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## Adding Legal Research to the Bar Exam: What Would the Exercise Look Like?

Patrick J. Meyer

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## ADDING LEGAL RESEARCH TO THE BAR EXAM: WHAT WOULD THE EXERCISE LOOK LIKE?

*Patrick J. Meyer\**

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### I. INTRODUCTION

The traditional state bar examination consisted of one day of the multistate bar exam (MBE) and one day of the multistate essay exam (MEE) questions. The current form of the traditional two-day bar exam has been mostly unchanged for decades. The one major change to the exam came when the National Conference of Bar Examiners (NCBE) added a third, originally fully optional, exam component called the Multistate Performance Test (MPT) that was in use by over half of the

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\* Associate Professor and Library Director, Univ. of Detroit Mercy School of Law. The author would like to thank Professor Catherine Archibald for her comments on the article. The author also thanks the following editors of the *Akron Law Review*: Bradley Hough, Jacob Wagner, Matthew Modderman, Emily Rich, Grant Mcleod, and Michael Grund.

states by 2003.<sup>1</sup> Now, 43 states have adopted this hands-on component as a part of their bar exams, with two other states having their own practice component of the exam.<sup>2</sup> The MPT was developed at the request of several jurisdictions that wanted a test that would better evaluate legal practice skills.<sup>3</sup> According to the NCBE, the purpose of the MPT is to test an applicant's ability to perform fundamental lawyering skills that a beginning attorney is expected to know how to do<sup>4</sup> and which is seen as not being adequately tested via the essay or multiple-choice components of the exam.

Various authors have criticized the current bar exam format and have offered meaningful suggested changes. This article will not attempt to list all of the perceived weaknesses of the bar exam. Rather, the focus will largely be on deficiencies pertaining to a lack of legal research readiness in the practice of law.<sup>5</sup> To set the stage for a discussion of that issue, it is pertinent to mention the findings of a publication that is likely one of the most cited works of the past two decades: the vaunted *MacCrate Report* of 1992.<sup>6</sup> The authors of the *MacCrate Report* found ten practice skills that are "essential for competent representation," which are universally referred to as Fundamental Lawyering Skills.<sup>7</sup> One of the ten Fundamental Lawyering Skills is legal research.<sup>8</sup> The report states that "if anything, the bar examination discourages" the teaching of lawyering skills in law

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1. Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696, 1702, 1707 (2002) [hereinafter *Rethinking Admission*].

2. *Multistate Performance Test*, NAT'L CONF. B. EXAMINERS, <http://www.ncbex.org/exams/mpt/> [<https://perma.cc/7NQS-BYKB>]. In addition to the 43 states that have adopted the MPT, California and Pennsylvania use a skills test, but not the MPT. They utilize their own practice exam.

3. Alan Kay, *Letter From the Chair*, 65 B. EXAMINER, Nov. 1996, at 2, 2; *Performance Testing: A Valuable New Dimension or a Waste of Time and Money?*, 52 B. EXAMINER, Nov. 1983, at 12, 14 [hereinafter *New Dimension*]; Jane Peterson Smith, *The July 1993 Performance Test Research Project*, 65 B. EXAMINER, May 1995, at 36, 36; See also Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to "MacCrate" Entry to the Profession*, 23 PACE L. REV. 343, 408 (2003) [hereinafter *Bar Exam Box*] (noting that the MPT was based on an earlier successful experiment in California and that California still uses its own practice test that was first implemented in 1983).

4. *Multistate Performance Test*, *supra* note 2.

5. See *Rethinking Admission*, *supra* note 1, at 1698–99 (noting that although it had been 10 years since the *MacCrate Report* was published, the question of how to assess an entry-level attorney's practice readiness had not been answered).

6. A.B.A. SEC. LEGAL EDUC. & ADMISSION TO B., REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 135, 138–40 (1992) [hereinafter *MACCRATE REPORT*] (presenting ten Fundamental Lawyering Skills, which includes legal research).

7. *Id.* (referring to the ten skills using the phrase "Fundamental Lawyering Skills").

8. *Id.* at 138 (noting that, specifically regarding legal research, attorneys should know the origin of rules, have the ability to use basic research tools, and know how to effectively create a research plan).

school.<sup>9</sup> According to former City University of New York (CUNY) School of Law Dean Kristin Booth Glen, since the *MacCrate Report* clearly identified ten Fundamental Lawyering Skills, there is no justification for not testing all of them.<sup>10</sup> The primary focus of this article is testing the skill of legal research, which is clearly an important skill to master before starting to practice. As evidence, a recent study found that 45% of a new attorney's time will be spent researching.<sup>11</sup> My proposal is to add an interactive legal research exercise to the MPT, meaning that applicants would have to conduct research in one or more databases to answer questions. By making the exercise interactive, other Fundamental Lawyering Skills will be tested, as explained in this article.

Part I reviews the best assessment and measurement methods and strategies. Part II concerns relevant issues with the current bar exam, and solutions that authors have proposed. In this part, each component of the bar exam will be reviewed for significance and effectiveness. In part III, I address how to improve the MPT by directly addressing its criticisms through the use of an interactive legal research exercise that would accurately address several of the Fundamental Lawyering Skills that may be tested. In part IV, I offer two examples, presented in Appendices A and B, of what an interactive legal research exercise could look like, as a means to generate discussion that will lead to further development of such an exercise.

## II. BEST ASSESSMENT/MEASUREMENT METHODS AND STRATEGIES

The two critical criteria that a test must meet are that of reliability and validity.<sup>12</sup> Reliability is achieved when the test is measuring what it is supposed to measure time and again.<sup>13</sup> Validity concerns whether the interpretations of the exam scores are accurate.<sup>14</sup> Reliability concerns the test itself and validity concerns the interpretation of test results. A test can be reliable (consistently measuring what it is designed to measure) but not valid (what is being measured is not an appropriate predictor in the first

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9. *Rethinking Admission*, *supra* note 1, at 1711 (quoting MACCRATE REPORT, *supra* note 6, at 278).

10. *Id.*

11. THOMSON WEST, RESEARCH SKILLS FOR LAWYERS AND LAW STUDENTS 2 (2007), [https://nsulaw.typepad.com/novalawcity/files/town\\_hall\\_legal\\_research\\_white\\_paper1\\_2.pdf](https://nsulaw.typepad.com/novalawcity/files/town_hall_legal_research_white_paper1_2.pdf) [<https://perma.cc/3762-5TF7>].

12. *Bar Exam Box*, *supra* note 3, at 433.

13. *Id.*; *see also* AM. COUNCIL ON EDUC., EDUCATIONAL MEASUREMENT 3, 9 (Robert L. Brennan ed., 4th ed. 2006).

14. *Bar Exam Box*, *supra* note 3, at 433; *see also* AM. COUNCIL ON EDUC., *supra* note 13, at 2, 8.

place). An example of an exam that has questionable validity is the MEE, which requires the completion of six questions with 30 minutes per question,<sup>15</sup> whereas the process used to answer questions in practice, as well as the time allocated to do so, is much different.<sup>16</sup>

One is given an idea as to what criteria are to be considered in determining if a test has reliability and validity by reviewing what the creators of the MPT looked at. In creating the MPT, the NCBE and American College Testing Programs, Inc. (ACT) designed several criteria, which includes whether the test was appropriate for measuring beginning lawyer skills, whether the skills could be defined as to each task on the test, the adequacy of each task in measuring beginning practice skills, the degree to which each of the tasks assesses these skills, and the degree to which the components of each task support the inferences obtained from the score.<sup>17</sup>

At the heart of creating a reliable and valid bar exam is the identification of practice skills that can be tested. There have been few major studies that have identified attorney effectiveness criteria. Shultz and Zedeck noted that although three major studies identified attorney effectiveness criteria derived by questioning practitioners, none of the studies actually used the criteria as a measurement tool to assess the effectiveness of practitioners at work.<sup>18</sup> One of the three studies is the aforementioned *MacCrate Report*, which identified ten Fundamental Lawyering Skills<sup>19</sup> after conducting a detailed study of law school graduates and their employers and holding four public hearings designed to maximize input on issues concerning practice readiness of new attorneys.<sup>20</sup> In the Law School Admission Council (LSAC) Report titled *Defining Competence in Legal Practice*, Baird *et al.* identified 20 key characteristics of practitioners by surveying and interviewing senior attorneys from large organizations.<sup>21</sup> The third study addressed by Shultz and Zedeck was conducted by Hough and identified 11 critical attorney

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15. *Multistate Essay Examination*, NAT'L CONF. B. EXAM'RS, <http://www.ncbex.org/exams/mee/> [<https://perma.cc/3EK8-G4A6>].

16. *See infra* Part II.

17. Marcia A. Kuechenmeister, *A Performance Test of Lawyering Skills: A Study of Content Validity*, 64 B. EXAMINER, May 1995, at 23, 23.

18. Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 LAW & SOC. INQUIRY 620, 623–25 (2011).

19. MACCRATE REPORT, *supra* note 6, at 138–40.

20. Shultz & Zedeck, *supra* note 18, at 624; MACCRATE REPORT, *supra* note 6, at xi, xii.

21. Shultz & Zedeck, *supra* note 18, at 624; LEONARD L. BAIRD ET AL., *DEFINING COMPETENCE IN LEGAL PRACTICE: THE EVALUATION OF LAWYERS IN LARGE FIRMS AND ORGANIZATIONS* 1, 34–39 (1980).

skills derived from collaboration between attorneys and psychologists.<sup>22</sup> Thirty-three attorneys attended workshops where they collaborated and developed over 550 examples of acceptable and unacceptable attorney behavior.<sup>23</sup> Psychologists reviewed the examples and developed 11 categories.<sup>24</sup> Finally, several other attorneys sorted the examples into the 11 categories.<sup>25</sup> All three reports noted that research was a critical practice skill.<sup>26</sup>

Since none of the three studies actually measured attorney effectiveness using the criteria that was developed through consultation, Shultz and Zedeck felt it was necessary to embark on a study of their own that would both identify effectiveness criteria and apply the criteria in an effort to measure lawyer effectiveness.<sup>27</sup> Through the use of hundreds of interviews, several focus groups, and over 2,000 respondent answers to a survey, they identified 26 lawyer effectiveness factors, which—like the three other reports—also included legal research.<sup>28</sup> Shultz and Zedeck devised several types of tests to measure these 26 factors by including Situational Judgment Tests, which utilize hypothetical scenarios.<sup>29</sup> By including Situational Judgment Test hypotheticals, they were able to measure judgments to difficult situations typically encountered in the workplace.<sup>30</sup> Shultz and Zedeck followed up by administering the Situational Judgment Test hypotheticals to more than 1,100 practitioners.<sup>31</sup> Results of over 200 hypothetical scenarios showed a positive correlation between job performance and 23 of the 26 lawyer effectiveness factors.<sup>32</sup> I will focus on the Situational Judgment Test hypotheticals, as they resemble the interactivity of my legal research exercise.

The success that Shultz and Zedeck attained in assessing practice readiness by using Situational Judgment Tests can be explained by analyzing the various types of assessment methods. Booth Glen succinctly

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22. Shultz & Zedeck, *supra* note 18, at 624; Leaetta M. Hough, *Development and Evaluation of the "Accomplishment Record" Method of Selecting and Promoting Professionals*, 69 J. APPLIED PSYCHOL. 135, 136 (1984).

23. Hough, *supra* note 22, at 136.

24. *Id.*

25. *Id.*

26. Shultz & Zedeck, *supra* note 18, at 624–25.

27. *Id.* at 621, 625.

28. *Id.* at 621.

29. *Id.* at 632–36.

30. *Id.* at 634.

31. *Id.* at 632, 639.

32. *Id.* at 643 (noting that the three factors that did not show a correlational effect were managing others; evaluation, developing and mentoring; and community service).

summarizes the three major assessment methods: direct observation (such as the PSABE described *infra*), simulations (such as the current performance exam, which most closely matches Shultz and Zedeck's Situational Judgment Tests), and objective tests (such as the traditional MBE); Booth Glen analyzed and ranked how existing bar exam components function under each method.<sup>33</sup> Booth Glen notes that objective tests rank high in scoring because there is a high level of agreement as to the correct answers, especially for straight-forward factual questions.<sup>34</sup> Objective tests also score high in reliability, in that several hundred questions must be answered during the exam.<sup>35</sup> However, objective tests rank the lowest of all three methods in prediction because they do not test performance in a practice situation.<sup>36</sup> Is it possible to accurately predict how well new attorneys are able to conduct their day-to-day tasks by scores from a written or multiple-choice exam?

The remedy to prediction deficiency is to add an exam component that predicts well. But that is not as easy to do as it sounds. For instance, direct observation ranks the highest of the three methods for prediction (but receives only one of three in scoring and reliability).<sup>37</sup> Direct observation takes a lot of time to complete. For instance, the PSABE (described *infra*) was first proposed as a 350-hour observation.<sup>38</sup> It is not possible to incorporate meaningful direct observation into the current bar exam scheme. In addition, having the PSABE (described *infra*) as an option to the traditional bar exam would require thousands of busy professionals and much planning, effort, and dedication on the part of the evaluators and each state bar.<sup>39</sup> Another issue with direct observation is that it scores the lowest of the three methods in reliability, in part because of generally few performance events and variables between the various observations.<sup>40</sup> Finally, direct observation scores lowest in scoring, in that experts often vary widely on their evaluation criteria.<sup>41</sup> On the other hand, simulations score well for prediction, as well as for the other two categories,<sup>42</sup> and are being used in the current bar exam scheme. The most

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33. *Bar Exam Box*, *supra* note 3, at 430 (citing Michael T. Kane, *The Validity of Assessments of Professional Competence*, 10–26 (Eric Document ED 343 958, 1992), <https://files.eric.ed.gov/fulltext/ED343958.pdf> [<https://perma.cc/R4F-B62S>]).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Rethinking Admission*, *supra* note 1, at 1721 n.96.

39. *Bar Exam Box*, *supra* note 3, at 419 n.325.

40. *Id.* at 430.

41. *Id.*

42. *Id.*

reasonable way to improve on bar exam predictability is to improve on the existing simulation component.

### III. ISSUES WITH THE BAR EXAM AND SUGGESTED IMPROVEMENTS

The major complaint about the bar exam is that it largely does not assess those skills that are required in practice.<sup>43</sup> Multiple-choice and essay questions primarily test an applicant's knowledge of legal principles and their application to various fact patterns.<sup>44</sup> The traditional bar exam cannot adequately test other practice skills such as negotiation, investigation, and counseling.<sup>45</sup> This is most apparent when analyzing the essay portion of the examination. For this portion, applicants are given just a few hours to answer several essay questions. For instance, the MEE, which is administered by 37 states and the District of Columbia (soon to be 39 states), contains six essays and is three hours in length.<sup>46</sup> In practice, an attorney usually has far more time than a few minutes to answer client questions. Within that time, an attorney ponders the issues presented, conducts research, perhaps consults with colleagues, drafts a response, reviews the response and perhaps conducts additional research, redrafts the response, and submits the work product.<sup>47</sup> Because of the great difference between what is required in answering the essay portion of the bar exam and how one answers issues in practice, authors have noted that essay exams do not accurately measure what an attorney does.<sup>48</sup> Additionally, essays require reliance on memory to a level that is not required in practice.<sup>49</sup> Essay exams have also been criticized for a lack of reliability because only a few essay questions can be asked.<sup>50</sup> This is especially noticeable when compared to the large number of questions contained in the MBE. Finally, grading of essay examinations is more prone to subjectivity (again, compared to the MBE).<sup>51</sup> So results from the

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43. *Rethinking Admission*, *supra* note 1, at 1709–11.

44. Charles T. Beeching, Jr., *A Bar Examiner's Perspective on Minimum Competence*, 65 B. EXAMINER, Nov. 1996, at 6, 8.

45. *Id.*

46. *Multistate Essay Examination*, *supra* note 15 (noting that Texas and Ohio have adopted the UBE, which requires that the MEE be administered; Ohio will administer its first UBE in the Summer of 2020 and Texas will do so in February 2021; and the District of Columbia also administers the MEE).

47. Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363, 377 (2002).

48. *Id.*

49. Ben Bratman, *Improving the Performance of the Performance Test: The Key to Meaningful Bar Exam Reform*, 83 UMKC L. REV. 565, 575 (2015).

50. *Id.*; *see also* AM. COUNCIL ON EDUC., *supra* note 13, at 708.

51. AM. COUNCIL ON EDUC., *supra* note 13, at 708.

essay exams alone are not reliable enough to determine if an applicant is fit to practice.<sup>52</sup> Jane Peterson Smith, former Director of Testing at the NCBE, notes that essay exams do not meet commonly used benchmarking scores that would indicate reliability.<sup>53</sup>

The MPT partially fills the practical testing void that multiple-choice and essay questions leave with unmet potential to do so more completely. Although the MPT was developed to assess practice skills,<sup>54</sup> it is not without criticism. One criticism revolves around the creation of the first MPT. As a precursor to drafting the first MPT, the NCBE evaluated an existing practice exam scheme as its guide, along with seeking to test the *MacCrate Report's* ten Fundamental Lawyering Skills.<sup>55</sup> The NCBE, however, ultimately did not adopt a significant number of skills tests that existed in the practice exam scheme, including legal research, presumably because legal research and several other Fundamental Skills were deemed to be too narrow in focus to comport with NCBE guidelines.<sup>56</sup> The MPT, however, was designed after the successful California performance test experiment of the early 1980s, which at its zenith was a seven-hour test consisting of two case files and four tasks.<sup>57</sup> The California experiment consisted of three parts. One part was a 90-minute interactive session where the applicant watched trial practice videos and answered subsequent questions.<sup>58</sup> Another part required the applicant to write a typical document that he or she would likely complete in practice, using a closed file of documents.<sup>59</sup> The final part consisted of an applicant being required to play the role of an attorney in a proceeding, which was recorded and evaluated.<sup>60</sup> However, after NCBE's assessment of the California experiment concluded, it settled on only one 90-minute written exam as a requirement for the MPT.<sup>61</sup> To this day, there is no interactive

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52. *Id.*; see also Smith, *supra* note 3, at 41.

53. Smith, *supra* note 3, at 41 (stating that in order for an exam to stand on its own, a reliability coefficient of .8 or above is necessary, which is a threshold that the essay exam does not meet).

54. Jane E. Cross, *The Bar Examination in Black and White: The Black-White Bar Passage Gap and the Implications for Minority Admissions to the Legal Profession*, 18 NAT'L BLACK L.J. 63, 71 (2004) (citing Kuechenmeister, *supra* note 17, at 23).

55. Smith, *supra* note 3, at 37.

56. *Id.* I say "presumably" because although negotiation, counseling, ADR, and organization and management of legal work were specifically mentioned as being too narrow in scope to test, legal research was not mentioned (but has never been tested since the inception of the MPT).

57. *Bar Exam Box*, *supra* note 3, at 408–12.

58. *Id.* at 409.

59. *Id.*

60. *Id.*

61. *Id.* at 412. Faced with the sheer enormity of implementing this program to the large number of California bar exam takers, California also settled on a far less ambitious practice exam, consisting of two three-hour exercises. California has recently changed its bar exam, reducing it from three to

portion to the MPT. This has led to the criticism that the MPT does not test much more than the traditional bar exam tests. For instance, Bratman evaluated MPTs from a recent ten year period and found that five of the six Fundamental Lawyering Skills that the NCBE states that it tests (out of the ten Fundamental Lawyering Skills identified by the *MacCrate Report*) are inadequately or never evaluated.<sup>62</sup> Only one Fundamental Lawyering Skill, legal analysis and reasoning, was consistently tested.<sup>63</sup> Others note that the MPT primarily tests legal analysis, which is already tested to great effect.<sup>64</sup> The criticism is that since the MPT was adopted without the interactive nature of the California experiment,<sup>65</sup> and as another written exam,<sup>66</sup> it is of limited effect.<sup>67</sup> Critics also note that the MPT does not test the skill of fact gathering because of the closed file nature of the problems.<sup>68</sup> Finally, it is worth noting that the MPT will lack generalizability or validity to the extent that it does not ask several questions of the applicant.<sup>69</sup>

More change is necessary if the bar exam is to be a better indicator of practice readiness. What follows is a brief general summary of

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two days. Patrick R. Dixon & Alan S. Yochelson, *Shhh . . . California Examinees May Be Sleeping In after Day Two of the Bar Exam*, 86 B. EXAMINER, June 2017, at 30, 30.

62. Bratman, *supra* note 49, at 568, 584–97.

63. *Id.* at 586 (noting that although the MPT does test the Fundamental Lawyering Skills of factual analysis, communication, and organization and management of a legal task, it has not done so sufficiently. Bratman also notes that the MPT has failed to properly incorporate the skills of problem solving and recognizing and resolving ethical dilemmas).

64. *Bar Exam Box*, *supra* note 3, at 411 (citing *New Dimension*, *supra* note 3, at 20–21); Smith, *supra* note 3, at 36 (finding a strong correlation between MPT scores and essay and multiple-choice scores for bar exam takers, suggesting that the MPT was largely testing the same skills as the traditional components of the bar exam).

65. *Bar Exam Box*, *supra* note 3, at 412.

66. *Id.* at 411 (citing *New Dimension*, *supra* note 3, at 20 (expressing concern with the written nature of the MPT exam and hoping that it will eventually test fact gathering and other practice skills)); Curcio, *supra* note 47, at 378 (“Unfortunately, because the MPT requires the applicant to digest a lot of information in a short amount of time and then produce a written product with no time for editing, it is questionable whether it really measures skills different than those measured by the essay portion of the exam.”).

67. *Bar Exam Box*, *supra* note 3, at 412 (“The MPT only slightly expands upon what is already tested.”) (citing Curcio, *supra* note 47, at 379); *id.* at 412 n.300 (“The NCBE’s own study confirmed that the MPT mainly tests skills tested elsewhere on the exam.”).

68. *Performance Testing*, *supra* note 3, at 17 (noting that because of the closed nature of the MPT, in which all relevant facts are given in the fact pattern (and all research is given to the applicant), that the crucial practice skill of fact gathering is not tested); *New Dimension*, *supra* note 3, at 21 (noting that written exams do not allow for testing many practice skills).

69. Rachel Slaughter et al., *Bar Examinations: Performance or Multiple Choice?*, 63 B. EXAMINER, Aug. 1994, at 7, 8 (stating that if a limited number of problems are tested then generalizability is weakened). I believe that there is room to ask a number of varied questions within each problem, which will increase generalizability.

proposed improvements as a means to usher in my specific discussion about legal research.

Even with its detractors, the MPT is gaining in popularity, as evidenced by the fact that nearly every jurisdiction employs it.<sup>70</sup> Coinciding with the growing popularity of the MPT, many of the suggested bar exam improvements center on a call to incorporate more practical testing on the bar exams, through apprenticeships or the like. Both Curcio and Hansen, among many, defend the virtues of apprenticeships, noting that the apprenticeship system and/or subsequent required exams work well in Canada and Europe.<sup>71</sup> Apprenticeship works well because of the direct practice experience it provides. And, of course, the apprenticeship system was the main means of entry to the legal profession in the early days of this nation's existence.<sup>72</sup> Some of Curcio's other solutions are to provide credit for pro bono work and to test legal research.<sup>73</sup> Hansen proposes a year-long supervised research project in a student's last year of law school.<sup>74</sup> Bratman's evaluation of ten years of MPTs led him to propose an expansion of the number of *MacCrate Report* Fundamental Lawyering Skills tested, as well as the number of MPT questions offered on the exam.<sup>75</sup> Trujillo notes that the bar exam can be enhanced by incorporating computers into the exam or by employing staggered testing where more than one exam is required for bar admission.<sup>76</sup> The former would leverage the power of technology to better test lawyering skills.<sup>77</sup> The benefit of a staggered testing approach, such as exists in the medical profession, is that students would have to master the material before progressing.<sup>78</sup> The legal profession exhibits a bit of the

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70. *Multistate Performance Test*, *supra* note 2.

71. Curcio, *supra* note 47, at 401–09; Daniel R. Hansen, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191, 1230 (1995).

72. See Patrick Meyer, *The Status of Curricular Change During the Industry's Great Recession: Radical, or the New Norm?*, 42 OHIO N. L. REV. 155, 156–59 (2015) (discussing the apprenticeship system in early American law).

73. Curcio, *supra* note 47, at 411–12.

74. Hansen, *supra* note 71, at 1232–33. Other authors have also reached a similar conclusion as to the third year being devoted to practical training. See Stephen Ellmann, *The Clinical Year*, 53 N.Y. L. SCH. L. REV. 877, 881 (2008); Margaret Martin Barry, *Practice Ready: Are We There Yet?*, 32 B.C. J. L. & SOC. JUST. 247, 267–72 (2012).

75. Bratman, *supra* note 49, at 584–97, 606–09 (finding that although the NCBE stated that they test six of the ten Essential Skills, in actuality they test one well and another superficially); MACCRATE REPORT, *supra* note 6, at 138–40.

76. Lorenzo A. Trujillo, *The Relationship Between Law School and the Bar Exam: A Look at Assessment and Student Success*, 78 U. COLO. L. REV. 69, 98 (2007).

77. *Id.*

78. *Id.* at 98–102.

staggered test approach with the Multistate Professional Responsibility Examination (MPRE), which is currently administered three times per year,<sup>79</sup> and by nearly every state requiring post-licensure continuing legal education.<sup>80</sup> Trujillo analyzed a far more ambitious proposal by Baird and Greenspan, which would break the bar examination into several exams staggered over time, each of which would have to be passed to proceed.<sup>81</sup> Under the Baird and Greenspan proposal, the MPRE and MBE would be taken after year two of law school, followed by an exam after the fifth semester, a bar examination after graduation, continuing education requirements, and then a final bar examination for permanent licensure.<sup>82</sup> Trujillo recognizes that staggered testing will allow assessment over several years,<sup>83</sup> identifying struggling students early in the process.<sup>84</sup> Booth Glen proposes a three-month court placement where all ten Fundamental Lawyer Skills would be assessed, which she named the Public Service Alternative Bar Exam (PSABE) and which would be an alternative to the bar exam.<sup>85</sup>

Curcio notes that other disciplines recognize the value of offering computer-based tests for entrants to their respective professions,<sup>86</sup> and my contention in this article is that legal research should be tested by requiring applicants to conduct computer-based research during the exam. Since my proposal expands the breadth of bar exam skills testing, it is helpful to analyze the major methods of assessing competence and how well these methods measure what they are intended to measure on the bar exam to see where my proposal fits into the assessment scheme.

#### IV. DISCUSSION: ADDING AN INTERACTIVE LEGAL RESEARCH EXERCISE TO THE BAR EXAM

The highly-revered book titled *Educational Measurement* describes the vast promise that computers pose for improved performance assessment in the form of a list of five dimensions of innovation that

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79. *Multistate Professional Responsibility Examination*, NAT'L CONF. B. EXAMINERS, <http://www.ncbex.org/exams/mpre/> [<https://perma.cc/E4W9-6S3F>].

80. *Minimum CLE Hours by State*, LORMAN, <https://www.lorman.com/Minimum-CLE-Hours-by-State> [<https://perma.cc/L2VR-YUJ9>].

81. Trujillo, *supra* note 76, at 99–101 (analyzing Jayne W. Barnard & Mark Greenspan, *Incremental Bar Admission: Lessons from the Medical Profession*, 53 J. LEGAL EDUC., 340, 340 (2003)).

82. Trujillo, *supra* note 76, at 100–01.

83. *Id.*

84. *Id.* at 101.

85. *Rethinking Admission*, *supra* note 1, at 1702, 1721–22.

86. Curcio, *supra* note 47, at 394–98.

online testing provides.<sup>87</sup> The relevant dimension is “response action.”<sup>88</sup> Response Action concerns the concept of interactivity, with the suggestion being that increased interactivity will lead to improved assessment.<sup>89</sup> An interactive legal research exercise would clearly fit into this dimension because applicants would, at the least, be required to devise a search strategy, figure out where to search in the chosen database, choose which filters to click onto, decide how to formulate search queries, and evaluate and select appropriate documents from a list of retrieved results that answer the given problem.

As previously noted,<sup>90</sup> the MPT is not without its criticism. Criticisms aside, the MPT is popularly seen as being an accurate means of testing practice readiness. From the beginning, performance assessments promised the three-pronged benefits of measuring skills that the multiple-choice exams were not good at doing, providing validity because they measure skills more like that which applicants will experience in practice and serving as a complement to existing testing mechanisms.<sup>91</sup> This was seen in an early study that concluded a “more direct assessment of skill” is achieved via the MPT since it could test practical components not already being tested on the bar exam.<sup>92</sup> Another study similarly noted that the MPT measured that which is not fully measured by either the MEE or MBE.<sup>93</sup>

The criticisms of the MPT mentioned in Part II, *supra*, can be addressed. An electronic legal research performance exam will be vetted beforehand, leading to validity.<sup>94</sup> Library directors, legal writing professors, and practitioners could be the basis for the vetting group.<sup>95</sup> An interactive legal research exercise could be crafted to ask several varied questions from the same fact pattern, making the results more generalizable because of the increased number of questions asked.<sup>96</sup> An answer key would have to be developed before the exercise is

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87. EDUCATIONAL MEASUREMENT, *supra* note 13, at 508.

88. *Id.*

89. *Id.*

90. *See supra* Part I.

91. Slaughter et al., *supra* note 69, at 7.

92. Cross, *supra* note 54, at 89 (describing a 1995 ACT panel study cited in Kuechenmeister, *supra* note 17, at 24–29).

93. *Id.* (citing Smith, *supra* note 3, at 41).

94. EDUCATIONAL MEASUREMENT, *supra* note 13, at 706–07.

95. *Id.* (calling for a cross-section of practitioners who are in the position to determine what skills are necessary for new practitioners to possess).

96. *Id.* at 707 (noting the importance of asking several shorter, focused questions as a means of increasing generalizability of results). This can be accomplished when administering an interactive legal research exercise by asking several distinct questions for each larger fact pattern.

administered, and graders would need to be sufficiently trained on how to score answers. A uniform answer key would ensure reliability. One logical pool of answer key developers and graders are librarians, many of whom regularly create and grade research exercises in the course of their work. It is a cohesive group of professionals who are used to working together. Legal writing professors could also participate in developing the answer key and in grading. To increase the validity and reliability of its tests, the NCBE employs test development vetting and provides an answer key and training on how to grade.<sup>97</sup> So the NCBE has the expertise to guide this process.

Making the legal research exercise interactive would logically best fit the MPT portion of the exam. Although the thought of adding legal research to the bar exam is not new,<sup>98</sup> relatively few authors have written about the topic and none have proposed that it be an interactive exercise. Barkan has written on adding legal research to the bar exam on at least two occasions.<sup>99</sup> He posits that either short answer or multiple-choice formats should be used instead of an interactive research format where an applicant is required to conduct research.<sup>100</sup> For instance, Barkan states that a fact pattern could be given followed by questions asking the applicant what information needs to be found, where the information could be found, or to distinguish between different types of documents.<sup>101</sup> I disagree that such is the best measure of legal research skills. Barkan admits, at best, that short answer and multiple-choice questions can test an applicant's knowledge of legal research but not their ability to conduct research.<sup>102</sup> Bratman concludes that the NCBE, which is assessing the

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97. Curcio, *supra* note 47, at 419 (citing Jane Smith, *Testing, Testing*, 68 B. EXAMINER, May 1999, at 46, 48). Curcio states that the NCBE already employs a "substantial pretest validity screening process." *Id.* Curcio also quotes Smith, who stated that "graders are given a Drafters' Point Sheet and Grading Guidelines." *Id.* (quoting Jane Smith, *Testing, Testing*, 68 B. EXAMINER, May 1999, at 46, 46). Finally, Curcio states that the NCBE offers an MPT grading workshop. *Id.*

98. See Steve M. Barkan, *Should Legal Research Be Included on the Bar Exam? An Exploration of the Question*, 99 L. LIBR. J. 403, 404–06 (2007) [hereinafter *An Exploration*]; Erica Moeser, *President's Page*, 75 B. EXAMINER, May 2006, at 4, 5 (stating that the NCBE is in the initial stage of assessing whether such a test is feasible); Erica Moeser, *President's Page*, 82 B. EXAMINER, Sept. 2013, at 4 (finding a legal research exam is still on the NCBE's agenda); Steve M. Barkan et al., *Testing for Research Competency on the Bar Exam: The Next Steps*, 28 LEGAL REFERENCE SERVS. Q. 281, 281 (2009) [hereinafter *Next Steps*]; Curcio, *supra* note 47, at 411–12; Bratman, *supra* note 49, at 600 (stating that there is a strong case for testing legal research).

99. See *An Exploration*, *supra* note 98, at 404–06; *Next Steps*, *supra* note 98, at 282–83.

100. *An Exploration*, *supra* note 98, at 411; *Next Steps*, *supra* note 98, at 289.

101. *An Exploration*, *supra* note 98, at 411.

102. *Id.*

possibility of adding a legal research exercise to the MPT,<sup>103</sup> will ultimately develop another means of testing for legal research skills if it decides to do so.<sup>104</sup> I propose that the best way to assess one's research ability is by the completion of a multi-question interactive legal research exam. In Part V, *infra*, I provide two sample legal research problems that will hopefully start the discussion as to what the exercise would look like.

As mentioned previously, the current MPT resembles Shultz and Zedeck's Situational Judgment Tests,<sup>105</sup> which showed a positive effect in measuring performance results on over 200 hypothetical scenarios.<sup>106</sup> The MPT can improve on what Shultz and Zedeck accomplished by adding an interactive legal research exercise to it: instead of asking an applicant to choose answers presented based on canned hypos (as the Situational Judgment Tests require), the applicant would be provided with a fact pattern and would have to employ judgement to identify a research plan and then actually conduct the research to answer the several questions posed. This is also an improvement on what Barkan sees as the logical means of testing legal research—by way of short answers and multiple-choice answers—or basically by testing legal research knowledge and not legal research skills. Changing the nature of the MPT to one with more interaction would make it more like a task one will encounter in legal practice. In doing so, criticisms of the MPT would be assuaged.

Adding an interactive legal research exercise to the MPT would solve the issues associated with inadequate or non-testing of fact gathering and the use of judgment. These are critical skills that will be required in legal practice. Doing so would change the MPT from being predominantly a written examination, which makes it similar to the MEE and thus subject to many of the limits already noted for written answers. Of the ten Fundamental Lawyering Skills, those of problem solving, legal analysis and reasoning, legal research, organization and management of legal work, and (possibly) factual investigation would be tested via an interactive legal research exercise. The *MacCrate Report* notes that some salient components of the skill of “problem solving” include identifying and diagnosing a problem, developing a plan of action, implementing the plan, and incorporating new information as appropriate.<sup>107</sup> An interactive

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103. Erica Moeser, *President's Page*, 75 B. EXAMINER, May 2006, at 4, 4; Erica Moeser, *President's Page*, 82 B. EXAMINER, Sept. 2013, at 4, 4.

104. Bratman, *supra* note 49, at 601.

105. See authority cited *supra* notes 27–32.

106. Shultz & Zedeck, *supra* note 18, at 643.

107. MACCRATE REPORT, *supra* note 6, at 141–48.

legal research problem addresses those components of problem solving, as it would require an applicant to identify relevant facts from the fact pattern, devise a research plan of action to answer the questions presented, implement that research plan to locate relevant information, and identify and properly use relevant information that is found during the research process. That process would also test the applicant's ability to successfully organize and manage the research problem to a greater extent than the current canned MPT exercises do. Other components of the Fundamental Lawyering Skill of organization and management of legal work that would be tested by an interactive legal research exercise would be the ability to formulate goals, manage time appropriately, and prioritize tasks.<sup>108</sup> Legal analysis and reasoning would be tested by the necessity to identify and diagnose the legal issues given in the fact pattern and by having to compare and contrast laws that are found during the research process.<sup>109</sup> The skill of factual investigation could certainly be a part of such an exam. As an example, one of the questions can call for finding a descriptive secondary source that will illuminate the issues given in the fact pattern. Through these examples, one can see how an interactive legal research exercise would test more of the *MacCrate Report's* Fundamental Lawyering Skills than does the existing format of the MPT.

Requiring an interactive legal research exam involves three major changes to the administration of the current bar exam. The first change involves determining exactly who would administer this new interactive legal research exam. The research exam closely resembles the current MPT items, which are created by the NCBE. The NCBE is in the best position to administer the interactive legal research exam, as the Uniform Bar Examination (UBE) states (currently numbering 34) are required to offer both MPT items.<sup>110</sup> And over the years the NCBE has developed ways to better assure reliability and validity.<sup>111</sup> The NCBE would work with the appropriate database vendors to allow exam takers access to their databases. Alternatively, development and administration of the interactive legal research exercise could be left to each state, which would require the NCBE to modify its rule that the UBE jurisdictions must administer both parts of the MPT. The rule could be modified, for

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108. *Id.* at 199–201. Those are some of the salient components of the skill of Organization and Management of Legal Work.

109. *Id.* at 209 (listing the relevant components of the skill of Legal Analysis and Reasoning as identifying and formulating legal issues and criticizing and synthesizing legal argumentation).

110. *Uniform Bar Examination*, NAT'L CONF. B. EXAMINERS, <http://www.ncbex.org/exams/ube/> [<https://perma.cc/F8XY-2BAG>].

111. Curcio, *supra* note 47, at 419.

instance, to allow each state to substitute a state-specific interactive legal research item for one of the two MPT items. If such a modification is granted, each state would have to contract with one or two research database providers to allow exam takers access to their databases for the exam. This could be Westlaw and/or Lexis Advance. Or it could be ICLE in Michigan, a widely used publisher of secondary source materials that currently gives access to nearly 60 online practice books.<sup>112</sup> Other states may have a choice of vendors too. Such a contract will not likely cost much, if anything, as it would give the vendor free advertising publicity and bragging rights over its competitors. The second major change—exam security and integrity in an online environment—would have to be expanded from what is the norm because of the use of the database(s) in the exam. For the duration of the interactive research exam, the applicant must only be able to access the chosen database(s), along with a template for typewritten answers. One means of doing this is to require that content-control software be installed on the laptop by a certain date before the exam. This step would also require the NCBE or state bar to contract with a content-control software vendor.<sup>113</sup> Such software can be configured to allow access only to the websites being used on the exam,<sup>114</sup> and it may be controlled remotely by an administrator (assuring exam taker compliance). Applicants would show up early on the day of the research exam to make sure their laptops are working properly before the exam begins, just as students are instructed to do for law school exams. Providing access to the appropriate databases may also be accomplished through a proxy server page that authenticates each applicant who has a special code.<sup>115</sup> The final change is the most obvious. The NCBE or state bar must be sure that the testing site has a high-speed wireless internet network that is in good working order. Although not currently a given, this task is much easier to realize in this day and age.<sup>116</sup> From the

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112. *What We Do: Products and Services*, INST. CONTINUING LEGAL EDUC. (ICLE), <https://www.icle.org/modules/about/WhatWeDo.aspx?page=ProductsServices> [<https://perma.cc/DYF9-2CZK>].

113. See BROWSECONTROL, <http://www.browsecontrol.com> [<https://perma.cc/7WFE-6PAL>] (blocking websites and allowing access only to listed websites); CURRENTWARE, <https://www.currentware.com/> [<https://perma.cc/W85E-QVXB>] (blocking websites and allowing access only to listed websites).

114. See authorities cited *supra* note 113.

115. See *EZproxy*, OCLC, <https://www.oclc.org/en/ezproxy.html> [<https://perma.cc/3PZY-ARE5>].

116. See, e.g., Tali Arbel, *Verizon says 5G network will cost extra \$10 a month*, AP NEWS (Mar. 13, 2019), <https://apnews.com/d990a895eb8c4c7d8a7c6be6dd17b159> [<https://perma.cc/3CWA-CXRY>] (stating that 5G will be available to its customers in April 2019); Mike Snider, *5G phones are one step closer to reality*, USA TODAY, 3B (July 13, 2018),

perspective of network speed, it is worth noting that recent news articles attest to the fact that 5G networks are on the short horizon, and estimates are that 5G network speed will be between 10 times and 100 times faster than are current 4G and 4G LTE networks.<sup>117</sup>

Most states administer a two-day, two-and-a-half-day, or three-day exam consisting of the MBE and a day of essay questions such as in the MEE. Forty-three states employ the MPT as well, either as a 90-minute (one MPT item) or three-hour (two MPT items) commitment.<sup>118</sup> At least one author suggested adding a fourth day to the bar exam, devoting days three and four to the MPT.<sup>119</sup> My suggestion is that all states employ the full two-item MPT (most do this already) or a similar exam for those states that use their own practice exam, with an interactive research exercise comprising one of the two items. Those states that use the UBE already administer both MPT items, as it is a requirement to do so by the NCBE.<sup>120</sup> States considering adopting the UBE, or who have committed to adoption of the UBE, may already administer a practice exam. For instance, Ohio

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[https://www.thegoldinstitute.online/\\_Resources/Persistent/a1ce72c5d1c8d0e70e759b602bfe99f0dc546122/USA\\_Today\\_-\\_13\\_07\\_2018.pdf](https://www.thegoldinstitute.online/_Resources/Persistent/a1ce72c5d1c8d0e70e759b602bfe99f0dc546122/USA_Today_-_13_07_2018.pdf) [<https://perma.cc/LS2K-TG9Z>] (noting that the increase in speed will affect all types of computers and networks, not just Smartphones); Chris Hoffman, *How 5G Could Transform Your Home Internet Connection*, HOW-TO GEEK, <https://www.howtogeek.com/366259/how-5g-could-transform-your-home-internet-connection/> [<https://perma.cc/N2SX-TJ88>] (stating that 5G will theoretically be 100 times faster than 4G and reduce latency by 80%); Mohammed Al Khairy, *How 5G changes the way you watch and collaborate*, QUALCOMM: ONQ BLOG (Jan. 24, 2019), <https://www.qualcomm.com/news/onq/2019/01/24/how-5g-changes-way-you-watch-and-collaborate> [<https://perma.cc/5FS4-GCCV>]; Mohammed Al Khairy, *5G: Your life is about to change*, QUALCOMM: ONQ BLOG (Oct. 29, 2018), <https://www.qualcomm.com/news/onq/2018/10/29/5g-your-life-about-change> [<https://perma.cc/4GGG-ATDH>] (stating that 5G will provide lower latency, more capacity, and up to 20 times the speed of 4G); Igal Elbaz, *Breaking News: AT&T 5G Network First in the U.S. to Surpass 1 Gigabit Wireless Speeds*, AT&T: TECH. BLOG (Mar. 29, 2019), [https://about.att.com/innovationblog/2019/03/1\\_gigabit\\_wireless\\_speeds.html](https://about.att.com/innovationblog/2019/03/1_gigabit_wireless_speeds.html) [<https://perma.cc/NH6Z-LQU7>] (5G speed is “equivalent to downloading a 2-hour HD movie in 20 seconds.”); *We’re building our network to deliver the full potential of 5G. Are you ready?*, VERIZON WIRELESS, <https://www.verizonwireless.com/articles/business/5g-network-performance-attributes/> [<https://perma.cc/CUL2-2WR7>] (stating that 5G could be “many times faster” and reduce latency by 75%–80% than the speed of 4G); *What is 5G?*, T-MOBILE, [https://www.t-mobile.com/5g?icid=WMM\\_TM\\_I9NETWORK\\_UHIFVZ1BKZKJARS4J16163\\_HP](https://www.t-mobile.com/5g?icid=WMM_TM_I9NETWORK_UHIFVZ1BKZKJARS4J16163_HP) [<https://perma.cc/95BT-MPTS>] (stating 5G will be up to 10 times faster and will have virtually no latency time); *Sprint’s True Mobile 5G*, SPRINT, <https://www.sprint.com/en/landings/5g.html> [<https://perma.cc/W9JC-NH9W>] (“With 5G, high amounts of data can be transmitted more efficiently than 4G LTE. That means stronger network reliability, faster downloads, and support for more connected devices than ever before.”).

117. See authorities cited *supra* note 116.

118. *Multistate Performance Test*, *supra* note 2.

119. Bratman, *supra* note 49, at 605.

120. *Uniform Bar Examination*, *supra* note 110.

currently administers both items of the MPT<sup>121</sup> and will start administering the UBE in July 2020.<sup>122</sup> Since the UBE requires both MPT items to be tested, my proposal will not cause Ohio to have to alter the number of MPT items on their bar exam. Ohio and other UBE jurisdictions would be set to have one of the two MPT items be an interactive research exercise, once such is developed. Alternatively, since the MEE is considered to be a less reliable exam than the MBE because there are few essay questions asked and grading is prone to subjectivity,<sup>123</sup> the time allotted to the MEE could be shortened in non-UBE jurisdictions,<sup>124</sup> with the rest of the time devoted to one regular MPT part, with the second part—the legal research exam—taking place on the morning of day three. The UBE only requires three hours of the MEE, with the other three hours of that day allotted to the MPT,<sup>125</sup> making a two-day exam possible. California has recently shortened their three-day exam into two days by replacing one of their six one-hour essay questions with a 90-minute practice question.<sup>126</sup>

#### V. SOLUTION: WHAT COULD A LEGAL RESEARCH EXERCISE LOOK LIKE?

The two primary ways that I assess the ability of my Advanced Legal Research students to conduct legal research is by administering a three-part take-home assignment and by administering a two-hour final exam. I have substantial experience doing both, having done so in 50 administrations of Advanced Legal Research over a 21-year time frame. I

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121. *About the Ohio Bar Exam*, CLEVELAND-MARSHALL COLLEGE OF LAW: LAW LIBRARY, <https://www.law.csuohio.edu/lawlibrary/bar/ohio> [https://perma.cc/5DTB-SPXH].

122. *Jurisdiction Information, Ohio*, NAT'L CONF. B. EXAMINERS, <http://www.ncbex.org/jurisdiction-information/jurisdiction/oh> [https://perma.cc/4EEG-LMT7] (last updated Oct. 28, 2019).

123. Bratman, *supra* note 49, at 575 (citing Susan M. Case, *The Testing Column: Quality Control for Developing and Grading Written Bar Exam Components*, 82 B. EXAMINER, June 2013, at 34, 36); Diane F. Bosse, *Assessing Minimum Competence in a Changing Profession: Why the UBE is Right for New York*, 87 N.Y. ST. B.A. J. 39, 42 (2015). Essay tests are less reliable than multiple-choice tests because they ask (far) fewer questions. They're also less objectively graded than are multiple-choice answers that have agreed-on answers.

124. Lawrence M. Grosbert, *Should We Test for Interpersonal Lawyering Skills?*, 2 CLINICAL L. REV. 349, 373–74 (1996) (stating that a performance test could be used in place of some of the traditional portions of the exam).

125. NAT'L CONFERENCE OF BAR EXAM'RS, UNDERSTANDING THE UNIFORM BAR EXAMINATION 1, 5 (2019), <http://www.ncbex.org/pdfviewer/?file=%2Fdocsdocument%2F209> [https://perma.cc/Q7FD-LVY9].

126. Dixon & Yochelson, *supra* note 61, at 30 (California does not administer the UBE, but has administered its own practice exams for decades).

also employ a timed final exam in our mandatory first semester Introduction to Legal Research & Communication course.

The benefit of the three-part take-home assignment is that students are allowed time to think through the issues, since they are given one week to complete each part. Having three parts also allows me to focus on important discrete aspects of legal research. A quick grading turn-around time allows students to focus efforts based on my substantial comments. The first assignment utilizes a fact pattern that is usually from three paragraphs to a page in length. The purpose of this assignment is for students to learn how to find useful, descriptive secondary sources, which students must consult to adequately answer the questions presented. In doing so, students are given valuable experience learning how to properly pare through irrelevant information to identify information that is relevant. The second assignment focuses on the use of case law annotations (if it's a statutory problem) or a digest/Key Numbers/case law headnotes (if it's a common law problem) as a means of quickly and accurately identifying the range of applicable primary law. Additionally, the use of these tools serves as a boundary that may be used to better approximate when a topic is fully researched (e.g., a persistent difficulty a novice researcher has is knowing when to stop the research process). The third and last assignment focuses on primary law verification via Shepard's and KeyCite. This assignment always contains questions for which an explanation of the negative treatment signal is required and how it affects the given fact pattern. This sort of assignment can be easily modified to fit into a practical bar exam question.

My two-hour final exam tests slightly different skills. Instead of basing the whole exam on one fact pattern (like I do for the three-part take-home assignment), I ask several short questions that require students to find a host of different document types. This method requires a broad understanding of the functionality of both Westlaw and Lexis Advance. I am far more concerned about whether students know how to best use the functionality of the two services than in stumping them with unreasonably difficult questions. Therefore, the grades on my exam are a much better indicator of research abilities than if I utilized a more traditional law school exam approach. By timing the exam, I am further testing how well students are familiar with the functionality of the two services. The better students know how to use the two services, the more likely they are to finish answering all of the exam questions, and they are likely to be more accurate than those who are not as familiar with the services. This type of exam would be the easiest to modify into an MPT part because the time constraints are already similar to the current length of each part of the

MPT. However, because I believe that the modified take-home exams are better indicators of overall research knowledge, I will focus on the take-home assignments (in modified form) as the examples given for a sample interactive legal research exercise.

The jurisdiction chosen for the legal research exercise need not necessarily be set in each state, since finding each state's materials in services such as Westlaw and Lexis Advance are exactly alike. If you can find materials from one state, you can find materials from any other state. The basic competency of finding the laws of one jurisdiction is equally tested when researching the laws of another jurisdiction. It is far easier to create just one exam for all jurisdictions, which is exactly how the NCBE crafts its other skills tests. It is also not necessary to worry about what topic is too niche to test. My take-home assignments focus on areas of law that the average law school graduate will encounter in practice, as she may well find herself in a boutique law firm or going solo.<sup>127</sup> Small law firms are more likely to accept the types of cases that are not profitable enough for the larger firms—landlord/tenant, garnishments and executions, business torts, workers compensation, and the like. Since a basic skill being evaluated is the ability to find law on a topic, there is still relevance in the exercise for those who plan to practice in big law. For states that choose to craft their own interactive legal research exercise based on their state's law, care would have to be given to choosing a topic for which there are adequate secondary source materials.

To date, no practice research exam has been revealed. In the spirit of starting the conversation, two possible exercises follow—one based on federal law and one based on Michigan law. These exercises are only for the purpose of starting a discussion as to what such an exercise could look like. They are not intended to be offered as polished final exercises. In fact, further modification is likely, simply because each exercise was originally administered as a three-part take-home assignment given over several weeks. In that regard, the first example may be considered to be too short for a three-hour exam, and the second example may be too lengthy for three hours.

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127. Interview with Nathaniel Bean, Assistant Dir., Career Servs. & Outreach, Univ. of Detroit Mercy School of Law (Mar. 19, 2019) (stating that combined graduate placement statistics for Dec. 2017, May, 2018, and July, 2018 at Univ. of Detroit Mercy School of Law show 52 of 166 grads working in firms of 1–10 attorneys, or 31 per cent); *Employment Rate for Class of 2017 Grads Increases Modestly Compared to 2016*, NAT'L ASS'N L. PLACEMENT: NALP BULLETIN (Sept. 2018), <https://www.nalp.org/0918research?s=Employment%20Rate> [https://perma.cc/LK2T-EW4Z] (finding 38%–50% of law school grads over the past several years start their legal career in law firms of 10 or fewer attorney). During that same period, about half as many new graduates went to work in firms of 11 to 100 attorneys. *Id.*

A draft legal research exercise covering federal law could look like the following example in Appendix A.<sup>128</sup> This federal law example could be administered by the NCBE for all MPT subscribers.

Conversely, states could craft state-specific research assignments, such as the one below in Appendix B, which is Michigan-based.<sup>129</sup> The ICLE database is ideal for providing the answers for one of the two secondary sources asked for in Part 1, with Westlaw or Lexis Advance required for the second secondary source asked for in Part 1, and both Westlaw & Lexis Advance required to KeyCite/Shepardize (Part 2). Other states likely have excellent publisher databases to base at least part of the interactive legal research exercise on.

Alternatively, the interactive legal research exercise could be crafted along the lines of my two-hour final exam for Advanced Legal Research. For my final exams, I ask roughly 16 questions that each have short fact patterns. These questions require answers from several different types of documents primarily in Westlaw and Lexis Advance. I may ask for a case from a certain jurisdiction, a federal or state administrative code section, a state-specific secondary source, legislative bills from multiple jurisdictions concerning a hot social issue, a case retrieved from using a specific case's headnote or via use of the Key Numbers function, a sample form, clause, checklist, an expert witness, a case law annotation pertaining to a legislative code section, a municipal code section, or an average settlement amount. By using several short fact patterns, the ability to repeatedly craft acceptable search queries is tested. By requiring many different document types, one's mastery of the services is tested.

## VI. CONCLUSION

This article advocates for the inclusion of an interactive legal research exercise on the bar exam. Legal research is a Fundamental Lawyering Skill that all new attorneys must know how to perform,<sup>130</sup> as it will consume a large portion of their time in their formative years of practice.<sup>131</sup> An interactive legal research exercise would require the applicant to have a firm understanding of how to conduct legal research,

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128. The exercise presented in Appendix A is a modification of a three-part take home assignment I administered, over the course of several weeks, in my Advanced Legal Research course in 2003.

129. The exercise presented in Appendix B (with modifications here for adaptation to a bar exam) was administered in three take-home assignments, administered over the course of several weeks, to my Advanced Legal Research students in spring 2018.

130. MACCRATE REPORT, *supra* note 6, at 135.

131. THOMSONWEST, *supra* note 11, at 2.

as well as requiring a mastery of legal hierarchy. It would involve several of the MacCrate Fundamental Lawyering Skills, including problem solving, legal analysis and reasoning, legal research, organization and management of legal work, and possibly factual investigation. With the advent of 5G wireless technology, which brings 10 times the speed of its predecessor,<sup>132</sup> low bandwidth will no longer be an impediment to having an interactive legal research exercise on the bar exam. The benefits of such an addition to the bar exam have major positive implications on practice readiness.

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132. See authorities cited *supra* note 116.

APPENDIX A. SAMPLE LEGAL RESEARCH EXERCISE BASED ON FEDERAL LAW<sup>133</sup>

You are a defense attorney and have just been retained to defend a client who has been charged with violating a federal gambling statute. The facts are as follows: For the past three years, your client had been using his large, personal yacht on Friday and Saturday evenings, at which time several guests were treated to an evening of liquor, dining, and then an assortment of card games in which money was bet. At no other times did your client use the yacht. The yacht, registered in the state of Florida, always followed the same navigational pattern. First it slowly headed out of port in Jacksonville, Florida, and then always came to a stop aside a buoy just over five nautical miles from shore, where it was anchored. At that time, passengers were led to the card tables for a night of black-jack, poker, and other card games. At some point in the morning, all card games were halted, and the yacht headed back to the same port in Jacksonville as it embarked from. No excursion lasted more than 11 hours. The weekend cruises were advertised as ocean card game excursions. The predominant reason for the cruises was for the card game gambling activities.

Suit has been brought in a U.S. district court in Florida, which is in the Eleventh Circuit. Your brief is due to the court very shortly. Complete the research noted below so that a brief can be crafted. Assume that you know little or nothing about this area of law.

The first order of business is to find two secondary sources that will explain the given facts.

1. Cite one law review article published since January 2011 that addresses our issue.

a. Provide the article title and the journal citation. Your citation need not be in proper Bluebook format.

b. What does the law review article state the law is that governs our facts? Include citations to relevant federal laws or cases that back up these assertions.

2. Find a secondary source, other than a law review article, that is on point with our facts.

a. What is its citation? Your citation need not be in proper Bluebook format.

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133. This exercise is a modification of a three-part take home assignment I administered, over the course of several weeks, in my Advanced Legal Research course in 2003.

- b. What does this second secondary source state about the law that applies to our facts? Include citations to relevant federal laws or cases that back up these assertions.
3. Briefly summarize the prevailing federal law pertaining to our facts, as noted in 1(b) and 2(b), above.
  4. List the most relevant case law applicable to our fact pattern. Explain why each case is relevant.
  5. Using the cases that you listed for 3 or the laws listed in 4 as a guide, find two *additional* federal cases or laws that discuss two different issues from the following list: the distance from land that the territorial waters extend; the definition of a “covered voyage”; the definition of “high seas”; the definition of a “gambling ship.”
  6. KeyCite (or Shepardize if using Lexis Advance) the controlling statutory law and controlling case(s). Is there any negative treatment to either one? Explain any negative or potentially negative treatment to your controlling authority and how it may negatively affect your client.
  7. According to the laws you have found, will your client be acquitted or convicted of the charge? Explain fully.

APPENDIX B. SAMPLE LEGAL RESEARCH EXERCISE BASED ON  
MICHIGAN LAW<sup>134</sup>

In late 2018, Bob Welsh and Ziggy Jones spent their life savings and also took out a second mortgage on their respective houses to fund a startup company, ZZY Entertainment. ZZY, a Detroit-based company, makes equipment for music recording studios and is incorporated in the state of Michigan. ZZY entered into a contract to be the exclusive recording equipment provider to a successful and growing recording studio chain called We Mix A Lot, which is headquartered in Detroit and incorporated in Michigan. The three-year exclusive contract was entered into in December 2018 and pays ZZY Entertainment \$500,000 in December of each year. ZZY is to use the money for the remainder of the year to purchase supplies and construct the equipment for We Mix A Lot. There is no provision in the contract for delayed payments. Assume that no arbitration clause covers this situation.

We Mix A Lot made the first payment of \$500,000 to ZZY in December 2018. ZZY has thus far successfully filled its end of the contract, and We Mix A Lot has stated it is quite pleased with ZZY's work. Competitor ABC Equipment provides the exact same services as our client, ZZY Entertainment. ABC Equipment admits to knowing about the contract between ZZY and We Mix A Lot, and ABC Equipment has been actively trying to hurt ZZY's business since its inception. In November 2019, ABC Equipment finally convinced We Mix A Lot to accept terms of an exclusive contract to pay them (ABC Equipment) \$300,000 per year to provide recording equipment. We Mix A Lot then informed ZZY that it was not willing to pay ZZY for the remaining two years of its contract. As of March 2020, no payment has been made to ZZY for the second year. ABC Equipment received its \$300,000 payment from We Mix A Lot in December 2019.

We represent ZZY Entertainment. Others on our litigation team are working on the breach of contract cause of action against We Mix A Lot. You are tasked to research and find the likely cause of action **against ABC Equipment**.

**PART 1:**

For Part 1, you may use the ICLE database, Westlaw, and/or Lexis Advance. You are to answer Part 1 questions solely from the text of the secondary sources that you will be asked to select below.

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134. This exercise (with modifications here for adaptation to a bar exam) was administered in three take-home assignments, administered over the course of several weeks, to my Advanced Legal Research students in spring 2018.

For Part 1, you must find two Michigan-based secondary sources based on directions below.

**A. Your First Michigan Secondary Source**

ZZY Entertainment can bring suit against ABC Equipment by one of two similar causes of action. Find Michigan-based secondary source resources that explain both causes of action, the differences between them, and the burden of proof requirements for the most appropriate cause of action (between the two). Your first Michigan-based secondary source must be from one of these two categories:

- Michigan-specific legal encyclopedias; and
- Michigan practice guides/treatises.

Choosing a quality secondary source saves you time by properly explaining the law and by giving you relevant terms and citations to seminal primary authority. Your secondary source must contain **at least 45 citations to Michigan primary authority**. If not, then pick another source. Repeat citations may be counted as part of the 45 citations. A legal encyclopedia may be comprised of multiple sections of a chapter on point. If the relevant sections of the legal encyclopedia include a total of 45 citations, you can treat those combined sections as being one secondary source.

**1) What is the citation to your first Michigan specific secondary source that contains 45 or more citations?** Cite to relevant sections/chapters or a range of sections, and not just to a whole database or just to the title of the source. The citation need not be in Bluebook format.

**2) What relevant Michigan state court case law citations did you find in your **first secondary source**?** Record **two (2) relevant Michigan state court cases** that you found in this secondary source in the table below. Each case must address a different one of the issues from the list of four issues directly above the table. Include the case name and reporter citation of each case. (Your citation need not be in proper Bluebook format.) In the “Relevance” section in the table below, describe what the secondary source used your case as authority for. **DO NOT** retrieve and read the actual cases. Instead, rely on what your secondary source tells you about the cases.

Here are the issues:

1. Cite a Michigan state court case that lists the elements of either of our two potential causes of action;
2. Cite a Michigan state court case that explains the burden of proof requirements for either of our two potential causes of action;

3. Cite a Michigan state court case that answers whether punitive damages are available for either of our two potential causes of action;
4. Cite to a Michigan state court case that explains under what circumstances it is acceptable for a third party to cause a breach of contract under the relevant cause of action.

Case Name & Citation:	Relevance of Case (be specific: list the elements or the burden of proof requirements, etc.):
1)	
2)	

### B. Your Second Michigan Secondary Source

Practitioners often consult more than one secondary source before conducting primary law research as additional information can be found in different sources. For question II, choose your second Michigan-specific secondary source using the category that **you did not choose** the first source from:

- Michigan-specific legal encyclopedias; and
- Michigan practice guides/treatises.

Choosing a quality secondary source saves you time by properly explaining the law and giving you relevant terms and citations to seminal primary authority. Your secondary source must contain **at least 45 citations to Michigan primary authority**. If not, then pick another source. Repeat citations may be counted as part of the 45 citations. A legal encyclopedia may be comprised of multiple sections of a chapter on point. If the relevant sections of the legal encyclopedia add up to include a total of 45 citations, you can treat those combined sections as being one secondary source.

**1) What is the citation to your second Michigan specific secondary source that contains 45 or more citations?** Cite to relevant sections/chapters or a range of sections, and not just to a whole database or just to the title of the source. The citation need not be in Bluebook format.

2) What relevant Michigan state court case law citations did you find in your **second secondary source**? Record **two (2) relevant Michigan state court cases** that you found in this secondary source in the table below. Each case must address a different one of the two remaining issues that you did not address with your cases from the first secondary source. Include the case name and reporter citation of each case (your citation need not be in proper Bluebook format). In the “Relevance” section in the table below, describe what the secondary source used your case as authority for. **DO NOT** retrieve and read the actual cases. Instead, rely on what your secondary source tells you about the cases.

Here are the issues:

1. Cite to a Michigan state court case that lists the elements of either of our two potential causes of action;
2. Cite to a Michigan state court case that explains the burden of proof requirements for either of our two potential causes of action;
3. Cite to a Michigan state court case that answers whether punitive damages are available for either of our two potential causes of action;
4. Cite to a Michigan state court case that explains under what circumstances it is acceptable for a third party to cause a breach of contract under the relevant cause of action.

Case Name & Citation:	Relevance of Case (be specific: list the elements or the burden of proof requirements, etc.):
1)	
2)	

**You must submit your answers for Part 1 before you can access Part 2.**

**Part 2:**

For Part 2, you will answer the questions using either Westlaw or Lexis Advance as directed.

Your team has identified four relevant cases, and you need to verify that they are still valid. Provide an answer as to why the following four cases have negative or possibly negative treatment. The first step in doing

so is to identify if there is a negative or possibly negative signal indicator next to the case names and, if so, determine if the headnote you are concerned with is affected. These negative or possibly negative signal indicators to scrutinize are shown as flags in Westlaw/KeyCite  and as signs in Lexis Advance/Shepards . The second step involves following the flag/sign to determine why the cases have marked your case headnote.

You are to **use your own words** for your answers so we may determine if you understand what the cases are stating. **Copying and pasting from the case is not acceptable.** An example answer follows. Review it carefully and use it as your guide for answering the questions below. Note that the example includes the relevant facts, which your answer must contain for you to receive credit.

**Example Question** (based on a fact pattern different than yours): Your team wants to rely on the holding expressed in headnote 3 of *Alexander v. U.S.*, 500 F.2d 1, which bars medical malpractice lawsuits under the Federal Torts Claims Act by commissioned officers of the Public Health Service. Identify and explain any possibly negative treatment to this headnote by using the KeyCite function in Westlaw.

**Example Answer:** *Premachandra v. U.S.* distinguishes the holding in headnote 3 of *Alexander*. In *Alexander*, the court held that commissioned officers of the Public Health Service could not sue for *medical malpractice* under the Federal Torts Claims Act (FTCA) because there is an existing statutory disability scheme that provides for an exclusive remedy. In *Premachandra*, the trial court held that a *wrongful termination* cause of action was barred under the FTCA. The distinguishing factor is the cause of action is different in both cases.

#### QUESTIONS:

1. KeyCite (don't Shepardize) *Trepel v. Pontiac Osteopathic Hospital*, 135 Mich.App. 361.

Identify negative or possibly negative treatment to **headnote 9** of *Trepel* by following any negative or possibly negative signal indicators that are present. These signal indicators are clearly shown in the introductory instructions to Part 2. **In your own words** (copying and pasting will not be accepted), state why the negative or possibly negative case(s) flagged headnote 9 of *Trepel*. Be specific and concise.

2. KeyCite (do not Shepardize) *Great Northern Packaging, Inc. v. General Tire & Rubber Co.*, 154 Mich.App. 777. Identify negative or possibly negative treatment to **headnote 3** of *Great Northern* by following any negative or possibly negative signal indicators that are present. These signal indicators are clearly shown in the introductory instructions to Part

2. **In your own words** (copying and pasting will not be accepted), state why the negative or possibly negative case(s) flagged headnote 3 of *Great Northern*. Be specific and concise.

3. Shepardize (do not KeyCite) *Dzierwa v. Michigan Oil Co.*, 152 Mich. App. 281. Identify negative or possibly negative treatment to headnote 3 of *Dzierwa* by following any negative or possibly negative signal indicators that are present. These signal indicators are clearly shown in the introductory instructions to Part 2. **In your own words** (copying and pasting will not be accepted), state why the negative or possibly negative case(s) flagged headnote 3 of *Dzierwa*. Be specific and concise.

4. Shepardize (do not KeyCite) *Health Call v. Atrium Home & Health Care Servs.*, 268 Mich. App. 83. Identify negative or possibly negative treatment specific to headnote 3 of *Health Call* by following any negative or possibly negative signal indicators that are present. These signal indicators are clearly shown in the introductory instructions to Part 2. **In your own words** (copying and pasting will not be accepted), state why the negative or possibly negative case(s) flagged headnote 3 of *Health Call*. Be specific and concise.