes clear in reading the cases, however, and professors can help students see this is a class debriefing session, that the only plausible liability theory is negligence and that the dispute will center on whether or not there was a duty to the plaintiff, and, if so, whether that duty was breached. The facts make fairly clear that causation and damages are not at issue, and the case law is all about duty. For these reasons, the PT also provides a helpful exercise in assisting students in identifying what is most likely contested or disputed in an action, reiterating that the plaintiff must nonetheless prove all of the elements of the cause of action in question in order to prevail.

## CONTRACTS/UCC

Southwest Health Center v. Computech, (CA July 1986), is a transactional problem set in a UCC context. The Library is comprised entirely of UCC provisions, so it serves as a good review if given toward the end of the course. That this PT is set at the consultation stages, with the student role-playing the lawyer who is reviewing a proposed contract, provides a wonderful opportunity to discuss the differences between preventive/transactional lawyering and litigation. Many of the cases in your casebook likely look back, once problems occurred. This PT asks students to look forward and determine how problems might be avoided, through careful drafting, planning, and negotiation. Depending on the time you have to devote to practical exercises in class, you can spin this off into other drafting problems, perhaps engaging the class in going back in time to re-draft some of the contracts in cases you read.

In terms of professionalism and seeing oneself as a lawyer, this PT provides a springboard to spend just a few minutes of class time discussing the differences in different types of law practices, and encouraging students to take a wide range of classes while in school, to apply for different types of internships, and to make an informed determination about what practice areas may best matches their own skills, talents, and desires. (The more invested students are in their own futures, the better they are likely to do on the bar exam and in practice.)

## CIVIL PROCEDURE

Piccolo v. Dobbs, (MPT February 1998), is a ninety-minute PT, easier to find time for than a full three-hour PT. The exam asks students to role-play as plaintiff's counsel drafting a motion to compel discovery from a defendant who is unwilling to turn over certain critical recordings and transcripts. It provides a basic review of discovery, something you may or may not have much for in class but something that will occupy a great deal of time in practice for any future litigators.

## EVIDENCE

Dodson v. Canadian Equipment Company, (CA July 1993) is a three-hour exam that breaks evenly into two 90-minute tasks. For an evidence course, the most relevant of the tasks is the cross examination plan. It fits particularly well after class sessions where you have studied witness impeachment. Library authorities include FRE provisions so may well complement what you have taught in class. If time is short, you can assign this as homework. If you can devote a full class to it, consider breaking the

class into teams and asking students to conduct the cross examination plan they drafted aloud, some playing plaintiff's counsel and asking questions and some playing opposing counsel and making objections. You can also appoint certain students to act as the witness and/or judge or you can serve as judge and make your own rulings.

### CONSTITUTIONAL LAW

In re: Gardenton, (MPT February 1998) covers free speech issues, focusing on permissible and impermissible restrictions on speech in public high schools. If you have assigned *Tinker* and related cases, this would fit after discussing those cases. Even if you have not assigned these cases, because PTs include authorities, students do not need any specific background to answer the questions. The PT is set as a problem solving and drafting/editing exercise where students are advising a high school board of education about a proposed communications code, before any sort of litigation has commenced. As with the contracts problem discussed above, this PT provides a fine tool to help students see lawyers not just as litigators but also as counselors and planners. The related chapter in *Bar Exam MPT Preparation & Experiential Learning for Law Students* includes several spin-off exercises that purposefully there are no answers to, providing additional ready-to-use class or homework exercises.

### PROFESSIONAL RESPONSIBILITY

In re: Deale, (CA Feb. 1993), provides an excellent exercise to bring ethical issues to life and to bring home the truly critical need for students to begin to view themselves as lawyers, understanding and "owning" their future professional responsibilities. In this problem, the student role-plays as counsel in a law firm where a fellow attorney has engaged in some egregious conduct, setting himself and the firm up for serious trouble. You could assign this in the middle or toward the end of the course. (You might even assign this exam both at the very beginning and end of the semester as a way of assessing learning outcomes.) The professional responsibility chapter in *Bar Exam MPT Preparation & Experiential Learning for Law Students* debriefs this exam and also proposes other ethical issues for further discussion that could be used as practical class exercises, reprinted here below. (Note: the book purposefully does not include answers to these short hypos so you can assign them as in-class writing tasks or have students break into small groups and report to the class on their discussions.)

One particularly compelling reason for having students complete an exam such as this PT during law school is to highlight the very real

pressures that new associates often face to violate ethics rules, often at the direction of more experienced lawyers who are their supervisors. It can be helpful to address this head-on and encourage students to role-play how to handle such issues, and, if necessary, how to confront their superiors so as to empower them to do so if/when they face such dilemmas.

PR-related hypos reprinted from professional responsibility chapter in *Bar Exam MPT Preparation & Experiential Learning for Law Students*, at 221-2:

1. *You are Plaintiff's counsel. You just received a request from Defense counsel to continue the hearing you had set for tomorrow morning. You went to some length re-arranging your own calendar to make the hearing work, and you believe that opposing counsel attorney is asking for the continuance to stall. How do you handle the situation?*
2. *You represent X and are in court on your first case ever. You are speaking to the court clerk who is rude. The clerk says that you and your client are wasting the court's time, and suggests that you do not know how to handle yourself as a lawyer. What do you say or do?*
3. *You are in court litigating a particularly thorny issue, and, on a quick break from the proceedings, your client tells you that he intends to just "skip certain details" if the court asks him about them. How do you handle the situation? Is this a Bronston type situation where it would be up to the court to ask the right questions? Should you advise your client to answer truthfully but not volunteer additional information? Write a short paragraph on how you would respond to your client.*
4. *You have met with your client once. At the close of the initial meeting, after telling you a bit about her case, and after your explaining how you could potentially help her, she gave you a large retainer. Before your next meeting, she tells you that she and her adversary have tried going to a mediator and hope to resolve things without a lawyer and no longer need your services. How do you handle the situation?*
5. *You are acting as the mediator for two parties. With your help, they have a preliminary agreement, and you have encouraged them each to have outside counsel read it before they sign it, if they wish. One of the attorneys consulted phones to yell at you, insinuating that you are biased or being "paid off" because the agreement is so one-sided. How do you handle the situation?*



6. *The court is set to hear your argument, and the judge says, "Counselors, I have a docket full of important matters this morning, and you both are wasting my time. Go! Out in the hallway and figure this out. Come back in 30 minutes with a solution." You are taken aback by the judge's tone. Opposing counsel (who is a much more experienced lawyer than you are) tries to push you into a compromise, but you really believe, based on the facts and law, that your client should prevail. How do you handle the situation?*

#### REAL PROPERTY

If you cover the rule against perpetuities (RAP) in your real property course, you may want to use Westside Community Corporation, (CA July 1999) to show that it is not an arcane obsolete rule but one with real application today. You also may want to assign this as homework if you do not have time to cover the RAP in your course.

#### FAMILY LAW

Stolier v. Wallach, (CA July 1989) is set in a family law context that involves a dispute over grandparental visitation. The actual task is both a discovery and informal investigation plan that heavily tests factual analysis skills. The exam provides an excellent diagnostic assessment to determine students' understanding of factor-based (as opposed to element-based) rules, their ability to sort relevant from irrelevant information, and their skills in marshaling relevant facts to prove particular factors. This PT provides an excellent springboard to discuss fact gathering.