IN THE SUPREME COURT OF FLORIDA

FLORIDA BOARD OF BAR EXAMINERS RE AMENDMENT OF RULES OF THE SUPREME COURT RELATING TO ADMISSIONS TO THE BAR

Case No. 95,626

PETITION

The Florida Board of Bar Examiners, by and through its undersigned attorney, petitions the Court for approval of certain amendments to the Rules of the Supreme Court Relating to Admissions to the Bar and, in support thereof, states:

1. By opinion issued on June 4, 1998, the Court declined to adopt the Board's recommended rule amendment that would authorize law students to take the Multistate Professional Responsibility Examination (MPRE). *Florida Board of Bar Examiners re Amendment to Rules*, 712 So.2d 766 (Fla. 1998). In so ruling, the Court reasoned: "The Florida Supreme Court Commission on Professionalism is currently studying the issue of allowing law students to sit for the MPRE and plans to make a recommendation in regard thereto in the near future." *Id.* at 767.

2. At its meeting on February 18, 1999, the Commission on Professionalism approved a motion to report to the Court that the Commission favors allowing students to take the MPRE prior to graduation.

3. By this petition, the Board seeks to amend Rule 4-13 and related rules to allow law students to sit for the MPRE.

4. The attached Appendix contains the proposed rule amendments reflecting the additions and deletions. A narrative explanation of the rationale and historical background for the proposed rule amendments is also provided.

WHEREFORE, the Board requests an order amending, confirming and adopting the amendments to the Rules that are reproduced and attached to this Petition as the Appendix. The Board recommends that the new rules should be effective upon entry of the order of the Court and applicable to only those MPRE scores transmitted to the Board after the effective date.

DATED this 19th day of May, 1999.

Respectfully submitted,

FLORIDA BOARD OF BAR EXAMINERS
FRANKLIN R. HARRISON, CHAIR

Kathryn E. Ressel
Executive Director

By: Thomas A. Pobjecky

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Copy furnished to:
John F. Harkness, Jr., Executive Director, The Florida Bar
Deans of the Florida Law Schools
Wm. Reece Smith, Jr., Esquire

APPENDIX

[Additions are underlined; deletions are ~~struck through~~.]

Rule 2-11.1 as it will appear if amended:

> **2-11.1 Educational Qualification.** To be admitted into the ~~Florida~~ General Bar Examination and ultimately recommended for admission to The Florida Bar, an applicant must have received the degree of Bachelor of Laws or Doctor of Jurisprudence from an accredited law school (as defined in 4-13.2) at a time when the law school was accredited or within 12 months of accreditation or be found educationally qualified by the Board under the alternative method of educational qualification. Except as provided in Rule 2-11.2, none of the following shall be substituted for the required degree from an accredited law school:
>
> (a) private study, correspondence school or law office training;
>
> (b) age or experience;
>
> (c) waived or lowered standards of legal training for particular persons or groups.

Rule 2-13 as it will appear if amended:

> **2-13 Prohibitions Against Application.** No person shall be eligible to apply for admission to The Florida Bar or for admission into the ~~Florida~~ General Bar Examination unless the time period as indicated below has expired or the required condition or status has been met.

Rule 4-13 as it will appear if amended:

> **4-13 Educational Qualifications.** In order to submit to any ~~portion~~ part of the ~~Florida~~ General Bar Examination an applicant must be able to provide evidence at the time of submission to the General Bar Examination of receipt of, or completion of, the requirements for the degree of Bachelor of Laws or Doctor of Jurisprudence from an accredited law school or be found educationally qualified under the alternative method of educational qualification as provided in Rule 2-11.2. The law degree must have been received from an accredited law school or within 12 months of accreditation. An applicant may sit for the MPRE prior to

graduation from law school; however, the requirements of Rule 4-18.1 are applicable.

Rule 4-33.1 as it will appear if amended:

4-33.1 Transfer of Score. The applicant shall direct requests to transmit the score attained on the MPRE to the agency that administers the MPRE. Scores are transmitted on a certificate supplied by the agency and should be forwarded directly by that agency to the Board. ~~MPRE scores attained by an applicant prior to the applicant's completion of law school educational requirements as set out in Rule 4-13 shall not be accepted.~~

Rule 4-64 as it will appear if amended:

4-64 Invalidation of Examination Results. Results of the ~~Florida~~ General Bar Examination shall be invalidated if the applicant fails to establish that the law school graduation requirements were completed before the applicant submitted to the ~~Florida~~ General Bar Examination.

RATIONALE:

In *Florida Board of Bar Examiners re Amendment to Rules*, 548 So.2d 235 (Fla. 1989), the Board petitioned the Court for a rule change that would authorize bar applicants to submit to the Multistate Professional Responsibility Examination (MPRE) prior to the graduation of law school but within twenty-five months of successful completion of the other parts of the Florida Bar Examination.

The Board reasoned that the MPRE measured examinees' knowledge of established ethical standards governing the legal profession rather than testing their technical competence. Because the MPRE is an awareness test that covers the narrow subject of American Bar Association ethical standards, the Board believed that taking the examination during law school would have little or no adverse impact upon students' studies.

The Court recounted arguments advanced by the deans of Florida law schools in opposition to the Board's proposal that their law students would devote less time than usual to their law school course work throughout the weeks preceding the MPRE and that because of scheduling of the MPRE, the students would most certainly miss some law school classes in order to take the examination. The Court rejected the proposal concluding that the benefits to be obtained by permitting the MPRE to be taken while the student is still in law school did not outweigh the possibility that the students' law studies may be adversely affected.

In September 1996, the Board held a workshop to examine the existing components of the Florida Bar Examination and to consider possible components of the bar examination of the future. A Task Force, comprised of members of the Board, was formed to follow-up on suggestions considered during the workshop.

In preparation for the workshop, a survey was administered to the applicants sitting for the July 1996 General Bar Examination. The survey included items about the length of the examination, the subject matter included on the examination, alternate testing formats including open book examinations and performance test examinations and requested any comments applicants may have with regard to the administration of the examination. The survey results revealed that the most frequently noted comment was that applicants should be permitted to take the MPRE while in law school.

The Task Force on the Bar Examination recommended to the full Board a proposed rule amendment that would permit law students to take the MPRE before completion of the requirements for graduation if the Florida law school deans agreed they would not oppose this petition as

they previously did in 1989. In January 1997, the Board wrote to the Florida law school deans requesting their input on such proposal.

Dean Donald J. Weidner of the Florida State University College of Law, by letter dated January 29, 1997, stated that he would not oppose a change permitting law students to take the MPRE, but stated that the Professional Responsibility faculty would prefer that the students take the MPRE during the summer rather than during the regular academic year.

Associate Dean Gail E. Sasnett of the University of Florida College of Law, by letter dated February 11, 1997, stated that the administration supports allowing students to take the MPRE while they are still in school.

Dean Lizabeth A. Moody of Stetson University, by letter dated February 25, 1997, advised that the faculty members who teach Professional Ethics were polled and their opinion was unanimous that they would continue to oppose having their students take the MPRE prior to graduation. She stated the faculty members felt if the students were permitted to take the examination while in law school, it would constitute a major disruption in their studies and might also deflect their attention from Professional Responsibility questions that are raised in the students' other courses once they had completed the MPRE.

Dean Joseph D. Harbaugh of Nova Southeastern University, by letter dated March 6, 1997, confirmed his support for allowing law students to sit for the MPRE.

Associate Dean Jay Silver of St. Thomas University School of Law, by letter dated June 27, 1997, expressed his "appreciation for the thoughtful intent behind the proposal." Dean Silver recommended that students be allowed to take the MPRE following completion of their law school course on professional responsibility in either their second or third year of law school.

Dean Samuel C. Thompson, Jr. of the University of Miami School of Law verbally reported that he had no objection to the Board's proposal.

At the February 12, 1997 Select Committee meeting, Dean Joseph Harbaugh of Nova Southeastern University stated that he supported the Board's proposal to accept MPRE results from students while they are still in law school. Former Dean Jeffrey E. Lewis of the University of Florida spoke against the proposal to permit MPRE prior to graduation listing the following reasons: symbolism of splitting the ethics portion from the rest of the exam is not a good one; it is disruptive to the academic classes; it affects when the students take the Ethics course; why do it if the only reason to do it is that everyone else is doing it. Dean Lewis' position prevailed with the Select Committee and the Committee's draft of its report to the Supreme Court includes a recommendation that graduation be required before taking any part of the General Bar Examination.

The Board's proposal was also considered by the Student Education and Admissions to the Bar Committee (a standing committee of The Florida Bar) at its June 27, 1997 meeting. By a vote of 16 to 1, the Committee endorsed the change to allow law students to take the MPRE. In October 1997, the Board petitioned the Court to amend several rules of the Rules of the Supreme Court Relating to Admissions to the Bar including a proposal to allow law students to take the MPRE.

By opinion issued on June 4, 1998, the Court declined to adopt the Board's recommended rule amendment that would authorize law students to take the MPRE. *Florida Board of Bar Examiners re Amendment to Rules*, 712 So.2d 766 (Fla. 1998). In so ruling, the Court reasoned: "The Florida Supreme Court Commission on Professionalism is currently studying the issue of allowing law students to sit for the

MPRE and plans to make a recommendation in regard thereto in the near future." *Id.* at 767.

At its meeting on February 18, 1999, the Commission on Professionalism discussed whether law students should be allowed to sit for the MPRE. Dean Richard A. Matasar of the University of Florida College of Law spoke in favor of the proposal and Wm. Reece Smith, Jr. spoke in opposition. By a vote of 10 to 3, the Commission voted in favor of the proposal. A copy of the minutes of the Commission's February 1999 meeting along with the written arguments of Dean Matasar and Mr. Smith are attached to this appendix.

The proposed rule amendments would be in line with most other jurisdictions that administer the MPRE. During 1993-94, 37 jurisdictions responded to a Committee of Bar Admission Administrators' survey and indicated that their applicants could take the MPRE while in law school. Furthermore, allowing applicants to take the MPRE while in law school would permit them more flexibility in selecting a convenient place and time for the examination.

If approved, the proposed rule amendments would still require compliance with Rule 4-18.1. Such rule requires the successful completion of all portions of the bar examination (including the MPRE) within 25 months. Thus, law students will defer taking the MPRE until the later part of their law school education. The 25 month rule will also ensure that individuals practicing law in a foreign jurisdiction for a number of years be required to demonstrate their current knowledge of legal ethics and the rules of professional conduct by taking and passing the MPRE along with the other parts of Florida's bar examination.

The adoption of the Board's proposal will coordinate with the adoption of new test specifications for the MPRE adopted by the

National Conference of Bar Examiners. Such specifications became effective with the March 1999 administration of the MPRE and provide for a more relevant and comprehensive coverage of ethical and professional issues facing members of the legal profession. The MPRE will now "be based on the law governing the conduct of lawyers, including the disciplinary rules of professional conduct currently articulated in the ABA Model Rules of Professional Conduct, the ABA Code of Judicial Conduct, 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 1999 INFORMATION BOOKLET, National Conference of Bar Examiners at page 2.

The importance of legal ethics and professionalism will also continue to be emphasized by the Board. For example, Rule 4-33.2 increases the minimum passing score on the MPRE from 70 to 75 in 1999 and then to 80 after 1999. As authorized by Rule 4-22, the Board will continue to test regularly on the rules of The Florida Bar pertaining to professional conduct and trust accounts in essay questions under Part A of the General Bar Examination. Lastly, bar applicants in Florida will still be required to certify under oath that they have read Chapter 4 (Rules of Professional Conduct) and Chapter 5 (Rules Regulating Trust Accounts) of the Rules Regulating The Florida Bar. *See* Rule 3-14.19(f) of the Rules of the Supreme Court Relating to Admissions to the Bar.

Minutes of the Joint Commission and Committee
Retreat on Professionalism
February 18, 1999
Tampa, FL

Meeting was opened at 8:50 a.m. with opening remarks by Chair, Justice Harry Lee Anstead.

In attendance were Justice Harry Lee Anstead, John Harkness, Bob Parks, Jeanette Hausler, Michael Josephs, Tom Elligett, Lizabeth Moody, Claudia Isom, Bill Wagner, Chris Searcy, Ed Moore, Tony Musto, Howard Coker, Jeanne Clougher, Hugh Starnes, Florence Foster, Amy Mashburn, Rick Matasar, Dan Morrissey, Dexter Douglass, Reece Smith, Martin Sperry, Tony Boggs, Mark Killian, John Luzzo, Bill VanNortwick, Frank Bedell, Catherine Lannon, Kathryn Ressel, Don Weidner, James M. Russ, Louie Adcock, Lisa Kahn, Paul Remillard, Terri Anderson, Beverly Miller, Hugh Grimes, Edith Osman, Margaret Matthews, and Patti Henning.

REPORT OF STANDING COMMITTEE

Committee Chair, Chris Searcy reported on the activities of the Standing Committee. He advised the Professionalism Award subcommittee had made a recommendation for this years winner, which was approved at the last meeting. The award will be presented at the Judicial Luncheon of The Florida Bar.

The Historical Video Series montage has been CLE approved, and is available to any interested individual. Additionally, a new series of interviews is beginning and Paul Lipton is coordinating this project.

Chris advised that standing committee members would be assisting the judicial subcommittee of the commission with the Professionalism Conclave scheduled for the annual meeting.

Jeanette Hausler reported on the upcoming Master's Seminar on Professionalism which the committee will be conducting at the annual meeting. Confirmed panelists will include Justice Pariente, Judge Hoeveler, Don Horn and Wilhelmina Tribble. The program selected is "The Case of The Silent Alarm". Paul Remillard will moderate. It is scheduled for the afternoon of June 24.

New programs and activities being considered by the Standing Committee include a mentorship program and a subcommittee has been formed to determine if there is a way every new lawyer in Florida can have a mentor. The idea of holding Quarterly Seminars at large firms is being brought together, with a pilot being considered in Broward County. A student Essay Contest is another concept being considered as a way to encourage law students to focus on issues of professionalism.

BAR SUBCOMMITTEE REPORTS

MPRE

As Justice Anstead serves on the Supreme Court, he requested Judge VanNortwick facilitate discussion on this issue.

Louie Adcock made preliminary remarks concerning the Commission being requested to consider the Florida Board of Bar Examiners petition to the Supreme Court to permit law students to sit for the Multistate Professional Responsibility Exam (MPRE) prior to law school graduation. He explained that the Bar Subcommittee was charged with the task of reviewing this issue and making a recommendation to the full commission.

Reece Smith presented his views as to why he felt the MPRE should be taken after graduation (see attached). Mr. Smith feels education in legal ethics/professionalism is lacking in law schools, and not being taught pervasively in substantive classes. Legal ethics should be the most important subject in law school, but isn't. He commented allowing taking the MPRE prior to graduation sends the wrong message and lessens importance. Students can detect a lack of emphasis on this subject.

Dean Matasar reported for the subcommittee (see attached). He agreed with most of Reece Smith had said with the exception of when the exam was taken. He said this was not an advosary position between their ideas, but a conversation to see what would be the best for the students. Dean Matasar agreed with many points, but felt when the exam was taken would not affect the outcome. The message isn't sent by when the exam is taken, but by what is said throughout education. He said the profession has changed. There is a strong effort at law schools to increase courses with professional emphasis earlier in the term. Changing the existing rule would allow an option to the schools. It wouldn't be mandatory, but an option decided upon by each school.

General comments and discussion followed. Louie then presented the formal proposal to the full commission with the Bar Subcommittee moving to report to the Supreme Court favoring allowing students to take the MPRE prior to graduation. Motion seconded.

Vote of the commission members as follows: 10 yes, 3 no. Motion passed.

Another motion was made to require law schools to require a comprehensive program of teaching professional responsibility. Seconded.
Motion was made to refer item to the law school subcommittee for further review. Seconded.

Diversity

Paul Remillard reported for subcommittee members Joe Harbaugh and Elaine James, who were unable to attend. He presented a proposal (see attached) which encompassed information discussed by the subcommittee, along with information received from Justice Pariente and Elaine

James. He then introduced Margaret Matthews, President of the Hillsborough County Bar Association, who discussed the annual Diversity Program held on Martin Luther King, Jr. birthday. They had a very well received program this year, and plan on doing a diversity program using a new perspective each year.

Comments were made that the commission needs to recognize the commitment made by the Center to this issue. A Diversity Subcommittee is in place, and work is already begun toward this effort. Also, the commission has an absolute commitment to this issue.

Suggestion was made to devise a way to take what was done in Hillsborough County to others such a local bars and circuit committees. The Center was asked to put together a package of the Hillsborough materials and send it out with a letter from the Bar leadership. Another idea was to include a question on diversity in the Historical Video Interviews.

Justice Anstead offered to speak to the Supreme Court's Commission on Fairness.

Judges Lisa Kahn, Hugh Grimes, Florence Foster and Claudia Isom volunteered to serve on this committee.

Large Law Firm Summits

Rick Matasar reported on the concept of having a 'meeting of the minds' in a summit format. His vision is to have commission members visit every large legal employer in Florida and ask what their professional plan is and what they're doing. It was felt the message should not stop at law firms, but go everywhere including State Attorney's, public defenders, etc. The overall response of the commission was very enthusiastic.

Solo-Small Firm Symposium

Lisa Kahn reported on the progress of holding symposia for solo-small firm practitioners. She said the overall feeling was we were not reaching the small firms. The concept of the symposia will be to meet in small groups to find out what their problems are, what their needs are, and how we can help. The first programs will be scheduled this coming fall.

LAW SCHOOL SUBCOMMITTEE REPORTS

CLE Publications

Ed Moore explained the concept of incorporating a professionalism introduction to all CLE books and publications. The proposal was made that all CLE publications contain an introduction or chapter devoted to professionalism in the area of law which is the subject of the particular publication. The introduction or chapter should be authored by a leading practitioner in the area of the CLE publication. A letter from Justice Anstead will be sent to section chairs (see agenda backup- Tab F) requesting they write an appropriate introduction for their section.

Jack Harkness indicated their should be no problem in putting this into The Florida Bar publications. The commission accepted the concept, and Ed Moore will spearhead the project.

Institutional Membership

Don Weidner reported that this issue was now being discussed through the Bar. Howard Coker indicated there was no problem, it just needed to go through all of the channels of the Bar.

Faculty Award

Don Weidner reported for Matt Comisky. He read a letter which was sent to all law schools requesting nominations of faculty for this award. The deadline was extended from Feb. 28 to March 15. The award will be presented at the Judicial Luncheon at annual meeting, along with the Professionalism Award.

Article

Kathryn Ressel presented a short article for "The Professional" about the outcome of the survey of law school faculty. The article will appear in the next issue (see attached).

Conclave of Law Faculty

Liz Moody reported on plans to hold a faculty conclave at Stetson on March 19. The conclave will focus on teaching professionalism, and faculty are encouraged to attend. Frank Bedel on behalf of the Young Lawyers Division, said the report which had compiled what professionalism programs were being done at each law school did not include Stetson. He said this information had been inadvertently omitted, but would be sent in a new report to the full commission.

Visioning

Dan Morrissey passed out a report he had compiled from each law school which gathered ideas about how the legal academy might work with other members of the justice system to promote professionalism (see attached). Justice Anstead requested this information be turned into an article appropriate for publication in the Bar Journal. Dan Morrissey agreed to do so.

JUDICIAL SUBCOMMITTEE REPORTS

Guidelines

The judicial subcommittee proposed language for full commission review (see agenda backup) which would be in response to the Trial Lawyers request for endorsement of their guidelines of professional conduct. After review and discussion of the proposed language, a vote was taken of the commission members.

The vote was as follows: 7- yes / 0-no; Passed

The idea was presented to request the Trial Lawyers Section begin the process of seeing if the Supreme Court and The Florida Bar would mandate distribution of same to clients. Bill VanNortwick will follow up with this idea.

Conclave

Bill VanNortwick provided an overview of plans for the Circuit Committee Professionalism Conclave to be held on June 23 at the annual meeting this year. Justice Anstead encouraged support of the commission for this project.

BUDGET UPDATE

Bill VanNortwick reported for the Executive Budget Committee. Now awaiting the Bars budget committee review on Feb. 24. Justice Anstead commented that the budget initiative had been the Bar's initiative. He expressed his appreciation and support of the Bar leadership, including Howard Coker and Edith Osman.

CENTER UPDATE

Terri Anderson gave a brief report (see handout) of the more than 20 projects the Center is now trying to stay on top of. She also reported on the new CLE On-line program done in cooperation with FSU, and on the Stephen Covey Professionalism Program for Lawyers which will be held in Miami on March 11.

CLOSING

Justice Anstead requested comments from new members and attendees at this meeting. All comments were favorable and enthusiastic. The Justice then indicated the next meeting would be in September or October, held in Tallahassee.

With no further business, the meeting was adjourned at 3:00 p.m.

MEMORANDUM

To: Justice Harry Lee Anstead

From: Dean Richard A. Matasar

Re: Administration of the Multi-State Professional Responsibility Examination

Date: November 5, 1998.

On several occasions over the last few years, the Florida Board of Bar Examiners petitioned the Supreme Court of Florida to amend Rule 4-13 of the Rules Relating to Admissions to the Bar in order to permit law students to sit for the Multistate Professional Responsibility Examination ("MPRE") before graduation from law school. Law school deans, practitioners, and other commentators have been divided on the proper response to this petition. *Compare* Resolution of Student Education and Admissions to the Bar Committee (Edwin Scales Resolution) (June 27, 1997) ("supports and endorses the Florida Board of Bar Examiners' initiative to allow all Florida law students to take the [MPRE] while these students are in law school.") *with* Letter of Wm. Reece Smith, Jr. to Supreme Court (December 24, 1997) ("this is not the time to adopt proposed amendment 4-13"). On June 4, 1998, the Supreme Court declined to amend Rule 4-13, because it was awaiting a recommendation from the Professionalism Commission. *See* Amendments to the Rules of the Supreme Court Relating to Admissions to the Bar, No. 91,713, p.2 (June 4, 1998) (Per Curiam) ("The Florida Supreme Court Commission on Professionalism is currently studying the issue of allowing law students to sit for the MPRE and plans to make a recommendation in regard thereto in the near future.").

In response to the Supreme Court's direction, and at the request of the Professionalism Commission, I have been asked to analyze the issues involved with allowing students to take the MPRE prior to graduation. Although I am on record as being in favor of the change, I will endeavor to provide the arguments both in favor and against the change--using Reece Smith's well-reasoned opposition as the structure for the discussion. I conclude that the Commission should endorse greater flexibility in the Bar Admission rules.

Argument (1)--Permitting Students to Take the MPRE During Law School Sends the Wrong Message.

Opponents of permitting students to take the MPRE before graduation argue that doing so will send an improper message to students that professional concerns, even of minimal standards of professional responsibility, are less important in the practice of law than substantive knowledge. The argument is: accelerating testing on professional responsibility matters during law school, but delaying testing of substantive matters, devalues the former in favor of the latter.

I am uncertain why this message would be conveyed. There are others. Professional responsibility is so important that it must be tested early, and if a student fails, often, before we even let a student address substantive legal matters. Thus, professional responsibility is paramount. This position can be reinforced by the law schools which can emphasize the need to learn professional responsibility issues early in law school, especially to permit those issues to be raised throughout the remainder of the student's career.

Furthermore, currently professional responsibility might be seen as an afterthought--tested **AFTER** "real" subjects, segregated from "real" law, and taught only at the end. While I do not think that this is a correct perception, I see no reason why students would be more inclined to devalue professional responsibility issues tested **BEFORE** substantive law than they would to devalue the subject if it is taught **AFTER** substantive law.

Argument (2)--Administration of the MPRE Before Graduation will Be Disruptive of the Law School's Academic Environment.

It is argued that given human nature, it is inevitable that in-school administration of the MPRE will be disruptive of, and detract from, student attention to other courses.

My experience suggests differently.

First, the MPRE is given before graduation in many, if not most, other states. They seem to be functioning. Furthermore, for years medical schools have tested substantive areas in board examinations well before graduation.

Second, as the Associate Dean for Academic Affairs at Iowa, as a visiting faculty member at the University of Michigan, and as Dean of Chicago-Kent College of Law, I saw students struggle with studying for the MPRE while in school. However, in these cases, the MPRE was disruptive in the same way as job interviews, law review, moot court, and other major projects undertaken by students. They were required to balance their time, and we as teachers kept them honest by requiring attendance and class participation.

Third, permitting the students to take the MPRE while in school had the salutary effect of forcing the students to work harder in the Professional Responsibility course. With a bar examination looming this gave students the incentive to treat that course with respect, something often lacking in places in which the MPRE is not given and in which the students treat Professional Responsibility as a second class course in comparison with substantive matters.

Fourth, students have the option of taking the examination before graduation. They are not compelled to do so.

Finally, disruption is a small price to pay for giving students greater flexibility and choice.

Argument 3--Administration of the MPRE Before Graduation will Affect the Scheduling and Content of Courses.

It is argued that permitting the administration of the MPRE before graduation will give students an incentive to take the Professional Responsibility course too early in their law school careers. Thus, they will not have an appropriate appreciation of the legal context in which professional issues arise. It is further argued that the course should not be offered before the second semester of the second year of law school.

First, each school should decide for itself the semesters in which students may be permitted to take Professional Responsibility. Some schools may wish to defer. Others may wish to administer the course early, build upon it with advanced courses, or anticipate that the issues of professional responsibility will be raised throughout the curriculum.

Second, the law schools are in a better position than the Bar in regulating their appropriate curricular choices and pedagogy. If a school believes that any course should be taught in any particular semester, it can choose to limit its students' enrollment in the course to whatever semester it chooses. It can thereby control the timing of when a student can take the MPRE. By the same token, if a school believes that its students would benefit from taking the Professional Responsibility course at an early time in the curriculum and that its students would benefit from being permitted to take the MPRE at an earlier time, it should not be prevented from doing so because others have made a different choice. Each school is in the position to best understand its own students and faculty.

Argument 4--Administration of the MPRE before Graduation will Undermine our Desire to Reinforce the Teachings of Professional Conduct.

It is argued that if students are permitted to take the MPRE before graduation (or at an early point in their law school careers) the importance of professional responsibility and professionalism issues will fade. It is also argued that forcing students to take the MPRE after they have completed other parts of the bar examination will reinforce the importance of professional conduct issues.

These are plausible arguments. However, they are neither the only possible approaches nor the most likely. One might argue the following: by permitting students to take the Professional Responsibility course (and the MPRE) early in law school, students will learn the importance of those issues. They will challenge their faculty members in other courses to raise and discuss such issues. They will also be more likely to take advanced courses in the area--seminars or other courses looking at professionalism issues. Moreover, for those students who do not pass the MPRE, they will be forced to continue their study of the area until they achieve proficiency.

Argument 5--There Should be a Delay in making any Change in Rule 4-13 until

Instructors Can Incorporate New Developments into their Courses.

It is argued that the MPRE is being rewritten to reflect cases, statutes, and other regulations of the profession beyond the Model Rules. Furthermore, it is suggested that the American Law Institute's suggested revisions to the Rules in the Restatement need to be digested by instructors in order to assure that students are knowledgeable in the latest approaches to professional responsibility. Thus, it is argued that there should be a delay in implementing changes to Rule 4-13 until instructors can incorporate changes into their courses.

Law is constantly changing and evolving. It is the duty of the instructor to stay current with emerging law and law reform proposals. Thus, instructors must always anticipate changes to law. Furthermore, law school courses and bar examinations are not the same thing. Law schools teach courses to create life-long learning skills in their students, the desire to improve law, and the quest for justice, not just to pass on information sufficient to pass professional license examinations. Finally, although rarely acknowledged by the law schools, students take Bar Prep Courses to guide them in passing bar examinations. The market should assure that students receive information sufficient to pass the MPRE.

Argument 6--The Professionalism Movement in the State will be Harmed if Change in Rule 4-13 is Made at this Time.

This is a conclusion, not an argument. I believe differently. In my view, giving students greater flexibility, permitting schools to schedule courses as they wish to serve their own pedagogical goals, and empowering students to capture and become expert in professional issues does not undermine professionalism goals. If the school maintains a strong commitment to professionalism, it can teach its students that professional responsibility is so important that we require committed study and testing even before the student graduates. This is as compelling an approach as current methods.

* * *

In conclusion, there are strong reasons proffered to maintain the status quo. They reflect a heartfelt belief that the administration of the MPRE before a student graduates may undermine important goals of this Commission, disrupt the educational process of the school, and send students the wrong message about the importance of professional responsibility issues. I have argued that the opposite may be true. Professionalism issues can be reinforced by making professional responsibility the one course in law school that is tested for competency before a student graduates, that the educational process may be strengthened by allowing schools to sequence courses and use professional responsibility as a base course for others, and that a strong message of the importance of professionalism can be given when the course is elevated.

Given these arguments in counterpoint, I believe that the Supreme Court ought to err in favor of creating more flexibility. This is the position taken by most other states. If a school believes strongly that its students should defer taking the MPRE, it ought to be given the power to regulate whether its students are ready for the examination. This might be done by asking for a certification from the school before permitting its students to sit for the MPRE. In any event, however, the currently restrictive rule should be amended to permit schools that are comfortable with the earliy administration of the examination to allow their students to take the MPRE before they graduate.

MEMORANDUM

TO: The Supreme Court Commission on Professionalism

FROM: Wm. Reece Smith, Jr.

DATE: February 18, 1999

RE: A Response to Dean Matasar

Upon request, Dean Matasar has heretofore prepared a written rebuttal to my letter of December 24, 1997, addressed to the Supreme Court of Florida in connection with a proposed change in Rule 4.13 of the Rules Relating to Admission to the Bar. Following the format of Dean Matasar's rebuttal, I submit herewith a response to the views he expressed.

1. Permitting Students to Take the MPRE During Law School Sends the Wrong Message

Jeffrey Lewis, former Dean of the University of Florida Law School, agreed the wrong message would be sent. Dean Matasar is of the opposite view. Dean Matasar argues that students may well place greater value on Legal Ethics and Professional Responsibility if the MPRE is given while the students are in law school. They will see that Professional Responsibility is paramount and will note that students cannot take the general bar

examination until they have passed the MPRE. Moreover, he argues, permitting the MPRE to be taken while in law school will afford law schools an opportunity to "emphasize the need to learn professional responsibility issues early in law school, especially to permit those issues to be raised throughout the remainder of the student's career."

History teaches otherwise. Legal ethics and professional responsibility, according to national experts in the field, remain today "an unloved orphan of legal education." Pressed by the American Bar Association, most American law schools now offer a one, two or three hour required course in Ethics/Professional Responsibility. Very few require more. The subject is not emphasized in course offerings and many teachers are not familiar with the subject matter.

There is no apparent reason to conclude that offering the MPRE to students while in law school will change the law school emphasis on Ethics/Professional Responsibility. That has not happened in many law schools located in states that permit the "in-school" MPRE. And students' respect for Ethics/Professional Responsibility has not been enhanced because of the offering. These statements are documented generally by scholarly research. "(S)tudents continue to share the faculty's low opinion of legal

ethics." Russell G. Pearce, Teaching Ethics Seriously, Legal Ethics as the Most Important Subject in Law School, 29 Loyola University Chicago Law Journal 719, 725 (1998), citing Crampton, Konick & Rhode. Moreover, claims that Ethics/Professional Responsibility are taught pervasively through the substantive law curriculum are open to serious question. See Rhode, Ethics by the Pervasive Method, 42 J. Legal Educ. 31 et seq (1992).

Professors Crampton & Konick, leaders and respected scholars in the field, assert that, at a minimum, law schools should offer a required first-year course of at least three credits, a required advance course of three credits, and pervasive teaching throughout the curriculum. Crampton & Konick, Rule, Story & Commitment in Teaching Legal Ethics, 38 Wm. & Mary L. Rev. 145 (1996). Other authorities also argue for increased, required course emphasis, Pearce, supra, pp. 735, 738.

Happily, Florida law schools have recently given increased instructional attention to professionalism but it is too early to determine if these initiatives will make "professional responsibility. . . paramount." And what of out-of-state schools?

When applicants for admission to the bar are required to take the MPRE after graduation, they must at least review the Ethics/Professional

Responsibility field. They cannot say, as they may after passing an in-school MPRE, I've been there and done that.

2. Administration of the MPRE before Graduation will be Disruptive of the Law School's Academic Environment.

Dean Matasar argues otherwise. In prior settings, he "saw students struggle with studying for the MPRE while in school." But the MPRE, he asserts, was merely disruptive of other studies and activities "in the same way as job interviews, law review, moot court, and other major projects undertaken by students." My reply would argue that, if anything, MPRE study in school is likely to be more stressful and disruptive. One's opportunity to take the general bar exam and be admitted to practice is at risk. Moreover, why add yet more disruption and stress to the challenges of law school? It is noteworthy that in 1989 every Florida law school dean believed the "in school" MPRE would be disruptive of student studies and would adversely affect student class attendance. See, 548 So.2d 235 (Fla.Sup.Ct., 1989). What has changed other than the deans?

3. Administration of the MPRE Before Graduation Will Affect the Scheduling and Content of Courses.

Dean Matasar argues that each law school should be free to regulate its appropriate curriculum choices and pedagogy. I don't disagree. I am more concerned – as stated as a first principle in the publication of the ABA's Section on Legal Education and Admissions to the Bar entitled Teaching and Learning Professionalism – that law schools provide in their teachers role models for professionally responsible behavior and emphasis upon Ethics/Professional Responsibility in their course offerings. How and when law schools teach Ethics/Professional Responsibility is a law school responsibility. However, an in-school MPRE is likely to force all Florida schools to offer the required instruction early in the law school curriculum and is likely to detract the student's attention from Ethics/Professional Responsibility issues once the MPRE is taken successfully.

As for the argument that an in-school MPRE will lead students to challenge faculty in other courses on Ethics/Professional Responsibility issues and make the student "more likely" to take an advanced optional course, experience and available data teach otherwise. What is needed is greater

compulsory emphasis on the subject. See, generally, Pearce and authorities cited in 29 Loyola University Chicago Law Journal 719 (1998).

4. Administration of the MPRE Before Graduation Will Undermine the Desire to Reinforce Teaching of Professional Conduct.

Dean Matasar concedes, as plausible, my argument that student interest and knowledge of Ethics/Professional Responsibility will fade once the MPRE is taken in school and that having to review the field to prepare for the MPRE after graduation will reinforce the applicant's knowledge and appreciation of Ethics and Professional Responsibility. He replies, however, that an "in-school" MPRE will cause the students to appreciate the importance of the subject, to challenge their professors on relevant issues and "more likely" to take advanced courses. Why then has this not been so in states where the "in-school" MPRE is permitted? There are no data supporting the Dean's thesis. Available information is to the contrary. ". . .students continue to share the faculty's low opinion of legal ethics." Pearce, 29

Loyola University Chicago Law Journal 715, 725 (1998) and cited authorities.

What is needed first and foremost is greater compulsory emphasis on Ethics/Professional Responsibility instruction.

5. There Should be a Delay in Making any Change in Rule 4-13 Until Instructors Can Incorporate New Developments into Their Courses.

6. The Professionalism Movement in This State Will be Harmed if Change in Rule 4-13 is Made at This Time.

Dean Matasar's argument as to number 5 puzzles me. He correctly argues that law teachers should keep up with developments in the law and be prepared to teach accordingly. But he goes on to say "law school courses and bar examinations are not the same thing" and, if I read him correctly, he asserts that if a law school instructor falls short in preparing students for the MPRE then "Bar Prep Courses" will do so. Thus, "(T)he market should assure that students receive information sufficient to pass the MPRE." Surely I

misunderstand and surely he would agree that passing the MPRE is not the sole goal of Ethics/Professional Responsibility courses and the Professionalism Movement in Florida.

The fact remains the MPRE will be greatly expanded as of the Spring of 1999. It will inquire into subject matter far beyond the minimal standards of professional conduct. Those preparing the new MPRE assert that "outside the disciplinary context" the new examination is

> ". . . designed to measure an understanding of the generally accepted rules, principles, and common law regulating the legal profession in the U.S.; 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.)"

Lawyers' exposure to civil liability, a subject treated at some length in the Restatement of the Law Governing Lawyers, is one prime example. But this Restatement has yet to be published in final form. Surely now is not the time to change Rule 4-13 and to allow students to take the MPRE while in school. Both teacher and student need more time in which to adjust to a new, more comprehensive bar examination.

Conclusion. The issue here is not finding a way to give law schools more flexibility in curriculum and course control. That flexibility is available now. Neither is the goal making life easier for the bar examiner or the applicant. The inconvenience, if such it be, of taking two separate examinations at some location – will remain. Both the MPRE and the general examination must be taken, passed and graded. We should expect every applicant to demonstrate, at least, minimal competence in both areas of inquiry.

The issue is whether we will do all that reasonably can be done to impress Florida lawyers with the importance of professional conduct and responsibility. I adhere to the view that permitting applicants to take the MPRE while still in law school will do just the opposite. To permit that practice will disserve the public, the profession and the applicant.