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Change is Inevitable. Exhaustion is Optional: Get Your Students NextGen Ready with an Upcycled MPT

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Despite an understandable desire to play ostrich—to dig our heads into the sand so we cannot see and, therefore, can entirely ignore what is about to happen—change is coming to legal education. In July of 2026, the National Conference of Bar Examiners (NCBE) will begin to phase out the Uniform Bar Exam (UBE)¹ and will administer a new national licensing exam for law school graduates.² This reality means that, depending on the jurisdiction, at least some part-time students who matriculated in 2022 and full-time students who will matriculate in 2023 will be faced with a new final hurdle before attorney licensure: the NextGen Bar Exam (NextGen Exam).³

¹ *Understanding the UBE*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F209>.

² *About the NextGen Bar Exam*, NAT'L CONF. OF BAR EXAM'RS, <https://nextgenbarexam.ncbex.org>.

³ While the NCBE will first administer the NextGen in 2026, which jurisdictions will participate in this first administration of the new exam remains uncertain. SECTION ON

The shift to this new exam is not a nominal change; in fact, it is a complete reimagining of the bar exam. The NextGen Exam forgoes the UBE's stalwart components—the Multistate Bar Exam, the Multistate Essay Exam, and the Multistate Performance Exam—in favor of mixed-format, integrated “item sets,”⁴ challenging examinees to navigate doctrine and skills through a combination of short-answer, multiple-choice, multiple-answer, fill-in-the-blank, and lawyering-task-based questions. Moreover, the NextGen Exam reduces doctrinal coverage⁵ and increases the lawyering skills tested in two ways. In addition to expanded testing of the lawyering skills previously tested on the UBE—issue spotting, legal writing, and investigation and evaluation—the NextGen Exam will also test new lawyering skills, including legal research, client counseling and advising, and client-relationship management.⁶

This forthcoming shift from the UBE to the NextGen Exam will require institutional and curricular adjustments, both big and small. However, given the timing, professors—especially skills professors—cannot simply wait for larger changes in legal education to take hold before reassessing their own coverage and pedagogy. Instead, professors must explore ways to integrate NextGen skills into

ALT. DISPUTE RES., *ADR's on the Bar! Now What*, presented at AALS Annual Meeting (San Diego, Cal., Jan. 3, 2023), recording available at https://soundcloud.com/aals-2/section-on-alternative-dispute-resolution-adrs-on-the-bar-now-what/s-YjWqg3PGLIX?si=d5224fde6f2749aab72a402038cc6645&utm_source=clipboard&utm_medium=text&utm_campaign=social_sharing (relevant portion begins at 1:14). Each jurisdiction (typically through their state supreme courts) determines the requirements for attorney licensure; as such, the timing for each state's conversion from the UBE to the NextGen exam depends on the will of the supreme court in each state. *Id.* That said, according to the NCBE, all states seeking to adopt its new nationally portable exam will need to shift from the UBE to the NextGen exam a short time after the first administration of the NextGen Exam because the NCBE will, after the transition, cease offering the UBE or its component parts. *Id.* As of now, the NCBE has been unwilling to define what it means by a “short time.” *Id.*

⁴ The NextGen Exam will be split into multiple hour-and-a-half to two-hour integrated sets of questions called item sets. Judith Gundersen, *Evolution of the Bar Exam*, presented at AALS Annual Meeting (San Diego, Cal., Jan. 5, 2023), https://am.aals.org/wp-content/uploads/sites/4/2022/12/final_ncbe_presentation_for_aals_121922_accessible.pdf. As the NCBE has explained, these itemsets “[d]emonstrate one or more legal skills in context of a scenario raising one or more substantive or procedural legal issues.” *Id.*

⁵ The NextGen Exam reduces doctrinal coverage in two ways. First, it removes entire doctrinal subjects from the exam, including wills, trusts, and estates, family law, and secured transactions. See *Next Generation of the Bar Exam Content Scope Outlines*, NAT'L CONF. OF BAR EXAM'RS, <https://nextgenbarexam.ncbex.org/csopc-register>. Second, for the subjects that remain, the NextGen Exam delineates between subjects for which the examinees need memorized, deep knowledge and others for which examinees only need issue-spotting familiarity. *Id.*

⁶ *Id.* at 4–6.

their existing courses today to prepare students for the new challenges of the NextGen Exam. For skills professors and clinicians everywhere, this expanded skills coverage is both exciting and daunting. It is exciting because teaching skills is our love language. It is daunting because many of our existing skills courses are overfilled and our grading load is already overflowing, especially in light of the feedback-heavy nature of skills instruction.

Given these realities, it is essential that we develop efficient ways to weave additional skills teaching and assessment into existing skills courses and into “easy-to-adopt and assess” packages to employ across the curriculum. Reenter stage right: the UBE’s Multistate Performance (MPT) Exam. In fact, it is quite easy to quickly create a NextGen skills assessment tool by deconstructing and expanding an existing MPT. In the remainder of this article, we explore why the various components of the MPT make it a useful tool for assessing NextGen Skills. Then we explain—step-by-step— how to create a mock-NextGen item set using the NCBE’s NextGen Foundational Skills and Associated Lawyering Tasks⁷ and a released MPT.⁸ This mock item set, which is designed to teach and assess an array of NextGen skills, can then be used as a model to create additional item sets.

A. Why Use a UBE-Based MPT to Teach NextGen Skills?

Employing the UBE-based MPT to prepare examinees for the NextGen Exam serves two purposes. First, exposing students to MPTs gives them the opportunity to practice a question format the NCBE anticipates will be directly

⁷ See *Foundational Skills and Associated Lawyering Tasks*, NAT’L CONF. OF BAR EXAM’RS, https://www.aals.org/wp-content/uploads/2023/01/foundational_skills_and_associated_lawyering_tasks.pdf.

⁸ This assignment model was originally developed in preparation for a Legal Writing Institute (LWI) one-day workshop discussing the NextGen Exam’s impact on legal writing pedagogy. Eilertson & Shultz, *A Grimm Future? Pick a Nextgen Curricular Change That Fits your School—the Wee-little Change, the Medium-Sized Change, or the Great-Big Change*, presented at Leg. Writing Inst.’s One-Day Workshop (Charleston, S.C., Dec. 9, 2022). Michael Gianelloni, a representative from the NCBE, later used the assignment developed by Eilertson and Shultz as the starting point for an example of a NextGen itemset specifically designed to test research skills. See Jane Cross, Sabrina Defabritiis, Michael Gianelloni, Susan Landrum, Jon Lee, Andy Perlman & Melissa Shultz, *NextGen Full Send*, presented at AALS Annual Meeting (San Diego, Cal. Jan. 4, 2023), https://am.aals.org/wp-content/uploads/sites/4/2023/01/legal_writing_and_education_section_aals_annual_meeting_full_send.pdf. The assignment examples presented in this article draw from those two presentations.

incorporated into the NextGen Exam.⁹ The NextGen MPT will likely be shorter than the existing 90-minute MPT assessment,¹⁰ but as the NCBE has made clear, the basic construct of the existing MPT will be redeployed on the NextGen Exam. Given this plan, prior MPTs remain important in helping examinees prepare for the NextGen Exam. Second, the MPT continues to be a valuable tool to teach and assess lawyering skills because it was designed to do exactly that—test a broad range of skills, all of which are incorporated into the expanded content covered by the NextGen Exam. Echoing the description of the skills covered by the NextGen Exam, the NCBE explicitly designed the MPT to assess an examinee’s ability to

- (1) sort detailed factual materials and separate relevant from irrelevant facts;
- (2) analyze statutory, case, and administrative materials for applicable principles of law;
- (3) apply the relevant law to the relevant facts in a manner likely to resolve a client’s problem;
- (4) identify and resolve ethical dilemmas, when present;
- (5) communicate effectively in writing; and
- (6) complete a lawyering task within time constraints.¹¹

The MPT tests these skills by requiring examinees to perform one or more lawyerly-writing tasks such as “a memorandum to a supervising attorney, a letter to a client, a persuasive memorandum or brief, a statement of facts, a contract provision, a will, a counseling plan, a proposal for settlement or agreement, a discovery plan, a witness examination plan, or a closing argument.”¹²

B. How to Build a NextGen Skills Upcycled MPT Assignment from a Released UBE MPT

The first step to upcycle an MPT is to locate a previously released MPT or any MPT-type assessment that you or a colleague of yours has previously created. The NCBE has released ten UBE MPTs from past exam administrations, accessible online.¹³ An MPT is composed of a file, containing an assigning memo describing

⁹ The NCBE has clarified that “the majority of stakeholders agree that assessing legal writing is something that NCBE does relatively well through the MPT. For this reason, we anticipate having one to two MPT style extended response drafting items (probably 60 minutes a piece) per exam.” Cross et al., *supra* note 8.

¹⁰ *Id.*

¹¹ *Preparing for the MPT*, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/exams/mpt/preparing>.

¹² *Id.*

¹³ *Id.* In addition to the MPTs released by the NCBE, a number of individual jurisdictions also make past performance-test material available. See, e.g., *Performance Tests and Selected Answers*, STATE BAR OF CAL., <https://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination/Past->

the task and all of the factual information, and a library containing legal sources. Using these pre-existing materials, professors can expand the skills assessed to better mirror the NextGen Exam by breaking an existing MPT into five stages of testing (here, we call them testing phases), each of which targets specific skills. The first four phases introduce pieces of the MPT factual case file and library part-by-part to allow for testing of pre-writing NextGen skills through various question formats (such as multiple choice or short answer). The fifth phase requires students to consider the entirety of the original MPT (both file and library) to assess a student's ability to complete the original MPT task or an MPT-style lawyering task. For each testing phase described below, we have provided a sample of the depth of facts we recommend you release together with one or two sample NextGen-style skills questions. All of the samples provided are based on the released MPT *In re Peterson Engineering Consultants (Peterson MPT)*, from the February 2014 administration of the UBE.¹⁴

1. Phase One: Issue-Spotting

In the first phase of the upcycled MPT, students are provided limited facts from the case file, which might include the party names, jurisdiction, and just enough facts to begin thinking about potential issues facing the client. Using these preliminary facts, students are asked to answer several questions. The goals of the first phase of the assessment are to determine each student's ability to identify potential issues raised by a rudimentary fact pattern and then to assess their ability to home in on which facts might be relevant to those issues. These goals tie directly into many of the tasks identified by the NCBE's Foundational Skills and Associated Lawyering Tasks list (Tasks list). One task included on this list is "In a client matter, identify which Foundational Concepts & Principles¹⁵ are likely to affect the outcome of the matter."¹⁶ Below is an example¹⁷ of the type of facts and related question you might include for the first phase of a NextGen assessment based on the *Peterson MPT*:

Exams#ptsa; *Questions and Selected Answers*, TEX. BD. L. EXAM'RS,
<https://ble.texas.gov/selected-answers>.

¹⁴ Feb. 14th MPTs and Point Sheets, NAT'L CONF. OF BAR EXAM'RS,
<https://ncbex.org/assets/Uploads/2014-Feb-MPTs-PointSheets.pdf> (using *In re Peterson Engineering Consultants*) (hereinafter *Peterson MPT*).

¹⁵ *Next Generation of the Bar Exam Content Scope Outlines*, *supra* note 5.

¹⁶ See *Foundational Skills and Associated Lawyering Tasks*, *supra* note 7.

¹⁷ *Peterson MPT*, *supra* note 14.

Facts to Provide Students During Phase 1:

Our client, Peterson Engineering Consultants (PEC), seeks our advice regarding issues related to its employees' use of technology. PEC, all of its employees, and all of its business is located in the state of Franklin.¹⁸

Questions to Ask in Phase 1:

Issue Spotting Question: Identify two theories under which PEC could be held liable for its employees' use or misuse of internet-connected technology.

Sample Effective Answer for Phase 1:

PEC could be held liable for its employees' use or misuse of internet-connected technology through a theory of ratification or vicarious liability.

2. Phase Two: Issue-Spotting and Analysis, Investigation and Evaluation

In the second phase of an upcycled MPT assignment, students would be given additional MPT facts to help them understand the issue identified in phase one and then assigned questions based on the expanded factual scenario. The types of additional facts incorporated at this phase include: facts explaining more about the dispute, facts and information to help students hone the issue, and facts that suggest additional information that might be needed. The goal of phase two is to assess a student's ability to analyze the issue, evaluate the existing facts, and plan for investigation and collection of additional, necessary facts.

Our example for this phase focuses on this item from the Tasks list: "In a client matter that requires additional factual development, identify which facts need to be explored, and/or the best strategy for exploring or eliciting those facts, in order to be able to evaluate the strengths and weaknesses of the client's position and/or the opposing parties' positions based on the relevant legal rules and standards."¹⁹ Here is an example of additional facts and an additional question used in phase two of a NextGen assessment:

Facts to Provide Students During Phase 2:

PEC is a privately owned, non-union engineering consulting firm. Most of its employees work outside PEC's office for over half of each workday. Employees need to be able to

¹⁸ See *id.*

¹⁹ See *Foundational Skills and Associated Lawyering Tasks*, *supra* note 7, at 1–2.

communicate with one another, the home office, and clients while they are working outside of PEC's office. In addition, whenever working—inside or outside of PEC's office—PEC employees need access to the Internet in order to be able to retrieve needed information, documents, and reports. PEC issues its employees internet-connected computers and other devices (such as smartphones and tablets), all for business purposes and not for personal use. After reading the results of a national survey about computer use in the workplace, the president of PEC became concerned about two things: (1) the risk of liability for misuse of company-owned technology and (2) the potential loss of productivity stemming from employee use of technology for personal purposes during work. While the president knows that, despite PEC's policies, its employees use the company's equipment for personal purposes, the survey alerted her to problems that she had not considered.²⁰

Questions to Ask in Phase 2:

Investigation and Evaluation Question: What additional information would you need to gather in order to provide legal advice to PEC related to the issues you identified in phase one?

Sample Effective Answer for Phase 2:

Additional information I would need to gather in order to provide legal advice to PEC includes:

- Does PEC discipline employees or have a discipline plan for misuse of company-owned technology?
- What kind of employment duties do PEC employees need to use internet-connected technology for?
- How has PEC communicated its ownership of and intent to monitor use of internet-connected technology to employees?

3. Phase Three: Client Counseling and Advising, Client Relationship and Management, and Initial Legal Research

In the third phase of an upcycled MPT, students receive all of the facts and factual sources and answer questions related to the client relationship and preliminary legal research steps. At this stage, additional facts might include

²⁰ See Peterson MPT, *supra* note 14.

information on the client's objectives, information on the opposing party's position, and any facts necessary to guide the student in their interactions with the client and beginning stages of legal research. These facts can be delivered through various materials, including emails from the client, transcripts of interviews, or other client documents.

This phase assesses both a client-related task and a research-related task from the NCBE's Tasks list. Our example integrates these tasks: "list 2–3 benefits and 2–3 drawbacks of two approaches to settling disputed issues, consistent with the client's objectives" and "identify an accurate way to frame the research questions that need to be answered."²¹ This example provides the following new facts and poses the following additional questions:

Facts to Provide Students During Phase 3:

The president wants to know what revisions to the company's employee manual will provide the greatest possible protection for the company. After discussing the issue with the president, I understand that her goals in revising the manual are (1) to clarify ownership and monitoring of technology, (2) to ensure that the company's technology is used only for business purposes, and (3) to make the policies reflected in the manual effective and enforceable. Students would also be given an excerpt from the client's employee manual.²²

Documents Provided in Phase 3:

A summary of the results from the National Personnel Association Survey Concerning Computer Use at Work.²³

Questions to Ask in Phase 3:

Client-Counseling Question: Which of PEC's stated objectives would you recommend as the top priority? Why?
Research Question: What research strategies, including appropriate search terms, would be likely to uncover relevant binding sources in this case?

Sample Effective Answer for Phase 3:

Client-Counseling Question: The objective I would recommend as the top priority is the third objective: to make policies in the manual effective and

²¹ See *Foundational Skills and Associated Lawyering Tasks*, *supra* note 7.

²² See *Peterson MPT*, *supra* note 14.

²³ *Id.*

enforceable. The reason I would recommend prioritizing this objective is because, in effect, all three of the client's objectives turn, at least in part, on the completion of this objective. In other words, the first two client objectives seem to require the drafting or redrafting of company policies; any new or revised policies will be useless—because they will potentially remain ineffective and unenforceable—unless this top-priority objective is first satisfied.

Research Question: I would begin my research by locating a secondary source on ratification and respondeat superior. I would use that secondary source to find primary sources, such as cases or relevant statutes, and to develop an expanded list of search terms I could use to find additional authority. After limiting my search to the jurisdiction of Franklin, I would use the following search terms to find additional, primary authority:
Natural language search: employer liability for employee misuse of technology
Boolean search: employer /2 liabil! and employee! /s misuse! /s (technology or computer or phone)

4. Phase Four: Legal Research

In the fourth phase of the upcycled MPT, students are given the complete MPT library. Using this library of legal sources and the factual file, students would answer additional questions involving additional skills. Library materials include a variety of sources, including cases, statutes, or other materials from the MPT jurisdiction. Not all materials in the library need to be relevant to the assigned questions in this phase;²⁴ in fact, including some material that is not needed for the phase four questions tests the important skill of discerning relevance.

The research tasks set forth in NCBE's Tasks list include "identif[ing] the roles and differing characteristics of the sources, including their authoritative weight."²⁵The example below shows the type of materials and questions that one might include in the fourth phase related to this task:

²⁴ *Preparing for the MPT*, *supra* note 11.

²⁵ See *Foundational Skills and Associated Lawyering Tasks*, *supra* note 7.

Documents to Provide in Phase 4:

MPT Library (*Hogan v. East Shore School*, *Fines v. Heartland, Inc.*, and *Lucas v. Sumner Group, Inc.*)

Questions to Ask in Phase 4:

Research and Legal Analysis Question: Using the cases provided, identify which sources are relevant to or dispositive of PEC's potential liability for its employees' use or misuse of Internet-connected (or any similar) technology.

Research Question: How do you plan to use *Hogan v. East Shore School* in your analysis? Select all that apply.

* In a rule statement.

* As highest-level mandatory authority.

* As persuasive authority to fill a gap in mandatory authority.

* As persuasive authority to make a policy argument.

* To interpret ambiguous language.

* As background or framework of analysis.²⁶

Sample Effective Answer for Phase 4:

Fines v. Heartland, Inc., is relevant to the issue of PEC's liability under a theory of ratification or respondeat superior.

Lucas v. Sumner Group, Inc., is relevant to the issue of drafting discipline policies in PEC's employee manual.

I would use *Hogan v. East Shore School* in the following ways:

- In a rule statement
- To interpret ambiguous language
- As background or framework for analysis

5. Phase Five: The MPT Task

In the final phase of an upcycled MPT, students use the entire MPT file and library to complete one or more UBE-style MPT lawyering tasks. For example, pulling from the NCBE's Tasks list, a student might be asked to "draft specified section(s) of the document, demonstrating legal analysis in completing lawyering tasks."²⁷ A variety of lawyering tasks could be used at this stage, from an objective

²⁶ See Cross et al., *supra* note 8.

²⁷ See *Foundational Skills and Associated Lawyering Tasks*, *supra* note 7.

memo or a persuasive brief to “another common document, such as a mediation brief, an opinion letter, or a draft proposal for a contract.”²⁸ Below is an example of the ultimate lawyering task assigned using the *Peterson MPT*:

Questions to Ask in Phase 5:

Writing-Based Lawyering Task: Please prepare a memorandum addressing these issues that our firm can use when meeting with the president of PEC. Your memorandum should do the following:

- o Explain the legal bases under which PEC could be held liable for its employees’ use or misuse of Internet-connected (or any similar) technology.
- o Recommend changes and additions to the employee manual to minimize liability exposure. Base your recommendations on the attached materials and the president’s stated goals. Explain the reasons for your recommendations but do not redraft the manual’s language.

Sample Effective Answer for Phase 5:

See *In re Peterson Engineering Consultants MPT Point Sheet*.²⁹

C. Conclusion

Two things are clear: time is of the essence, and the spotlight is about to alight on skills professors as the focus of the bar exam shifts away from rote doctrinal knowledge and better mirrors the skills needed for entry-level legal practice. Given these two realities, legal writing, clinic, ADR, bar preparation, legal research, and other skills professors must continue—if not expand—our collaborative efforts to develop or, in this case, tweak existing skills-based materials to assess NextGen skills using the NextGen testing methods and to deploy them in law school classrooms across the country. These efforts, however, need not start from scratch; instead, we can begin to build NextGen Exam assessments by simply expanding the existing materials, processes, and assessments that skills professors have been employing for decades, such as the MPT.³⁰ This approach is especially important given the timing of the NextGen

²⁸ *Id.*

²⁹ See *Peterson MPT*, *supra* note 14.

³⁰ For example, legal writing professors have used the MPT to teach UBE-specific legal-writing skills for decades. See, e.g., Sabrina DeFabritiis & Kathleen Elliott Vinson, *Under*

Exam, which means that NextGen Exam examinees likely already sit in many of our classrooms, although the NCBE has yet to release prototype questions, sample answers, or rubrics. Upcycled assignments—like this Upcycled MPT—can easily be shared across the academy and can serve as a Band-Aid while the legal academy begins the arduous task of making larger-scale changes to legal education to better match law school curriculum with the entry-level lawyering skills³¹ now tested on the NextGen Exam.

Pressure: How Incorporating Time-Pressured Performance Tests Prepares Students for the Bar Exam and Practice, 122 W. VA. L. REV. 107, 110 (2019).

³¹ The attempt to better match legal education with entry-level lawyering skills is, of course, not a new concept. AMERICAN BAR ASSOCIATION TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (Robert MacCrate ed., 1992). However, despite skills professors work since the MacCrate Report, progress has been slow.