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MPRE Reconsidered, The

Leslie Levin

University of Connecticut School of Law

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ESSAY

The MPRE Reconsidered

BY LESLIE C. LEVIN*

INTRODUCTION

Recently, after some years of law practice and teaching, I took the Multistate Professional Responsibility Examination ("MPRE") to gain admission to another state's bar. Although I had never before taken the MPRE, the subject of professional responsibility was not a new one for me. In fact, I approached the MPRE with relatively little trepidation because I actually knew something about the subject.¹ Too much knowledge, however, is not a good thing when it comes to taking the MPRE. Indeed, my two-hour experience with the test was akin to an out-of-body experience.

The MPRE is required for bar admission in forty-seven states² and was taken by almost 50,000 people in 1996.³ It is based on model rules and is

* Associate Professor of Law and Director of Lawyering Process Program, University of Connecticut School of Law. J.D. 1979, Columbia University School of Law.

¹ Over the last dozen years I taught a law school professional responsibility course, served on a bar association committee that opined on New York's Lawyer's Code of Professional Responsibility, wrote about mandatory lawyer disclosure rules, and served on a large law firm's ethics committee. Although I still occasionally suffered from exam nightmares, I thought I should be able to handle the MPRE.

² See National Conference of Bar Examiners, *1997 Information Booklet - Multistate Professional Responsibility Examination 1* (1996) [hereinafter *1997 Information Booklet*]. Only three states (Maryland, Washington, and Wisconsin) decline to use the MPRE. See *Comprehensive Guide to Bar Admission Requirements 1996-97* 72 (A.B.A./National Conference of Bar Examiners 1996) [hereinafter *Comprehensive Guide to Bar Admission*] (The *Comprehensive Guide to Bar Admission* indicates that Delaware, Pennsylvania, and Virginia also do not require the MPRE. The information about these three states was updated based on telephone calls to those states' respective Bar Examiners.). The MPRE also is used in the District of Columbia, Guam, the Northern Mariana Islands, and the Virgin Islands. *Id.*

³ See *1996 - Statistics*, B. EXAMINER, May 1997, at 15, 30 (noting that 49,680 people took the test in 1996).

therefore best taken by test-takers who know little about any particular state's professional responsibility rules or bar discipline practices. The National Conference of Bar Examiners ("NCBE") designs the questions so the correct answers will be the same under both the American Bar Association's Model Code of Professional Responsibility ("Model Code") and its Model Rules of Professional Conduct ("Model Rules"),⁴ although neither model formulation has been adopted in its entirety in any state.⁵ Approximately ten to fifteen percent of the questions on the MPRE concern the model ABA Code of Judicial Conduct, although judicial codes also vary from jurisdiction to jurisdiction.⁶

My criticism of the MPRE is not simply that it may be more challenging for applicants who actually know something about state professional responsibility rules than for those who do not. The problems run deeper. The MPRE has become virtually a national admission test for lawyers, yet until very recently, there has been little public questioning of its focus or its usefulness.⁷ While the MPRE has done much to bring professional

⁴ See 1997 *Information Booklet*, *supra* note 2, at 25. Beginning in March, 1999, the correct answers to questions relating to attorney discipline will be governed exclusively by the Model Rules. See *infra* text accompanying notes 56, 57

⁵ Approximately 40 jurisdictions have adopted some variation of the Model Rules. See STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS STATUTES AND STANDARDS 3 (1997). Many states that have adopted the Model Rules format have deviated significantly from the text of those rules. See *id.* at xxii. Most other states continue to use some version of the Model Code.

⁶ For example, the Federal Judicial Conference adopted a variation of the 1990 Model Code of Judicial Conduct. See *Code of Conduct for United States Judges*, 150 F.R.D. 307 (1992). About half of the states have adopted at least part of the 1990 Model Code. See JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS § 1.02, at 4-5 & n.20 (2d ed. 1995).

⁷ Occasionally, academics or judges will take a passing swipe at the MPRE. See, e.g., Mary C. Daly et al., *Contextualizing Professional Responsibility: A New Curriculum for a New Century*, 58 LAW & CONTEMP PROBS. 193, 195-96 (Summer-Autumn 1995) (noting that studying for MPRE "requires a mastery of cognitive dissonance, both as to content and format"); *In re Voorhees*, 403 N.W.2d 738, 742 (S.D. 1987) (Henderson, J., concurring and dissenting in part) (stating that students studying for the MPRE "must become buzzword artists").

The fact remains, however, that relatively little has been written about the MPRE and what little commentary does exist was written mostly by uncritical bar examiners. See, e.g., Marygold Shire Melli, *Letter from the Chair*, B. EXAMINER, May 1990, at 2 (claiming that the MPRE requires the examinees to "master" the subject of professional responsibility). Only very recently has the National Conference of Bar Examiners begun to reconsider the usefulness of the examina-

responsibility rules to the attention of bar applicants, it also has unintentionally trivialized the subject because it tests hypothetical standards, its range is very limited, and it covers some topics irrelevant to all but a tiny percentage of lawyers.⁸ More important, the MPRE requirement now substitutes in most states for any requirement to demonstrate knowledge of the professional responsibility rules and related laws of that jurisdiction.⁹ It creates absolutely no incentive for bar applicants to familiarize themselves with the actual professional responsibility law of the jurisdiction in which they hope to practice, and gives no assurance they will do so.¹⁰

In this Essay, I make two assumptions. The first and less controversial assumption is that it is important for lawyers to be familiar with the professional responsibility law of the jurisdiction in which they are practicing.¹¹ This assumption is based in part on personal observations and other

tion. *See infra* text accompanying notes 55-58.

⁸ While 10-15% of the MPRE is devoted to judicial ethics, it appears that fewer than 1% of all lawyers are state court judges. In a telephone interview on October 8, 1996, Pamela Robinson, Associate Director for the Division for Bar Services, American Bar Association, stated that the total number of lawyers in the U.S. is 946,499. Of all lawyers, only 8877 are general jurisdiction state court judges. *See BRIAN J. OSTRAM & NEAL B. KAUDER, EXAMINING THE WORK OF STATE COURTS, 1994: A NATIONAL PERSPECTIVE FROM THE COURTS STATISTICS PROJECT 14* (National Center for State Courts 1996). Lawyers typically become judges many years after graduating from law school and, presumably, many years after taking a bar examination. *See, e.g., SECOND CIRCUIT REDBOOK 1995-96* (Vincent C. Alexander ed., 1995) (indicating average length of time between graduation from law school and assumption of judicial office for all federal circuit, district, bankruptcy, and magistrate judges listed was over 20 years).

⁹ In this Essay, the term "professional responsibility rules" is used to describe the formal code or rules adopted by a state to govern lawyers' professional conduct. The term "professional responsibility law" includes both the professional responsibility rules and other law that may govern the obligations of lawyers, including aspects of agency law, criminal law, civil procedure, evidence, and tort law.

¹⁰ To be fair, some states continue to test on the subject of professional responsibility on their bar examinations, but the testing is sporadic and often redundant. When I spoke with a fellow test-taker after the MPRE, he expressed surprise that two of twelve essay questions on the Connecticut bar exam had been devoted to professional responsibility subjects, but also assured me that he was tested on "general principles" found in the Model Rules and not on the specifics of the Connecticut Rules of Professional Conduct. This was confirmed by the Connecticut Bar Committee. Telephone Interview with R. David Stamm, Administrative Director of the Connecticut Bar Examining Committee (Mar. 12, 1997).

¹¹ This assumption further assumes that the professional responsibility rules and laws are wisely conceived, and that lawyers should know the rules rather than

anecdotal information suggesting that lawyers who know the professional responsibility laws will attempt to comply with many of them.¹² This assumption leads me to conclude that there should be some requirement that bar applicants or new lawyers at least *read* the professional responsibility law of the state in which they intend to practice. The MPRE does not insure this will happen, and may actually reduce the likelihood it will occur because so many states use it as a substitute for demonstrating knowledge of the state's professional responsibility law.

The second assumption is that bar applicants should be required to *demonstrate* some knowledge of the professional responsibility laws before they are admitted to a state bar. The broad question of whether bar

attempt to intuit the right response.

¹² Relatively little is known about the extent to which lawyers obey particular professional responsibility rules and, if they do, why they do. The development of ethics committees and complicated "conflicts checks" within law firms to avoid conflict-of-interest problems suggests that lawyers in certain practice settings attempt to comply with the known professional responsibility rules, where possible. *See, e.g.,* Susan Saab Fortney, *Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 GEO. J. LEGAL ETHICS 271, 280-81, 285, 287-89 (1996) (noting increasing use of conflict of interest procedures and ethics committees by law firms); *see generally* Jonathan M. Epstein, Note, *The In-House Ethics Advisor: Practical Benefits for the Modern Law Firm*, 7 GEO. J. LEGAL ETHICS 1011, 1013 (1974) (noting increasing need for ethics committees). My own experience in a large law practice revealed that many lawyers attempted to comply with the professional responsibility rules governing lawyer advertising, contacting unrepresented parties, fee arrangements, escrow accounts, and lawyers acting as witnesses. At the same time, there is evidence that lawyers will not follow professional responsibility rules that raise some of the most fundamental moral, economic, and social conflicts for lawyers. For example, there is empirical evidence that lawyers will not follow rules requiring them to disclose client confidences to prevent financial injury to third parties. *See, e.g.,* Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Harm Others*, 47 RUTGERS L. REV. 81, 128-30 (1994) (describing a survey of New Jersey lawyers revealing that few attorneys disclosed client confidences even where disclosure was necessary to prevent substantial harm to others). There also is evidence that lawyers will not report the known misconduct of other lawyers, even though they are required to do so. *See, e.g.,* Cynthia L. Gendry, *An Attorney's Duty to Report the Professional Misconduct of Co-Workers*, 18 S. ILL. U. L.J. 603, 606 (1994); Ronald D. Rotunda, *The Lawyer's Duty to Report Another Lawyer's Ethical Violations in the Wake of Himmel*, 1988 U. ILL. L. REV. 977, 979 & n.16 (1988).

applicants should be tested on their knowledge of the law as a condition of bar admission has been debated since at least the Jacksonian era. That question is beyond the scope of this Essay.¹³ The more specific question I raise is whether the MPRE is the best vehicle for insuring that bar applicants acquire and demonstrate knowledge of professional responsibility law, or whether it is time to reconsider use of the test.

Before addressing that question, it may be useful to briefly consider the MPRE's history. The MPRE was first introduced in 1980 in response to concerns about lawyers' ethical conduct and the public's perception of lawyers.¹⁴ Up to that time some states tested professional responsibility only minimally or not at all on their bar examinations and it was possible to gain admission to the bar without demonstrating awareness of any rules of professional responsibility.¹⁵ In addition, when tested on professional responsibility, examinees were required to answer essay questions that were subject to the idiosyncratic views of the examiners.¹⁶ By designing a multiple choice test of professional responsibility rules to supplement state bar examinations, the NCBE intended to address these concerns.

Unquestionably, the MPRE was a step in the right direction of insuring that lawyers admitted to practice acquire some knowledge of basic professional responsibility rules. The widespread use of the MPRE also has

¹³ Bar examinations are used in all fifty states and apparently are here to stay – in one form or another – for the foreseeable future. A summary and analysis of the debate over the wisdom of requiring any sort of bar examination as a condition of admission appears in Daniel R. Hansen, Note, *The Bar Examination: Justifications and Alternatives*, 45 CASE W. RES. L. REV. 1191, 1195-96 (1995).

¹⁴ In the mid- to late-1970s, the organized bar, still concerned about the impact of the Watergate scandal on the image of lawyers, was busy with recommendations to improve the lawyer disciplinary system and was beginning to consider revisions to the existing ABA Code of Professional Responsibility. By 1975, California implemented a separate bar exam that focused exclusively on professional responsibility issues. It was the forerunner to the MPRE, which made its debut in March 1980. See Eugene F. Scoles, *A Decade in the Development and Drafting of the Multistate Professional Responsibility Examination*, B. EXAMINER, May 1990, at 20; see also Joe E. Covington, *Multistate Professional Responsibility Examination*, 50 B. EXAMINER 21 (Nos. 1 - 2 1981).

¹⁵ See Frank Morrissey, *The MPRE. Ten Years Old and Exceeding Expectations*, B. EXAMINER, May 1990, at 4; Francis D. Morrissey, *Report of the Multistate Professional Responsibility Examination Committee*, 50 B. EXAMINER 18 (Nos. 1-2 1981).

¹⁶ See Scoles, *supra* note 14, at 21.

symbolic value: it helps validate lawyers' claims of professionalism,¹⁷ it fosters a perception among clients and the public at large that lawyers are required to act "ethically," and it sends a message to admitted lawyers that they are expected to know basic professional responsibility rules.¹⁸ There is a tendency, however, particularly where the regulation of lawyers is involved, to say "we worked on fixing it, therefore it is fixed."¹⁹ In fact, the notion that we should be satisfied with the continued use of the MPRE deserves closer examination.

At this point in the evolution of the education and regulation of American lawyers, the value of the MPRE is far more symbolic than real. While the symbolism is not insignificant, as a practical matter the current MPRE does no more than insure that bar applicants acquire and display some knowledge of the model professional responsibility rules before they practice law. This familiarization with model rules is a job that is usually performed by law

¹⁷ "Professional" status is important for a number of reasons, including lawyers' self-perception and economic well-being and the public's perception of lawyers. There have been many efforts to define "professionalism" but there is no common definition of the word. See Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES, TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 144, 145-48 (Robert L. Nelson et al. eds., 1992). The most recent ABA definition of the "characteristics of the professional lawyer" includes "learned knowledge" and "ethical conduct and integrity." ABA Professionalism Comm., *Teaching and Learning Professionalism*, 1996 A.B.A. SEC. LEGAL EDUC. & ADMISSION TO THE BAR 6-7 [hereinafter *Teaching and Learning Professionalism*].

¹⁸ This is, however, a problematic message for reasons discussed *infra* text accompanying notes 37-40.

¹⁹ This tendency is perhaps best illustrated by the history of efforts to improve lawyer discipline systems. In 1970, the ABA-commissioned Clark Committee Report declared the lawyer discipline system "scandalous" and listed 36 specific recommendations for reforming the system. See ABA Special Committee on Evaluation of Disciplinary Enforcement, *Problems and Recommendations in Disciplinary Enforcement* (1970). Most states reacted to the report by increasing their budgets and making modest changes in their lawyer disciplinary systems. The ABA and the states then announced that the states had "resolved" many of the problems when in fact they had just begun to address them. See, e.g., ABA Comm'n on Evaluation of Disciplinary Enforcement, *Lawyer Regulation for a New Century*, 1992 A.B.A. CTR. FOR PROF'L RESPONSIBILITY XIV; see also William T. Gallagher, *Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar*, 22 PEPP. L. REV. 485 (1995) (chronicling history of this phenomenon in California).

schools²⁰ and it is a job they perform tolerably well.²¹ If bar admission requirements relating to professional responsibility are to go beyond the symbolic, however, they must do more to insure that lawyers admitted to practice have some knowledge of the professional responsibility law of the state in which they intend to practice. At the same time, bar admission requirements should not penalize those who know something about a particular state's laws.²²

My personal challenge while taking the MPRE was to step back from what I knew and attempt to divine what the NCBE thought the answers should be in the narrow and hypothetical world of the Model Rules and Model Code. So, for example, when a question asked whether a defense

²⁰ The ABA accreditation standards for law schools state that law schools shall require that all students in the J.D. program receive instruction in "the history, goals, structure, duties, values, and responsibilities of the legal profession and its members, including the *ABA Model Rules of Professional Conduct*." "AMERICAN BAR ASSOCIATION STANDARDS FOR APPROVAL OF LAW SCHS. & INTERPRETATIONS § 302(b) (1996) (emphasis added).

²¹ An ABA survey of young Chicago lawyers and rural lawyers indicates that practitioners believe that sensitivity to professional ethical concerns was taught and learned mainly in law school. See Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 479, 481, 483-86 (1993).

There are, of course, a number of reports that teachers of professional responsibility courses do not feel the course is well-received or successful. See, e.g., Daly et al., *supra* note 7, at 194-96, 199; Roger C. Cramton & Susan P. Koniak, *Rule, Story and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 146-47 (1996) (stating that many law faculties "remain convinced that the subject is unteachable or believe that it is not worth teaching"). There is some indication that those feelings may be changing as new curricula are developed. See Daly et al., *supra* note 7, at 200, 209. Regardless of the shortcomings of law school professional responsibility courses, few would dispute that they usually accomplish more than a four-hour bar review lecture that covers the "black letter" rules. See, e.g., BAR/BRI, BAR REVIEW MPRE COURSE PAMPHLET (1997).

²² The possibility that bar applicants actually know something about a state's professional responsibility law is a real one. Some applicants were taught about a particular state's professional responsibility rules in a law school professional responsibility course. Others may have learned some state rules while working in live-client clinics and appearing in court pursuant to student practice rules. In addition, it is quite likely that the approximately 15% of MPRE test-takers admitted to practice, see Cynthia Board Schmeiser, *A Ten-Year Profile of the Administration of the MPRE Program*, B. EXAMINER, May 1990, at 6, 55, already know something about the rules in the jurisdiction in which they are practicing law.

attorney has a duty to provide the correct information to a sentencing judge who had been incorrectly advised by the prosecutor that the attorney's client had no prior convictions, I had to sort through the answers under the ABA Model Code of Professional Responsibility (no), the ABA Model Rules of Professional Conduct (no), the New York Lawyer's Code of Professional Responsibility (no), and the New Jersey Rules of Professional Conduct (maybe yes).²³

I had a different problem with the question about a lawyer who was dining with a judge in a restaurant when a prosecutor, who was a friend of the judge, stopped by their table and made an argument to the judge about why a pending motion for a mistrial should be denied. The judge was unmoved by the ex parte argument and subsequently granted the motion. The question was whether the lawyer who failed to report the prosecutor's conduct is "subject to discipline" for not reporting what happened.²⁴ A third-year law student might answer "yes" because the Model Code and Model Rules state that a lawyer has a duty to report the misconduct of another lawyer. I sat there, however, with pencil poised over paper, considering that no disciplinary committee would subject a lawyer to discipline for failure to report based on these facts.²⁵

The point, however, is not my own existential difficulty with the MPRE.²⁶ The questions I raise are whether the MPRE has outlived its usefulness and whether we can do a better job of insuring that bar applicants

²³ The New Jersey Rules of Professional Conduct provide that "[a] lawyer shall not knowingly fail to disclose to the tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure." N.J. RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(5) (1996). This language seemingly applies to situations in which the lawyer did not create the misapprehension. *See* 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § AP4:104 (2d ed. Supp. 1997).

²⁴ "Subject to discipline" means the conduct described "subjects the attorney to discipline under" the ABA model formulations. *1997 Information Booklet, supra* note 2, at 26.

²⁵ While the MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A) (1996) and MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1996) require the lawyer to report violations of professional responsibility rules by another lawyer, only one state seems to have imposed sanctions solely for the failure to report another lawyer's misconduct. *See* Gendry, *supra* note 12, at 607 & n.27 (involving situation where there was actual harm to the client from failure to report).

²⁶ Lest anyone think that my criticism of the MPRE is based solely on my personal struggles with the test, I should mention that I did in fact pass.

familiarize themselves with the professional responsibility law in the states in which they will be practicing.

While supporters of the MPRE might claim that there are few important differences between the subjects tested by the MPRE and the professional responsibility rules of any given state, this is incorrect. To begin with, the current MPRE is designed so the correct answer is the same under both the Model Code and Model Rules.²⁷ What this means is not entirely clear, but it appears that the MPRE uses only fact situations that can be answered by looking to provisions common to both codes.²⁸ Thus, the MPRE apparently avoids questions about subjects such as the lawyer's disclosure obligations to the court in an ex parte proceeding, negotiation ethics, and the responsibilities of a subordinate lawyer, which are not mentioned in the Model Code but are treated in the Model Rules.²⁹ The MPRE also avoids questions about the many subject areas in which the Model Rules defer to local law.³⁰ Issues with potential constitutional dimensions also are avoided. Thus, the professional responsibility rules tested by the current MPRE are more limited in scope than most states' rules.

In addition, there are some significant differences between the ABA's model formulations and many state codes. For example, applicants learn for the MPRE that they *may* – but need not – disclose client confidences to prevent a client from causing serious bodily harm to another,³¹ but in at least ten states, they *must* disclose those confidences.³² Applicants may learn

²⁷ See *supra* note 4 and accompanying text.

²⁸ See John F. Sutton, Jr., *Testing Professional Responsibility in View of Changes in the Code*, B. EXAMINER, Nov. 1984, at 26, 32.

²⁹ See MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.3(d); 4.1 cmt. 2; 5.2 (1994).

³⁰ The Model Rules, in contrast to the Model Code, leave much to local law but it is "virtually impossible to examine on matters where professional standards are not stated in the [Model Rules] but are left to local law" and accordingly, those "must be omitted by the MPRE." Sutton, *supra* note 28, at 32. See also 1997 *Information Booklet*, *supra* note 2, at 25 (stating that local statutes or rules of court are "not to be considered").

³¹ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C) (1996) permits disclosure to prevent a crime. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) only permits disclosure to prevent a client from committing a criminal act likely to result in death or serious bodily injury.

³² See ARIZ. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1997); CONN. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1996); FLA. RULES OF PROFESSIONAL CONDUCT Rule 4-1.6(b) (1997); ILL. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1997); NEV. RULES OF PROFESSIONAL CONDUCT Rule 156(2) (1996);

for the MPRE that it is "preferable" for a lawyer to communicate the basis or rate of a fee in writing, but some states make a writing mandatory.³³ These are not unimportant differences, particularly when so many new lawyers enter into solo practice or into relatively unsupervised practice settings.³⁴

Another problem with the MPRE is that its focus on "model" rules makes it difficult to take the test seriously.³⁵ The MPRE requires bar applicants to memorize rules that are not necessarily the rules of the jurisdiction where they intend to practice and therefore are seemingly not very meaningful. From their perspective, the requirement that they pass the MPRE is somewhat akin to requiring them to sit for bar exams that test them on the

N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1996); N.D. RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1997); TEX. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 1.05(e) (1996); VA. CODE OF PROFESSIONAL RESPONSIBILITY 4-101(D) (1996); WIS. RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS SCR 20:1.6 (1996). Notwithstanding the fact that this type of disclosure requirement exists in several states, there is no reference to the mandatory disclosure requirement in the MPRE study outlines marketed by BAR/BRI. See BAR/BRI PROFESSIONAL RESPONSIBILITY BAR REVIEW (Harcourt Brace 1996).

³³ Compare N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.5(b) (1996) ("When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing") with MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(b) (1994) ("When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing"). The Model Code states only that it is "usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-19 (1983).

³⁴ See, e.g., Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, *Legal Education and Professional Development - An Educational Continuum*, 36-37, 47 A.B.A. SEC. LEGAL EDUC. & ADMISSION TO THE BAR (1992) (noting that seldom do such attorneys have "an experienced attorney to whom they may go to [sic] for advice, nor training programs in which to learn on the job").

³⁵ It arguably is difficult to take any multiple choice test of ethical standards seriously. See, e.g., Richard Delgado, *Norms and Social Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 953 (1991) (reporting that students preparing to take MPRE conclude the correct answer is almost always the third least ethical one). There are, however, some legitimate arguments for favoring a multiple choice format. See *supra* text accompanying note 16. The point here is that the focus on "model" standards exacerbates the difficulty of taking this test seriously.

law of a mythical jurisdiction.³⁶ Consequently, law students, who comprise the majority of MPRE test-takers, view the requirement that they demonstrate knowledge of model rules with a mixture of amusement and contempt.

Finally, exclusive focus on testing on “the rules” sends the wrong message to law students and bar applicants, with potentially serious consequences. This focus promotes the view that professional responsibility can be reduced to following some black letter rules.³⁷ Not only do “the rules” provide much less guidance in practice than may appear at first blush, there invariably are several additional sources of the law of professional responsibility in any state – including criminal law, agency law, civil procedure, and court rules – with which a practicing lawyer must be familiar.³⁸ Bar applicants who believe they need only consult “the rules” to resolve an actual professional responsibility problem may come to real grief.³⁹ Moreover, because most law students must take the MPRE, they tend to approach their law school ethics course with the view that it is important only to learn “the rules” so they can pass the MPRE.⁴⁰

I do not mean to suggest that testing on professional responsibility rules as a condition of bar admission should be abandoned altogether or that it is preferable to allow applicants to take a professional responsibility course in

³⁶ The point can be made that the MPRE is no different than the Multistate Bar Examination (the “MBE”), in which students are required to learn the majority rule in six subject areas, but are not tested on the specific law of any state. One difference, however, is that in virtually all states, examinees also are required to learn about their own state’s law for the essay portion of that state’s bar exam. See 1998 BAR/BRIDGEST 4-56 (1998). Another difference is that most young lawyers research the law in the applicable state before advising a client about how the law pertains to the client’s particular situation (if only because they have been explicitly asked to do so). In my experience, many practitioners never think to check their state’s professional responsibility code or consider the possibility that a code section applies to their own contemplated conduct.

³⁷ See generally Ian Johnstone & Mary Treuthart, *Doing the Right Thing: An Overview of Teaching Professional Responsibility*, 41 J. LEGAL EDUC. 75, 82 (1991) (arguing against exclusively teaching doctrine in law school for this reason).

³⁸ This point is made in Cramton & Konjak, *supra* note 21, at 170, and elsewhere.

³⁹ See *id.* at 173 & n.105. I also repeatedly witnessed this problem in practice, when practitioners decided they need consider an issue no further because a potential problem with contacting a witness or sitting on the board of directors of a client corporation was not answered by “the rules.”

⁴⁰ See *id.* at 171 (noting students’ “tunnel vision”).

law school in lieu of the MPRE.⁴¹ Students who take a professional responsibility course in law school learn about those aspects of professional responsibility that interest the professor. Some law school professional responsibility courses are taught exclusively from a philosophical or sociological perspective with little reference to any professional responsibility rules. Other courses are extremely condensed.⁴² Even the "ideal" professional responsibility course is unlikely to equip any law student with adequate knowledge of the professional responsibility law of the jurisdiction in which the student intends to practice.⁴³

Admittedly, any suggestion that we reconsider using the MPRE flies in the face of growing calls for national rules of professional responsibility.⁴⁴ Notwithstanding the academic interest in the subject,⁴⁵ however, the reality is that we are still politically many years from uniform national rules.⁴⁶

⁴¹ Of the states that require the MPRE, only Connecticut and New Jersey permit applicants to take a law school professional responsibility course in lieu of the MPRE. See *Comprehensive Guide to Bar Admission*, *supra* note 2, at 34.

⁴² See Cramton & Koniak, *supra* note 21, at 147-48.

⁴³ It has been suggested that the ideal professional responsibility course might encompass "the rules," the history and philosophy of the profession, and the morality of the lawyer's role. See Johnstone & Treuthart, *supra* note 37, at 90 & n.60. Not surprisingly, even academics who are very committed to the subject of professional responsibility have expressed the view that the model ABA professional responsibility rules need not be taught in their entirety. See, e.g., Norman Redlich, *Testing for Professional Responsibility*, B. EXAMINER, Nov 1981, at 18, 20.

⁴⁴ Although it has been suggested that widespread adoption of the MPRE is "tacit endorsement" of a national code of ethics, see Mary C. Daly, *Resolving Ethical Conflicts in Multi-jurisdictional Practice - Is Model Rule 8.5 the Answer, an Answer, or No Answer at All*, 36 S. TEX. L. REV. 715, 733 (1995), the history of the MPRE's adoption does not support this view. A more likely explanation for the widespread adoption of the MPRE is that it provided a convenient vehicle for allowing states to impose a requirement that bar applicants demonstrate some knowledge of general professional responsibility concepts, without adding significantly to the burden on bar examiners to devise their own tests.

⁴⁵ See, e.g., Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 338 (1994); see also Ted Schneyer, *Professional Discipline in 2050: A Look Back*, 60 FORDHAM L. REV. 125, 127 (1991).

⁴⁶ The rules would presumably come from Congress or an agency established by Congress to promulgate such rules. Historically, however, Congress has been unable or unwilling to directly regulate lawyers' conduct. For example, in the wake of the ABA's failure to include in its Model Rules a requirement that lawyers disclose client information to prevent a client from causing serious harm to another,

Regardless of the merits of proposals for national rules of professional responsibility, it makes little sense to continue with a costly and ineffective "national" test requirement when there is no national standard.⁴⁷

It seems clear that we can do a better job of insuring that newly admitted lawyers are sensitized to issues of professional responsibility and know the professional responsibility law of the states in which they intend to practice. Even if the MPRE is substantially revised,⁴⁸ it should not be used as the sole bar admission requirement relating to professional responsibility issues.

First, law students should be required to take the equivalent of a three-credit professional responsibility course in law school, and there should be an effort to require (through enforcement of ABA accreditation standards or state bar admission rules) that the course cover professional responsibility rules and laws.⁴⁹ If bar applicants are not required to take a professional

Senator Arlen Specter proposed the Lawyer's Duty of Disclosure Act of 1983, S. 485, 98th Cong., 1st Sess. (1983). The Act never made it out of the Senate Judiciary Committee.

⁴⁷ The difficulty of reaching a consensus about which professional responsibility rules should be adopted is illustrated by the ABA's continuing efforts to articulate model rules and by efforts of academics to draft a Restatement of the Law Governing Lawyers. See, e.g., Ted Schneyer, *The ALI's Restatement and the ABA's Model Rules: Rivals or Complements*, 46 OKLA. L. REV. 25 (1993); Fred C. Zacharias, *Fact and Fiction in the Restatement of the Law Governing Lawyering: Should the Confidentiality Provisions Restate the Law?*, 6 GEO. J. LEGAL ETHICS 903 (1993). Indeed, the effort to draft a Restatement of the Law Governing Lawyers has been in progress for ten years and is unlikely to be completed before mid-1999. Telephone Interview with Todd Feldman, Assistant Editor, American Law Institute (Sept. 4, 1997). The difficulty of reaching a consensus can be expected to multiply exponentially as additional interest groups with differing perspectives become involved in the process.

⁴⁸ A recent announcement by the NCBE indicates that revisions in the scope of the MPRE will be made by March 1999. It is unclear at this time how substantial those changes will be. See *infra* notes 55-58, 64-68 and accompanying text.

⁴⁹ At present it appears that at least two-thirds of all accredited law schools require students to take a professionalism or ethics course, although the number of credits vary. See *Teaching and Learning Professionalism*, *supra* note 17, at 39-41. The ABA Professionalism Committee has proposed a requirement that every student successfully complete at least one ethics and professionalism course or component each year. See *id.* at 21. While the ABA accreditation standards already require that all students receive broad-based professional responsibility instruction, see *supra* note 20, there is evidence that the ABA does not enforce this rule. See Cramton & Koniak, *supra* note 21, at 147-48 & n.17. See also *Teaching and Learning Professionalism*, *supra* note 17, at 40 (stating that eight responding ABA-

responsibility course and are only required to take the MPRE, they will continue to learn about professional responsibility in a four-hour bar review cram course that is, understandably, oriented to black-letter rules. Law school programs with fewer than three credits, no matter how "intensive," simply cannot provide students with exposure to the full range of issues they will confront as practicing lawyers. The best way to sensitize future lawyers to the difficulty of professional responsibility issues and insure that they are exposed to some of the policy compromises underlying the rules of professional responsibility is to require them to take a comprehensive law school course.

Second, state courts and bar examining committees should adopt admission requirements that insure applicants learn about the state's professional responsibility laws prior to or shortly after admission to the bar. Ideally, state bar examining committees should draft tests tailored to their own professional responsibility laws, as is done in the three states that do not require the MPRE for bar admission.⁵⁰ Even if a state chooses to continue using the MPRE and does not create a separate test covering all the nuances of its professional responsibility rules and law, it should attempt to identify areas of importance in its own laws and test bar applicants on them at some other point in the admission process⁵¹ or in a post-admission probationary period.⁵²

accredited schools had no required ethics or professionalism courses).

⁵⁰ See *supra* note 2.

⁵¹ At a minimum, bar admissions committees might consider including in the "character interviews" that are obligatory in many states informal questioning about important aspects of the state's professional responsibility laws. This might at least encourage bar applicants to *read* the rules before admission to the bar.

⁵² In addition to – but not in lieu of – the state testing described above, state courts should require bridge-the-gap programs for new admittees that are designed to insure they gain some knowledge of the state's professional responsibility laws. At least six states (Arizona, Delaware, Maryland, Missouri, Texas, and Virginia) have mandatory programs for new lawyers covering a range of professionalism issues including practical ethics and codes of professionalism. See *Teaching and Learning Professionalism*, *supra* note 17, at 61-62; letter from Arthur Garwin, Professionalism Counsel, A.B.A. Standing Committee on Professionalism (Feb. 19, 1997) (on file with author). Hopefully at the beginning of a new lawyer's professional career, the lawyer will be receptive to information about professional responsibility law and about conduct that may result in the loss of the newly acquired license to practice law. At the same time, the quality of bridge-the-gap programs can be expected to vary considerably depending on the length of the programs, their focus, and the quality of the teaching staff. There is no guarantee

Third, even if we cannot move beyond the MPRE, we should improve upon it. For example, test coverage should be expanded beyond the model rules to include the full range of professional responsibility law, with an emphasis on the rules and laws lawyers most need to know in practice. Particular attention should be given to subjects that frequently result in disciplinary complaints, such as the lawyer's obligations concerning the proper maintenance of client funds. Moreover, the MPRE should no longer test on the Code of Judicial Conduct. Although only a relatively small percentage of the fifty questions on the MPRE is devoted to this subject, even one question is too many given the importance of knowing the law governing lawyers and the relative unimportance for most practitioners of knowing the ABA Judicial Code of Conduct.⁵³ The rules that examinees memorize concerning campaign contributions, financial disclosures, political appearances, and other esoteric subjects, have only marginal potential relevance to their practice and are probably not the rules actually applicable to the judges in their state.⁵⁴ There are many other subjects more worthy of coverage in a two-hour test.

Indeed, the NCBE recently considered a proposal to expand the range of subjects tested on the MPRE.⁵⁵ In August 1997, the NCBE announced its adoption of new test specifications, which will be administered for the first

that required attendance without a testing component will yield any retention of information.

⁵³ See *supra* note 8 and accompanying text.

⁵⁴ See *supra* note 6. While it is true that some states continue to require bar applicants to learn arcane areas of the law for their bar exams, learning minutiae about what a judge can do when running for election or when acting as a non-legal advisor seems even further removed from what most practicing lawyers need to know than other information tested for admission to the bar.

⁵⁵ In late February, 1997, the NCBE circulated to bar examiners, supreme court justices, and law school deans a proposal by the MPRE Test Drafting Committee to expand upon the MPRE's range of questions to "embrace what is widely termed the law of lawyering." The actual proposal was to include in the MPRE questions on controlling constitutional decisions and "generally accepted principles established in leading federal and state cases as well as procedural and evidentiary rules." Memorandum from Erica Moeser, President, National Conference of Bar Examiners, to Law School Deans (Feb. 28, 1997) (on file with author) [hereinafter Feb. Memorandum from Erica Moeser]. Responses to the proposal were considered in June, 1997, by a panel of judges, practitioners, and academics chaired by Dean Elizabeth Moody of Stetson University College of Law. See Erica Moeser, *President's Page*, B. EXAMINER, May 1997, at 2, 3.

time in March 1999.⁵⁶ The MPRE will continue to be offered in its fifty-question, two-hour format. It will no longer test on the ABA Model Code, but will still test on the Model Rules and the ABA Judicial Code of Conduct, as well as on "controlling constitutional decisions and generally accepted principles established in leading federal and state cases and in procedural and evidentiary rules."⁵⁷ The NCBE describes the new specifications as taking a "law-governing-lawyers" approach to professional responsibility,⁵⁸ but it is far from clear whether the new specifications will be that far-reaching.

While the NCBE's effort to expand the scope of the MPRE is a welcome step in the right direction,⁵⁹ it does not appear the new specifications will remedy many of the problems underlying the test.⁶⁰ Testing on the Model Rules but not the Model Code opens up broader subjects for testing,⁶¹ but still perpetuates the problem that the testing is of "model" rules that have not been adopted in their entirety anywhere.⁶² In fact, the exclusive focus on the Model Rules may further skew the bar applicant's understanding of the professional responsibility rules of the state in which she will practice because some states have retained the Model Code. Even states that have adopted the Model Rules sometimes retain provisions that are more similar to the Model Code.⁶³

The extent to which the "other" law of lawyering would be tested has not yet been determined by the NCBE,⁶⁴ but the four-page subject matter outline

⁵⁶ See Memorandum from Erica Moeser, President, National Conference of Bar Examiners, to Law School Deans (Aug. 21, 1997) (on file with author).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ One of the more welcome suggested changes is testing on the subject of malpractice liability. See Feb. Memorandum from Erica Moeser, *supra* note 55.

⁶⁰ See *supra* notes 8, 22-23, 27-36 and accompanying text.

⁶¹ See *supra* text accompanying note 29.

⁶² As previously noted, even the states that have adopted the Model Rules format have adopted significant variations on a number of provisions. See GILLERS & SIMON, *supra* note 5, at 3.

⁶³ See *id.* at xxii.

⁶⁴ The materials released by the NCBE do not indicate how much of the new MPRE would be based on the Model Rules and how much would be based on "other" law. At the time the new specifications were circulated this had not been determined and it may not be known until after the revised MPRE has been given two or three times. Telephone Interview with Jane Peterson Smith, NCBE Director of Testing (Sept. 8, 1997).

circulated by the NCBE focuses heavily on subjects governed by the Model Rules.⁶⁵ There appear to be relatively few new topics that will be tested by the MPRE, and some seem to be of questionable value.⁶⁶ Testing based on the Judicial Code of Conduct would continue.⁶⁷ In other words, even as revised, it appears the MPRE will remain, in the words of one NCBE official, "a low-stakes test with low passing scores." The proposed revisions may not do much to enhance the credibility of the test and will do nothing to insure that bar applicants learn the professional responsibility laws that will apply to them in practice.⁶⁸

⁶⁵ See Feb. Memorandum from Erica Moeser, *supra* note 55. For example, Section II of the Outline reads as follows:

- II. The Client Lawyer Relationship (10-14%)
 - A. Acceptance or Rejection of Clients
 - B. Scope, Objective, and Means of the Representation
 - C. Within the Bounds of the Law
 - D. Withdrawal
 - E. Attorney-Client Contracts
 - F. Fees

These topics are all governed by the Model Rules, and with the possible exception of "D," would not seem to require knowledge of constitutional decisions, leading state or federal decisions, or procedural or evidentiary rules.

⁶⁶ Two of the more worthwhile new topics are legal malpractice and attorney-client privilege, although it is not possible to determine from the Outline how much weight will be afforded those topics. See Feb. Memorandum from Erica Moeser, *supra* note 55. One of the more questionable new topics is the inherent power of the courts to regulate lawyers. This addition may serve to inculcate in new lawyers bar doctrine about the inherent right of courts to regulate lawyers and the view that the right is exclusively the judiciary's. See, e.g., Thomas M. Alpert, *The Inherent Powers of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 BUFF. L. REV. 525, 538-40 (1983). The addition of this topic may do more harm than good, because it may cause bar applicants to overlook the real impact of legislative enactments on the law governing lawyers.

⁶⁷ Fortunately, the NCBE has decided to reduce the weight given the ABA Model Code of Judicial Conduct to four to eight percent of the entire test. See Feb. Memorandum from Erica Moeser, *supra* note 55. While this only comprises two to four questions on the test, those questions would still be better used on topics more relevant to a lawyer's practice.

⁶⁸ Indeed, it appears that the focus of the MPRE will continue to be extremely general. For example, the NCBE suggests that a candidate who has "taken and reviewed a two- or three-credit law school survey course should be reasonably well-prepared to take the MPRE" but those wishing to engage in additional preparation should consult the Model Rules and the American Law Institute's

Shortly after the introduction of the MPRE, Norman Redlich⁶⁹ acknowledged that the MPRE was a dramatic step, but wrote: "I suspect that 15 years from now, we may look back on today's Multistate Professional Responsibility Examination as we look back upon the Articles of Confederation – a useful, important, intermediate step to get us from where we were to where we have to go."⁷⁰ His vision was a good one, but others have been less clear-sighted. It is time to reconsider the continued use of the MPRE and determine whether it does enough – and whether we can do more – to prepare lawyers for the professional responsibility challenges they will confront in practice.

Restatement of the Law Governing Lawyers, as well as treatises collecting and discussing the authorities. Feb. Memorandum from Erica Moeser, *supra* note 55, at 6. It appears that the Restatement of the Law Governing Lawyers will not even be complete by the time the revised MPRE is first offered, *see supra* notes 47, 56, and it may not necessarily restate the law, *see, e.g.,* Zacharias, *supra* note 47

⁶⁹ Redlich was then Dean of the New York University School of Law.

⁷⁰ Redlich, *supra* note 43, at 21.