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December 24, 1997

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SID J. WHITE
DEC 29 1997

The Supreme Court of Florida
c/o Sid J. White, Esq.
Clerk of the Court
Tallahassee, Florida 32399-1927

CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

In re Amendment to the Rules of
the Supreme Court Relating to
Admission of the Bar

Case No. 91,713

May It Please the Court:

I write pursuant to the Notice published in the December 1, 1997 issue of The Florida Bar News regarding proposed amendments to the Rules of this Court addressing Admissions to the Bar. My interest is in the amendment to Rule 4-13, Educational Qualifications, proposed by the Board of Bar Examiners. That amendment would permit an applicant for admission to The Florida Bar to sit for the Multi-state Professional Responsibility Examination (MPRE) prior to graduation from law school.

According to the Notice of this proposed amendment, the Board of Bar Examiners advance the amendment for the following reasons: (1) it would allow applicants to be admitted to practice without the two-week delay in admission that sometimes now occurs; (2) applicants would have more flexibility in selecting a convenient time and location for taking the MPRE; (3) applicants who fail the MPRE would have further opportunity to take and pass the MPRE without delay in admission; (4) and applicants who have taken and passed the MPRE elsewhere would not be required to take it again in Florida.

I have also have heard, but cannot confirm, that the Board of Bar Examiners also desires "to get the MPRE out of the way" for ministerial reasons before administering the general examinations. Perhaps it is noteworthy in this respect that the Board has previously proposed eliminating the MPRE for applicants

who have successfully passed a Professional Responsibility (or Legal Ethics) examination in an accredited law school.

I respectfully oppose the proposed amendment to Rule 4-13 for the reasons stated hereafter. But first permit me to state that I have been a member of The Florida Bar in good standing since 1949. I am a practicing lawyer and a former president of The Florida Bar and the American Bar Association, but have taught Professional Responsibility regularly at Stetson University College of Law since 1991. Earlier in my career, I was a full-time member of the faculty of law at the University of Florida. I presently serve as a member of the Council of the American Law Institute and have actively participated from the outset in the development of the Institute's proposed Restatement of the Law Governing Lawyers. I also currently serve as a member of the Florida Bar's Standing Committee on Professionalism and was chair of the Committee on Professionalism of the ABA's Section on Legal Education and Admissions to the Bar that published two volumes on Teaching and Learning Professionalism in 1996 and 1997 after three years of study.

Earlier this year, I was also a member of the committee (composed of jurists, law school deans and professors and practitioners) designated by the National Conference of Bar Examiners (NCBE) to review and comment upon proposed changes in the content of the Multi-state Professional Responsibility Examination. Those changes, which expand upon the subject matter of the current MPRE, have now been approved and are scheduled to take effect in March 1999. A copy of the subject matter to be covered by the new MPRE is attached hereto as Exhibit A.

The reasons for my opposition are as follows:

1. Other states permit students to take the MPRE while in law school and bar examiners in this state and elsewhere advance appealing arguments in support of this practice. Those arguments focus upon accommodating the applicants for, and facilitating, admission to practice in a given jurisdiction at the earliest possible date. These concerns, in my view, are not without merit.

But other concerns must also be taken into account. Paramount among these other concerns is the message that will be delivered officially by permitting the earlier, in-law-school, MPRE examination. I believe this practice sends the wrong message to budding lawyers. In effect, the message will be that professional concerns, and even minimal standards of professional

conduct, are less important in the practice of law than substantive knowledge. That message will be conveyed at a time when both this Court and the organized profession are seeking to enhance professionalism in the practice of law and are placing renewed emphasis on the character, competence and commitment of lawyers. The symbolism of professionalism and professional conduct will be adversely affected and their importance will be depreciated by implementation of the proposed amendment. The need to stress professionalism and professional conduct, I respectfully submit, is of paramount importance and outweighs the need to accommodate applicants.

2. My academic experience teaches that in-law-school administration of the MPRE inevitably will be disruptive of, and detract from, student attention to other courses of study. Such is human nature.

3. In-law-school administration **of** the MPRE may require Florida's law schools to make adjustments in the scheduling and content of course offerings. If the amendment is adopted, I believe it likely that most students will take Professional Responsibility during their second year in law school and will wish to take the MPRE shortly thereafter. In my view, students should not be permitted to take Professional Responsibility before the second half of the second year of study. An appreciation of the Professional Responsibility subject matter requires exposure to other courses of study customarily offered in the first three semesters of the law school experience. Students in the first three semesters whom I have taught generally have greater difficulty mastering the Professional Responsibility material and do not do as well as others on final examination. There are, of course, exceptions.

4. If students are permitted to take the MPRE while in law school, I believe they will be inclined thereafter to focus on other studies and on the general bar examination. Memories of the importance placed in Professional Responsibility courses on the values of professionalism and on the rules of professional conduct may well fade after the MPRE is taken. Requiring the taking of the MPRE after graduation, has the salutary effect of necessitating a review of, and reenforcing, the teachings of professional conduct.

5. As stated in the Description of the MPRE, page 5 of Exhibit A, the new MPRE will include inquiry regarding the regulation of the legal profession in the United States that is not based upon the rules of professional conduct (the Model

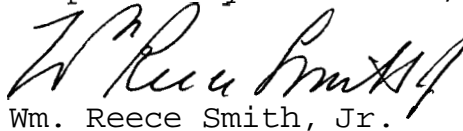
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Rules) but upon cases, statutes or regulations on the subject. The forthcoming Restatement of the Law Governing Lawyers is mentioned in the Description as "often" providing a "useful guide" for the majority view on relevant issues. That Restatement, for example, gives considerable attention to the civil liability of lawyers, a subject barely addressed in the Model Rules of Professional Conduct and its state counterparts. The Restatement is likely to be finally adopted by the American Law Institute at its annual meeting in May, 1998. If applicants are to be permitted to take the MPRE while in law school, the date of commencement of that practice should be postponed for at least two years in order to afford Professional Responsibility instructors the opportunity to incorporate the Restatement material in course offerings.

6. In summation, this is not the time to adopt proposed amendment 4-13 because of the emphasis now being placed on Professionalism in this state, the implementation in March 1999 of an expanded MPRE, and the paramount importance of proper professional conduct in the practice of law.

In the event of oral argument on Proposed Amendment 4-13, I respectfully request an opportunity to appear and be heard for a period of three (3) to five (5) minutes.

Respectfully submitted,



Wm. Reece Smith, Jr.

WRSjr:ymp

Enclosure

cc: Thomas A. Pobjecky, Esq.

Enclosure

Exhibit A

At its meeting on August 8, 1997, the NCBE Board of Trustees adopted the following test specifications effective with the Multistate Professional Responsibility Examination to be administered in March 1999.

MPRE Subject Matter Outline

The following subject matter outline indicates the examination's scope of coverage and the approximate percentage of items that are included in each major area. The outline is not intended to list every aspect of a topic mentioned. Although the test items for each *MPRE* are developed from these categories, each topic is not necessarily tested on each examination.

- I. Regulation of the Legal Profession (8-12%)
 - A. Inherent Powers of Courts to Regulate Lawyers
 - B. Admission to the Profession
 - C. Regulation After Admission
 - D. Maintaining Professional Standards—Peer Responsibility
 - E. Unauthorized Practice
 - F. Fee Splitting with a Non-Lawyer
 - G. The Law Firm
 - H. Contractual Restrictions on Practice

11. 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

- III. Privilege and Confidentiality—Clients and Former Clients (6-10%)
 - A. Evidentiary Privilege
 - B. Professional Obligation of Confidence
 - C. Client-Authorized Disclosure
 - D. Permissible Disclosure
 - E. Special Problems

- IV. Independent Professional Judgment—Conflict of Interest—Client Consent (10-14%)
 - A. As Affected by Attorney's Personal Interest
 - B. Attorney as Witness
 - C. Acquiring an Interest in Litigation
 - D. Entering into Business Transactions with Clients
 - E. Conflicting Interests—Clients and Former Clients
 - F. Influence by Persons Other than Client
 - G. **LAW** Firm, Associates, and Related Persons
 - H. Lawyer's Service as Arbitrator, Mediator, or Judge

- V. Competence, Legal Malpractice, and Other Civil Liability (8-12%)
 - A. Civil Liability, Including Malpractice
 - B. Maintaining Competence
 - C. Acceptance of Employment
 - D. Exercise of Diligence and Care
 - E. Limiting Liability for Malpractice

VI. Litigation and Other Forms of Advocacy (12-16%)

- A. Exercise of Professional Judgment
- B. Civility, Courtesy, and Decorum
- C. Conduct in the Course of Litigation—Claims, Defenses, Testimony, and Evidence
- D. Fraud or Perjury
- E. Communications in Course of Representation

VII. Different Roles of Lawyers **(4-8%)**

- A. Lawyer as Advisor
- B. Lawyer as Intermediary
- C. Lawyer as Evaluator
- D. Lawyer as Negotiator
- E. Lawyer as Mediator
- F. Special Obligations of the Lawyer in Public Service
- G. Appearances before Legislative Bodies

VIII. Safekeeping Property and Funds of Clients and Others **(4-8%)**

- A. Attorney as Trustee of Client Funds
- B. Attorney as Custodian of Client Property
- C. Disputed Claims

- IX. Communication About Legal Services (6-10%)
 - A. Public Communications About Services
 - B. Referrals
 - C. Group Legal Services
 - D. Contact With Unrepresented Persons
 - E. Fields of Practice—Limitations of Practice and Specialization

- X. Lawyers and the Legal System (2-6%)
 - A. Lawyer Activity in Improving the Legal System
 - B. Impropriety Incident to Public Service

- XI. Judicial Ethics (4-8%)
 - A. Upholding the Integrity and Independence of the Judiciary
 - B. Avoiding Impropriety and the Appearance of Impropriety
 - C. Duties of Impartiality and Diligence
 - D. Activities to Improve the Legal System
 - E. Extra-Judicial Activities (including compensation)
 - F. Political Activity **of** Judges
 - G. Candidate for Judicial Office

Description of the MPRE

The purpose of the NCBE Multistate Professional Responsibility Examination (MPRE) is to measure the examinee's knowledge and understanding of established standards related to a lawyer's professional conduct; thus, the MPRE is not a test to determine an individual's personal ethical values. Lawyers serve in many capacities: for example, as judges, as advocates, counsellors, and in other roles. The law governing the conduct of lawyers in these roles is applied in disciplinary and bar admission procedures, and by courts in dealing with issues of appearance, representation, privilege, disqualification, contempt or other censure, and in lawsuits seeking to establish liability for malpractice, and other civil or criminal wrongs committed by a lawyer while acting in a professional capacity.

The law governing the conduct of lawyers is based on the disciplinary rules of professional conduct currently articulated in the American Bar Association (ABA) Model Rules of Professional Conduct (1983 as amended), and the ABA Model Code of Judicial Conduct (1990 as amended), as well as controlling constitutional decisions and generally accepted principles established in leading federal and state cases and in procedural and evidentiary rules.

The MPRE is developed by a six-member Drafting Committee comprised of recognized experts in the area of professional responsibility. Before a test item is selected for inclusion in the MPRE, it undergoes a multistage review process that occurs over the course of several years before the test is administered. Besides intensive reviews by the Drafting Committee and testing specialists, each test item is reviewed by other national and state experts. All test items must successfully pass all reviews before they are included in the MPRE. After an MPRE examination is administered, the statistical performance of each test item is reviewed and evaluated by content and testing experts before the items are included in the computation of examinees' scores. This final statistical review is conducted to ensure that each test item is accurate and psychometrically sound.

The MPRE consists of 50 multiple-choice test items. These test items are followed by 10 Test Center Review items that request the examinee's reactions to the testing conditions. The examination is two hours and five minutes in length.

Test items covering judicial ethics measure applications of the ABA Model Code of Judicial Conduct (Model CJC) (1990 as amended). Other items will deal with discipline of lawyers by state disciplinary authorities; in these items, the correct answer will be governed by the current ABA Model Rules of Professional Conduct (Model Rules). The remaining items, outside the disciplinary context, are designed to measure an understanding of the generally accepted rules, principles, and common law regulating the legal profession in the United States; in these items, the correct answer will be governed by the view reflected in a majority of cases, statutes, or regulations on the subject. (The American Law Institute's Restatement of the Law Governing Lawyers is often a useful guide to discerning the majority view on a variety of issues.) To the extent that questions of professional responsibility arise in the context of procedural or

evidentiary issues, such as the availability of litigation sanctions or the scope of the attorney-client evidentiary privilege, the Federal Rules of Civil Procedure and the Federal Rules of Evidence will be assumed to apply, unless otherwise stated. **As** a general rule, particular local statutes or rules of court will not be tested in the MPRE. However, a specific test item may include the text of a local statute or rule that must be considered when answering the specific item. Amendments to the Model Rules or Model CJC will be reflected in the examination no earlier than one year after the approval of the amendments by the ABA House of Delegates.

How Should a Candidate Prepare for the MPRE?

Students who have taken and reviewed a two- or three-credit law school survey course in Professional Responsibility should be reasonably well prepared to take the MPRE. However, for those wishing to engage in additional preparation, there are numerous sources available for consultation, including the American Bar Association's Annotated Model Rules of Professional Conduct and the American Law Institute's Restatement of the Law Governing Lawyers, as well as treatises collecting and discussing the authorities.