Law Student Perspective

by Abbie Nordhagen

E-Neff Already: The National Conference of Bar Examiners Says You Need To Know Civil Procedure

The FRCP. No, not the Former Republic of Couch Potatoes (you and me before we began attending law school). We're talking the Federal Rules of Civil Procedure, and, this year, they will be featured prominently on the Multistate Bar Examination (MBE) section of your state's test.[1] What does this mean? Apart from psychological benefits of repeating the name *Iqbal,*[2] the MBE will now feature seven subjects instead of six. Also, if you have outgrown civil procedure puns, you only need to know two things: the Federal Rules of Civil Procedure will be on the MBE this year, and now would be a good time to stop reading.

Don't get your *Hosiery*[3] in a bunch: The MBE is still the same length. The test remains 200 questions spread over six hours. Every year, the MBE includes 10 questions that are experimental and unscored, meaning that 190 count toward the score. To make room for civil procedure, the number of questions devoted to each subject has been redistributed. Before this change, there were 31 to 33 questions on each subject. Now there will be 27 or 28. About two-thirds of the civil procedure questions will test students' knowledge of jurisdiction, venue, and motions. Many official law sources have called it the most significant change on the bar exam in 35 years. But what does that mean for the students? For those of you who are thinking you've had e-*Neff,*[4] this addition will not noticeably alter bar study and may instead be a benefit. This advantage is perhaps why civil procedure has found its way onto the MBE. Maybe, just maybe, the National Conference of Bar Examiners (NCBE) has our best interests in mind.

Civil Procedure Is Important—Learn It

First, it is just plain useful to know procedure. In law practice, numerous cases are disposed of on procedural issues, and pretrial procedure absorbs the lives of many attorneys. Writing an opening statement laced with nuance and poetry—the sexy stuff that kept *Law and Order* on the air for 20 seasons—matters little if an attorney improperly joins a party to a lawsuit. An impeccable brief is of no use if an issue within it is precluded. Procedure ought to be an attorney's bread and butter. A thorough, working knowledge of procedure is also likely to save clients' money, as procedural solutions often come simple and early.

Arguably, federal civil procedure is a more testable MBE topic than the ephemeral, shapeless mass that is criminal law. Which state's criminal law does the MBE test, anyway? Criminal law widely varies from state to state, and generally testing a conglomeration of non-state-specific law may not be helpful to prospective lawyers. The same goes for other subjects. Does anyone really care who owns Blackacre? CUNY School of Law Dean and Professor Kristin Booth Glen noted that the bar exam often features an "inappropriate emphasis on general or majority law, unrelated to the law of the state of administration."[5] The Federal Rules of Civil Procedure, on the other hand, is a defined code that, when changed, changes uniformly in every state. Testing this topic on the bar exam requires aspiring lawyers to learn a defined and utilized area of the law. A working knowledge of the rules will actually benefit a new practitioner, and the topics studied are the same law used in court.

Barbri and Kaplan have hired professors Richard Freer and John Preis, respectively, to prepare students for the change. Freer has taught civil procedure at Emory for 31 years. Preis is in his seventh year of teaching at Richmond School of Law and is in his ninth year of teaching civil procedure. Both professors think the addition wise. Freer noted that "every lawyer should have an understanding of how litigation works. Transactional lawyers, for example, must be aware of how a lack of clarity in their agreements can lead to disputes and how those disputes will be resolved through the formal litigation process."

Preis expressed the same view: "Civil procedure is undoubtedly more prevalent [in practice] than many of the other subjects tested." Civil procedure extends into every other legal topic. "It doesn't make a lot of sense to ask students about the dormant commerce clause, and not about how to file a suit in federal court," he said.

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Freer thinks that the NCBE wanted to emphasize the value of civil procedure, particularly at a time when "American law schools have been going in the wrong direction by cutting civil procedure to a single semester." Civil procedure is foundational to the practice of law. Lawyers ought to assign weight to these fundamentals. The NCBE expects students' knowledge of civil procedure to be extensive enough to confidently answer questions about civil procedure, regardless of the form in which they come. We students should expect the same from ourselves.

This Addition Won't Significantly Change Your Life

Though this addition may alter our May-through-July "lives," to use the term loosely, I propose the change will not be earth-shaking, because we are going to learn federal civil procedure anyway. On bar exams prior to 2015, all states tested some version of civil procedure. That means that not only would we have been expected to know civil procedure on past exams, we would have to know it well enough to write an essay on it. On my recent unofficial count, only six states do not test federal civil procedure on the essay portion of the exam.[6] Instead, these states solely[7] test state civil procedure. The remaining states test some version of federal civil procedure, though the nonconformists refer to it as "Pleading and Practice"[8] or "Jurisdiction of Courts."[9] All of the Uniform Bar Exam (UBE) states test federal civil procedure on the Multistate Essay Examination. When added to non-UBE states, 25 states test only federal civil procedure. The remaining 19 test both state and federal. Totals? Forty-four states already test federal civil procedure, with 25 of the 44 testing federal civil procedure exclusively. Six states only test state civil procedure. The *Erie*[10] truth is that we were going to have to learn civil procedure anyway.

Anecdotally, whenever I take a multiple-choice exam, I learn the information very well, but not perfectly. If I have a working knowledge of all of the information, a question with its various answers prompts my memory. In a sense, I know exactly what is in that brain "drawer"; it's just that I don't immediately know where the "drawer" is located on the desk. In comparison, whenever I prepare for an essay exam, I try to know the information inside out and upside down. When I am required to recall information without being prompted, my memorization is more detailed. In this situation, not only do I know the information each "drawer" contains, the outside of each "drawer" is labeled and alphabetized for easy access.

Educators also note differences between essay and multiple-choice exams. Multiple-choice exams require less concentration. Essay tests expose students who understand the information, not merely those who are "skilled in the art of guesswork."[11] In other disciplines, scholars have noted that essays "have the potential to show originality and a greater depth of understanding of the topic" than multiple-choice exams.[12] In other words, it is nearly impossible for students to score well on an essay exam if they don't know the information, but on a multiple-choice exam, students still have the benefit of old-fashioned luck. To perform well on a civil procedure essay exam, people must mind their P's and Q's. And by that, of course, I mean *Pan American Airways* and quasi in rem jurisdiction.[13]

For those concerned by this addition, the truth is that we were already going to be required to learn the information and to learn it thoroughly enough level to write an essay on it. Of course, it is possible that the multiple-choice section will test nuances as yet untested by state essay exams, but the fact remains that the subject that is now fair game on the MBE was already testable on most states' essay exams. Let's not *Rush*[14] to conclusions.

What Else Is Changing?

Though I do not think the change will largely affect our lives, I don't want to underplay the fact that it is a shift. Freer notes that multiple-choice questions both "open the door for more nuanced and detailed testing" and "permit a broader scope of coverage." He says that now the bar examiners will be free to test "the statutory abrogation of alienage jurisdiction in certain cases involving permanent resident aliens or 'prejudice' class actions under Rule 23(b)(2)." But in case they ask something less obvious, students will have to brush up on obscure rules that were previously unlikely to show up on an essay question.

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Preis also believes that study for the MBE will be more difficult: "Students are going to have to learn more information but not necessarily as an assurance that topics will be less tested." To make the topic study more enjoyable, he wants to "craft a narrative that is memorable."

Specifically, bar prep companies will need to accommodate this change in their lectures and study materials. Preis knows what this task demands of him. Teaching for the bar exam constrains the scope of what is taught. He must teach what the bar exam will test, not what he finds interesting. After so many years of teaching, he knows the topic inside and out and has used secondary sources mostly as an organizational aid. The National Bar Examiners have released 20 sample questions, and he has also reviewed the past Multistate Essay Exam questions written by the National Conference of Bar Examiners. Likewise, Freer has taken advantage of Barbri's question banks to develop questions. Both professors doubt that their own in-class lectures will change. Preis has responded to the addition by slightly altering his exams, particularly by shifting the focus of some questions, but he is still honing in on what is important for legal practice.

Where Do We Go From Here?

Here I am trying to convince you, my fellow law students, that this change won't make much of a difference in your lives. I know many of you may *Balk*[15] at this assertion, instead believing that law school and the bar exam do not prepare us for practice. You ask me, "How does studying the FRCP for a multiple-choice test—which as you, Abbie, assert requires a lesser understanding of the law—actually help in real life?" Students feel tugged around by the requirements of law school, drowned[16] by the reading assignments, and are skeptical at best that this change will make us better attorneys. I don't know whether studying the FRCP for the bar exam will help in practice because I have not practiced, but I do know that generally understanding the FRCP will help us ask the right questions and look in the appropriate places for answers (hopefully in the FRCP, just not during the bar exam[17]). If you are still skeptical, fine, I'll let you keep your eternal pessimism, but I do believe that devoting a couple of extra hours to understanding the FRCP during bar prep can only help us in practice. At the very least, it will displace the rule against perpetuities, and real lawyers don't even know that.[18]

Whether you agree or disagree, we all will study for the bar and take the new MBE anyway. I'll be right there with you. ⊙

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Endnotes

[1]Unless you are from Louisiana. No *Burger King* for you. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

[2]*Ashcroft v. Iqbal,* 556 U.S. 662 (2009).

[3]*Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979).

[4]*Pennoyer v. Neff,* 95 U.S. 714 (1878).

[5]Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to "Maccrate" Entry to the Profession,* 23 Pace L. Rev. 343, 366 (2003).

[6]Florida, Maine, Maryland, Massachusetts, Texas, and Vermont.

[7]*International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

[8]Indiana.

[9]Wisconsin.

[10]*Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938).

[11]Scott Weiss, *Contemplating Greatness: Learning Disabilities and the Practice of Law,* 6 Scholar 219, 235 (2004) (asserting that in the sphere of disability accommodations, it is not viable to accommodate by changing an essay exam into a multiple choice exam).

[12]William B. Walstad & William E. Becker, *Achievement Differences on Multiple-Choice and Essay Tests in Economics,* 84 Am. Econ. Rev. 193, 192–96 (1994).

[13]I did warn you to stop reading if you're too old for puns.

[14]*Rush v. Savchuck,* 444 U.S. 320 (1980).

[15]*Harris v. Balk,* 198 U.S. 215 (1905).

[16]*See Hickman v. Taylor,* 329 U.S. 495 (1947) (analyzing the discoverability of attorney work product in a factual situation in which a tug boat sank and the attorney interviewed all surviving seamen).

[17]*See,* e.g., *In re Bedi,* 917 A.2d 659, 669 (D.C. 2007) (denying an applicant admission for consulting notes in a bathroom stall during the bar exam—seriously, don't do that).

[18]*See Lucas v. Hamm,* 364 P.2d 685, 690 (1961) (holding that errors with regard to the rule against perpetuities cannot be considered malpractice because nobody really understands it, anyway); *see also* Leach, *Perpetuities Legislation* 67 Harv. L. Rev. 1349 (1954) (describing the rule as a "dangerous instrumentality in the hands of most members of the bar").