

## Performance Lecture

The Performance Section of the California Bar exam is designed to test your lawyering skills that you will need in order to be a successful lawyer. It is one of several testing formats that the Bar examiners use to determine an applicant's competence to practice law.

Success on the performance test requires that you keep control over your time and follow the instructions. Too many students quickly read the performance exam and launch right into writing their answer. Many students do not allocate their time, nor do they take the time to outline the performance. You need to be organized. If you do not allocate your time, or set up an outline you will either not finish on time, or you have not have successfully answered the call.

### What is in a Performance Exam

Each examination packet contains anywhere from 15 to 40 pages of reading material that is usually divided into three parts. Part one is the general instructions, part two is the **File** where the facts of the controversy are located and part three is the **Library** where the legal authorities are located.

The Performance Exam tests your reading comprehension. You must be able to read and comprehend the material thoroughly the first time through. You will not have enough time to re-read the material. Therefore, you must read each document carefully, so you understand the facts as you proceed through the performance.

In this age of television and text-messaging, the ability to read well is going by the wayside— it is becoming a lost skill. Unfortunately, you have chosen a profession where reading complex documents is the cornerstone of successful lawyering. So, you need to be quick and have the ability to comprehend what you are reading at a quick speed.

The Performance section also tests the student's ability to apply the law to the relevant facts. As you proceed through the **File**, you will be required to analyze the facts in order to distinguish between the relevant and irrelevant facts. This will enable you to extract those facts that are material to the determination of the assignment that you are instructed to write.

There are several ways to help you identify relevant facts:

1. The call of the questions. The call of the questions will narrow you to the issue/issues that are to be analyzed.
2. In the file you will see facts that are repeated many times, or emphasized.
3. The facts in the case authorities analogous or distinguishable from your file facts.

In taking a Performance exam, you need to be organized. How do you organize your exam? It is absolutely essential to be able to organize thoughts and arguments in a clear and logical manner. You should be prepared to spend the ninety minutes to two hours of the allotted time to outline and organization your exam answer. That is why it is important to outline the performance exam. How to set up your outline we will address later.

### How to write the Performance exam answer

You must be able to write your answer in a clear, concise, and logical manner. You must explain the position being asserted and keep it simplistic. The performance portion of the Bar exam does test your communication skills.

In addition, the performance section also tests your ability to perform under a stressful situation. It is natural to expect you will experience some anxiety during the exam. However, if you have confidence in your abilities, you will be able to overcome the stress. No matter how many sample exams you take, you cannot know the exact question you will be asked nor the exact format the examiners will choose. The best way to write a strong Performance exam answer is to go into the Bar examination prepared. I would recommend you practice 10-20 performance exams before you take the Bar exam. Remember, the Performance exam is self-contained. There is nothing to memorize and there are no tricks in the question. Your general knowledge of legal principles learned throughout law school, will give you the basis necessary to effectively handle the performance exam.

## **Breaking apart each portion of the performance exam:**

### **1. The General Instructions:**

The general instructions are generally a page or two pages in length. In the instructions you are told who the parties are to the lawsuit, and who you represent. You are also told the type of action civil or criminal, what jurisdiction you are in (usually the examiners state Columbia), the task you are to complete, like a memorandum, client letter, or other task like draft an opposition to a summary judgment motion. In addition, you are told of you need to draft your task in either an **Analytical or Persuasive** explanation, and what documents you will find in the file and the authority in the library. You will see that the more Performance exams you read that the general instructions are the same except for the jurisdiction, the task being asked and the grading of that task. Thus, you should become familiar so you will not need more than a minute to read the general instructions.

### **2. The FILE:**

The file generally contains anywhere from 10 to 20 pages. The factual information you need to perform your task is obtained from this section.

#### **A. The letter or memorandum to the Applicant**

The first document in the file, which follows the General Instructions, will typically be a "letter or memorandum to the Applicant", which will explain the type of document you will be expected to produce. This is an extremely important document because it will describe the general basis of the controversy, describes the document/documents that the Applicant is to produce and contains call of the question, and/or the instructions on how to perform the task.

Before reading anything else in the file, you should immediately turn to the "letter or memorandum to the Applicant" and look at the call of the question which is usually found at the end of the letter to the Applicant. The call tells you what your assignment is and, in most cases, identifies and/or gives you guidance related to the specific issues you must address.

By first reading the call of the question, you will be able to determine the subject matter of the examination and the issue/issues that are being presented. This will also assist you to recognize the facts needed from the file to support your analysis when you turn back to read the contents of the letter to the associate and the rest of the file in its entirety. Generally the Bar examiners have numbered the calls of the question which makes them easy to spot.

Please make sure you always follow the directions exactly as they are given by the examiners in the calls of the question. The call/calls are straight forward. Do not second guess the examiners. Simply handle the question as instructed using your general knowledge of law to identify the issue/issues if not specifically given in the calls themselves.

If the call of the question does not identify the specific issues being raised in the examination, look to the letter to the associate. Many times the examiners identify some documents in the file materials or in the Library materials that will be especially helpful for isolating issues raised in the examination. In this instance, it is very helpful to preview these materials at this early stage in the examination.

You should be able to identify your initial issues from the information given in the letter to the applicant and/or the call/calls of the question. Once doing so, you should immediately begin your outline by setting out each identified issue on a separate sheet of outline paper.

The call/calls of the question must be interpreted carefully, not only to determine what issues are being tested but also to determine which of three distinct testable categories are being addressed for purposes of analysis.

The three testable categories are:

1. Legal Analysis and Reasoning
2. Factual and/or Evidentiary Proof Analysis
3. Tactical Questions

Some examinations will require an analysis in all three categories, others only one or two. Examine the situational in terms of all three of the testable categories, but analyze in only those categories that apply to your performance examination.

### **1. Category # 1 - Legal Analysis and Reasoning:**

The task asking you to do legal analysis and reasoning ask you to analyze your case with the given authority in the library. This type of call requires you to determine what legal and/or factual issues are being raised. Students must analyze the relevant facts from the file and apply the appropriate legal rules that are found in the library. You will be required to analyze the merits of your action based on the applicable authority, and show how the facts do or don't support the authority and why.

#### **A. Examples of the calls that are requiring you to do legal analysis and reasoning:**

1. What legal theories are available to the Plaintiff and the contentions likely to be raised by the Defendant?
2. Was there a duty of care owed to our client?
3. What arguments will most likely allow our client to prevail on the theory of premise liability?
4. Draft a persuasive argument to the insurance company in letter form arguing the recreational use statute does apply?
5. What causes of action your client may assert?
6. What are the merits of the causes of action given in the complaint?

7. What procedural defenses are available to a derivative suit?
8. Is our client within the class of persons governed by a state statute?
9. Prepare a memo setting forth our position on disclosure of items requested by the District Attorney.
10. Are the parties bound by an enforceable contract?

**B. How to apply the Legal Analysis and Reasoning:**

Where legal analysis and reasoning is being tested, students must not only determine the issues that are being raised, but also which elements must be analyzed. Remember in some examinations, all of the elements of a given issue must be analyzed. In other examinations, only a few of the elements are placed at issue and must be analyzed. For instance, if you are asked to determine whether the client may bring an action for Negligence but the call of the question does not state which of the elements of Negligence must be analyzed, you would be expected to determine which element or elements are at issue.

To show a prima facie case for Negligence you need to show that the Defendant owed a duty to the Plaintiff, that he breached that duty, that the Defendant's acts were the actual and proximate cause of Plaintiff's damages. Having identified Negligence as the issue raised in the call, go to your outline and place the issue on the outline followed by the elements

DUTY, BREACH, CAUSATION AND DAMAGES, as illustrated in the example below.

Facts: \_\_\_\_\_ Favorable Authority \_\_\_\_\_ Unfavorable Authority \_\_\_\_\_

**Duty**

**Breach**

**Causation**

**Damages**

Remember to leave sufficient room between each element so that you can insert the relevant facts from the file, to each element as you identify them from each document in the file.

\*Note: If you do not know the elements based on the call or after reading of the file, you will be able to find the elements in the authorities in the library.

In many examinations, all of the elements of a given issue must be analyzed. In other examinations, only one or two elements of a legal principle will be at issue. Do not discuss elements which are not at issue. You will know which elements are at issue by:

1. The call of the question and/or
2. The amount of facts that are relevant to the element and/or
3. Authorities in the library that raise an analysis of a particular element.

If the legal authorities address a particular element and not all of the other elements, there is a strong likelihood that the other elements are not at issue and should be eliminated from your outline before you begin to write. Example Negligence

## **2. Category # 2 - Factual and/or Evidentiary Proof Analysis:**

The task of factual and/or evidentiary analysis is asking you to consider the facts and burden of proof. In other words do the facts support the tort or crime that is at issue? You will use the library as your legal authority pulling out the rules and discuss the facts to see if they support or do not support the issue that was raised. You will be obtaining the facts from witness interviews, or written documentary evidence and/or demonstrative evidence, etc. As previously stated analyze all of the elements of a given issue unless only one or two elements are placed at issue. Do not discuss elements which are not at issue. Again you will know which elements are at issue by:

1. The call of the question and/or
2. The amount of facts that are relevant to the element and/or
3. Authorities in the library that raise an analysis of a particular element

In this type of task, you may be asked to prepare a declaration, draft interrogatories, or a closing argument. You want to be familiar as to what these documents are and what is required. A declaration is a simple narration of the facts known by the witness. The declarant may only state the facts that are within his or her personal knowledge and must be relevant to the issues raised in the examination.

Interrogatories are a series of written questions presented in question form, and can only be asked to a party of the action. The purpose of an interrogatory is to obtain specific answers concerning a parties contentions and the facts supporting them. The purpose is to obtain facts known by the party, any documents in support of the action, witnesses, tangible evidence, and so on.

A closing argument is a summation of the facts that have been argued before the trier of fact. Each party is given the opportunity to remind jurors or judge about key evidence that was presented at trial and to persuade the jury or judge to adopt a favorable interpretation of their clients position.

### **A. Examples of the calls that is factual and/or evidentiary:**

1. What documents or other evidence needs to be obtained?
2. Will expert testimony be necessary to our case?
3. Prepare an affidavit for Mr. Jeffery that can be used to support our motion alleging violation of the fourth Amendment?
4. Prepare a memo setting forth our position on disclosure of items requested by the District Attorney?
5. What additional facts do we need in order to support the claim?
6. If we proceed to trial on this matter, do we have enough evidence to prove every elements of each offense beyond a reasonable doubt?
7. Write a memorandum to persuade the court to issue a judicial recommendation against deportation?

### **3. Category # 3 - Tactical:**

Tactical questions ask you to decide how to best handle the cause of action. In order to determine how the action should be handled you will have to look to the legal theory and how it is supported with the facts, and then look to the factual proof to see if the facts support the case. The best way to handle this type of question is by looking to the library and see how the law was applied in those cases. Look to the outcome and what is the objective in your case. Look to the goals of the parties, and how to achieve those goals. Remember you need to make sure you support your conclusion.

#### **A. Examples of the calls that is tactical:**

1. Should we settle or try the case?
2. Is it best to bring a motion to dismiss on the answer or the complaint?
3. How should we respond to Plaintiffs demand?
4. What are the consequences of rejecting versus accepting the goods?
5. Evaluate the contract to determine if meets our client's needs?
6. What issues should we discuss when counseling the client whether to accept or reject the settlement?

When pulling the facts out of the file and into your outline you can use your general knowledge of the law to help you determine what is relevant, both factually and legally, in your exam. However, do not use the specific rules of law you learned in law school to write your performance answer. You must use the legal authority cited in the library. You should never just skim a document. In the file you should read each document since it may contain facts that may not have been mentioned in the previous materials.

### **3. LIBRARY:**

The library generally contains from 10 to 25 pages and consist of codes/statute and cases. Typically, the library will contain two to three codes/statutes with four cases or no codes/statutes and six cases. The codes/statutes, average one-half page in length. The cases average three to four pages in length. It is important to read each authority in its entirety even if you think you recognize it. The rationale or the holding of the authority may have been changed by the Examiners to suit their purposes. Be aware that some of the legal authority in the library may apply to more than one issue in the exam. Therefore, do not be afraid to use the authority more than once in your answer. You must use and apply each and every authority in the library. Always use the law as it is stated in the legal authorities even if it contradicts something you learned in law school.

When reading the library materials, take the authorities in the order that they are presented and book-brief those cases and then transfer the relevant information, factually and legally, to the outline where pertinent.

### **What is Book Briefing?**

In book briefing a code or statute, you need to first determine the issue or issues to which the law applies. Mark the code or statute with an "R" in the margin of the code or statute. Then identify the buzz words from the guidelines, if they are given, and mark them with an "A" in the margin as the analysis.

The student needs to identify the underlying elements in the code or statute and see if based on the facts that the facts do fall within its purview. In addition, a code or statute will often contain more specific guidelines for its application which is considered to be code analysis. Make sure you use the language in the code or statute in order to show the examiner you are using the authority.

In book briefing a case, you need to look to the date and the jurisdiction of the case. Determine which party prevailed. This will tell you in which column to place the case in your outline. Cases in which the Plaintiff prevailed are to be placed in the Plaintiff column.

Likewise, cases in which the Defendant prevailed are generally to be placed in the Defendant column. Second, by determining from the outset which party prevailed, you will be able to know what to look for when reading the case. For example, if you represent the Plaintiff and the Defendant prevailed in the case in question, you will look for characteristics that are distinguishable from your client's file as you read through the case. Similarly, if you are reading a case decided in favor of the Plaintiff, you will look for characteristics which are analogous to your own case.

Underline the relevant facts and place an "F" in the margin next to the underlined facts. Then, underline the rule and place an "R" in the margin to mark its place. There may be more than one rule in the case. If so, mark one rule with an "R1". Number each successive rule with a number that corresponds to the issue number to which it applies. Identify key buzz words and analysis by placing an "A" in the margin to mark the place. In the event you have multiple issues/rules, you should number the analysis to indicate the issue/rule to which the case analysis applies. Then underline the conclusion and mark its place with a "C" in the margin.

When analyzing a case that was decided in favor of your client's position, look for facts and the rationale from the case that are significantly similar to your facts of your client's case. When analyzing cases decided in favor of your adversary's position, look for characteristics significantly different from the facts of your client's case.

Distinguishing cases: There are several suggested approaches to distinguishing unfavorable cases as you analyze them. These should be considered in the following order:

1. By identifying the facts of the case that are significantly different from the facts in your File making the case inapplicable to the facts in your file.

2. By identifying the case reasoning that is inconsistent in its application to the facts in your file.
3. By determining that the Authority is from a jurisdiction outside of the exam jurisdiction.
4. By looking to the case date and language that shows that either the authority is outdated and/or based on public policy the result is not supported based on the authority and how it was previously applied versus how it should be applied today to the facts in your file.

#### **4. Outlining and your authority**

Outlining is the key to a well written answer. It is virtually impossible to do well on the Performance exam if you do not outline. You will not be able to remember the specifics of the many facts in the file you have read, and the various legal authorities if you do not outline. If you outline properly, it will take little or no additional time as you will be outlining while you are reading through the exam packet. Do not read the entire packet and then try to outline; this method will cause you to run out of time. I would recommend that you outline in pencil so you can move facts or authority around on your outline without using arrows that will only confuse you and cause you to abandon your outline.

#### **5. Time Allocation**

You must monitor your time carefully so that you will have sufficient time in which to finish the exam. You must practice performance exams under actual test conditions, strictly adhering to the time limitations, so that get your timing down.

#### **Suggested timing for your three hour performance exam**

##### **30-40 Minutes for General Instructions and file Materials**

Read the General Instructions, then the Letter to the Applicant, and set up your outline pursuant to the call/calls of the question. Then fill in the factual material relevant to each issue on your outline as you read the remaining documents in the file.

##### **50-70 Minutes for the library**

Read each authority, book briefing as you read. Then transfer the relevant information from your book brief onto your outline where pertinent. Follow this procedure for each authority as you proceed through the Library.

##### **10 Minutes to review your outline and make adjustments**

Use this time to make any final additions, deletions, modifications, or other adjustments to your outline. Many times, arguments or other information considerations will occur to you while reviewing your outline and reflecting on its contents that may not have occurred to you as you were proceeding through the individual examination materials.



This is your opportunity to consider all of the data, factually and legally, that is relevant to each issue/element before you begin writing your ultimate response. Formulate your final arguments and strategize how to present your written answer.

**60-90 Minutes to write your answer**

If you have organized and outlined properly, you should have no problem completing the written portion of the exam in one hour.