

COMMENTARY & INSIGHT

Blind Contrition: Are Ethics Exams 'A Gesture of Doubtful Utility'?

By Gordon Mehler

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In August, once again, the American Bar Association's House of Delegates moved to put off a final vote on its five-year effort to adopt a new code of ethics. Meanwhile, bar examination candidates in at least 24 states will be burdened with a new day of testing devoted exclusively to legal ethics.

In light of the major disagreements on this subject among lawyers, and in light of the ABA's desire to revise its present code, many law students are wondering why legal ethics is being tested at all. One suspicion is that this separate day of testing is little more than a continuing reaction to the Watergate era, a gesture of blind contrition in atonement for the bad image of the legal profession.

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An open-ended essay question on legal ethics has appeared periodically on bar examinations for a long time, but the dramatic interest in legal ethics is a recent phenomenon, becoming a favorite topic in books and law review articles. The ABA followed suit by refusing to accredit any law school that fails to provide instruction in legal ethics, and in 1980, the National Conference of Bar Examiners introduced the Multistate Professional Responsibility Examination (MPRE).

The MPRE, a two-hour test given separately from the regular bar exam, is based on the ABA's Code of Professional Responsibility and Code of Judicial Conduct. Consisting of 50 multiple-choice questions, the MPRE makes legal ethics the most heavily tested

of the seven nationally uniform multistate bar subjects.

Protect Lawyers Against Themselves

John E. Holt-Harris, chairman-elect of the National Conference of Bar Examiners and a member of the MPRE's test drafting committee, concedes that Watergate was "the crowning blow" in the drive to expand legal ethics testing. But the primary aim of the MPRE, he insists, is to protect lawyers against themselves. "Lawyers who are called before bar grievance committees say, for example, they were unaware that contingent fees are prohibited by the code in criminal cases," says Holt-Harris. "The MPRE can guarantee that a lawyer has studied the Code and knows what his obligations are."

What precisely are the ethical obligations of a lawyer? Reading parts of the current Code of Professional Responsibility supports Justice William H. Rehnquist's observation that legal ethics is a subject full of "pious-generalizations, which contribute about as much to analysis as the emissions of a squid contribute to visibility."

Realizing that the code contains a number of platitudes and uncertainties, the bar examiners maintain that the MPRE tests only substantive areas about which there is no dispute. The problem, however, is that the MPRE does not ask straightforward questions about contingent fees in criminal cases, nor is the test conducive to a thoughtful reading of the code.

"The way to write a good multiple-choice question," says Monroe H. Freedman, a professor and former dean of Hofstra University School of Law, "is to concentrate on quirks and minutiae. The key is mindless memorization, things you forget right after the exam anyway." A Yale law professor and legal ethics scholar who took the MPRE recently to be admitted to the Connecticut bar said he "couldn't figure out what the examiners wanted" on several questions.

Overly Ethical?

The MPRE requires the examinee to distinguish between the code's "disciplinary rules," which, if violated, can result in a lawyer's disbarment, and its "ethical considerations," which are aspirational in nature and cannot result in disbarment. The student who confuses the two may find himself in the strange position of losing points on the MPRE for being overly ethical.

This brings up another question. Is the MPRE really an ethics exam? A nonlawyer might answer no. A code of ethics that allows a lawyer to withhold information needed to prevent the commission of a crime by his client cannot be very ethical. Perhaps the ABA sensed this in 1969 when it dropped the title Canons of Ethics in favor of Code of Professional Responsibility. The code is not holy writ, but an uneven blend of ethics and etiquette, social policy and self-interest.

Proponents of the MPRE stress the objective, testable character of the code and prefer to minimize the differences between legal ethics and other multistate bar exam staples such as contracts or torts. But this comparison is misleading. First, a sizable chunk of legal ethics is abstract and philosophical. Second, it is an embryonic subject that has not had the benefit of centuries of careful refinement. Third, those statutes and judicial opinions that have begun to address the ethical problems of legal practice are apt to be excluded from the MPRE since the test is based entirely on the ABA codes.

There are basic dos and don'ts in every profession, and it is true that common sense cannot always instruct lawyers on matters such as fee-splitting, dealings with clients of another lawyer, and selected conflict of interest rules. But the number of counterintuitive, black-letter code provisions is relatively small. They can be tested comfortably as part of the regular, two-day bar exam without engaging anxious bar candidates in a further round of ritual cramming.

Joe E. Covington, director of testing for the National Conference of Bar Examiners and retired dean of the University of Missouri School of Law,

believes the MPRE is an improvement over the essay format because an essay permits students to spice their answers with noble-sounding buzz words and then conclude that any behavior asked about is unethical.

Shoddy analysis, however, is red-penciled in other subjects, so one wonders why the bar examiners cannot do the same when they are grading an ethics essay question to which the code supplies a definite answer. Furthermore, many states include multiple-choice questions in their local bar testing. Here then is another outlet for objective legal ethics questions.

As one observer puts it, using the code as a guide to the practice of law is like using a valentine as a model for open heart surgery.

By focusing on picky points to facilitate national, multiple-choice testing, the bar examiners may have unwittingly shifted the attention of law students away from more important, though harder-to-test issues that have made legal ethics a subject of vibrant debate in recent years. These issues include client perjury, deficiencies in the adversary system of litigation, the problems of lawyers who serve as directors of client corporations, the duty to make legal services available, and many others.

Lawyers are not the only ones who face difficult choices in professional ethics. Doctors must wrestle with parallel dilemmas. How candid should a physician be about a patient's condition? Should those who can afford to pay receive better care than those who cannot? Where must the line be drawn in regulating abortion or psychosurgery? Medical schools have responded by offering courses in bioethics, but medical students are not required to sit through a machine-graded bioethics exam.

As a result of Watergate and unflattering opinion polls, the bar has been eager to show the public that it is cracking down on legal ethics. But to do so by resorting to saturation testing is a strategy of doubtful utility. A glance at the tally sheets of most bar grievance committees will reveal that the main problems in legal ethics are, and have always been, professional incompetence, case neglect, and excessive fees. These are human failings that the MPRE can do little to correct.

The bar examiners surely mean well, but they have tripped in their rush to hoist the banner of lawyerly virtue. The MPRE conveys the impression that legal ethics rest in an isolated corner of the law, and that proficiency in the subject is a matter of blackening the correct ovals. It encourages law students to forget that legal ethics, unlike contracts or torts, require more than the right rule—they require the right attitude.

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