

THE TESTING COLUMN

STANDARDS ON THE MPRE

by Susan M. Case, Ph.D.

The Multistate Professional Responsibility Examination (MPRE) is a 60-item test on the law governing the conduct of lawyers; content tested on the examination includes that covered by the ABA Model Rules of Professional Conduct and the ABA Code of Judicial Conduct, as well as generally accepted principles established in leading federal and state cases and in procedural and evidentiary rules. The MPRE is required for admission to the bars of all but three states, and is administered three times per year at test centers across the country.



The following is a typical question:

An attorney handled all of a corporation's legal work, which typically involved regulatory issues and litigation. The corporation planned to buy a copper mine, and the corporation's president was concerned about a congressional hearing concerning the extent of regulation in the copper industry. The president asked the attorney to testify that the copper industry was overregulated, and the attorney did so. The attorney registered his appearance under his own name and did not disclose that he was appearing on behalf of a client. Afterward, the attorney billed the

corporation for fees and expenses related to his testimony.

Was the attorney's conduct proper?

- (A) Yes, because the duty of confidentiality prevented the attorney from disclosing the identity of his client.
- (B) Yes, because the attorney-client evidentiary privilege prevented disclosure of the identity of his client in this context.
- (C) No, because the attorney failed to disclose that he was appearing and testifying in a representative capacity.
- (D) No, because the attorney accepted compensation in return for his testimony.

Although the MPRE is a national examination developed by the National Conference of Bar Examiners (NCBE), each jurisdiction establishes its own MPRE pass/fail point. An examinee's score must be equal to or greater than this point in order to pass the test in that jurisdiction; the same score might be considered passing in one state and failing in another state. Theoretically, jurisdictions could disagree on the level of proficiency an examinee

must demonstrate in order to pass that invisible line separating those with sufficient ethical understanding to protect the public from those with an inadequate knowledge of the standards of professional conduct. In practice, the MPRE pass/fail standards do differ slightly. In this column, I will discuss the practical realities of standard setting for the MPRE, both in terms of where we are today and in terms of where I expect to see changes over the coming years.

As an initial matter, it bears noting that MPRE scores clearly reflect the examinees' level of knowledge and ability to apply that knowledge, as opposed to test-taking skills or rote memory of isolated facts. As you would expect, studies have found a consistently moderate correlation between examinees' scores on the MPRE and their scores on other standardized exams like the LSAT and the MBE. Because the three tests are taken at different points in time, and are measuring somewhat different knowledge, one would not expect an extremely high correlation, but at the same time, those who do well on one of the tests are likely to do well on the others. Moreover, we have found that examinees who spend between 16 and 30 hours preparing for the MPRE performed better than those who spent less time. Finally, we have found that those who took a Professional Responsibility course performed better on the MPRE than those who did not take one. Examination scores provide a good indication of an examinee's ability to apply the rules of professional conduct to situations such as that shown in the sample question. Put another way, one can accurately claim that two examinees who received scaled scores of 80 on the MPRE have demonstrated a similar level of understanding of the rules and principles being tested.

But what does it mean to obtain a scaled score of 80, for example, on the MPRE? The MPRE scaled score range has a spread of 50 to 150. When the scale was originally established, the scaled score was developed so that the average score was arbitrarily set at 100. The average score has not changed much through the years; the average score is now approximately 99. Because the scaled score range is 100 points (50 to 150) and there are only 50 scored questions on the MPRE, not all of the scaled score points are used—typically every other scaled score point is used for a given examination. In other words, an examinee who received a scaled score of 80 typically answered only two more questions correctly than did an examinee with a scaled score of 76.

As noted above, the pass/fail point for the MPRE varies across jurisdictions. In 2005, the standard scaled score required to pass the MPRE ranged from 75 to 86, depending on the jurisdiction. The most common standards were 75 and 80, each required by 16 jurisdictions; a score of 85 was required by 15 jurisdictions, a score of 77 was required by two jurisdictions, and scores of 79 and 86 were each required by one jurisdiction.

For the November 2005 MPRE, these standards required the following percent correct scores:

75	48%
77	50%
79	51%
80	52%
85	53%
86	54%


Across all three administrations of the MPRE in 2005, the pass/fail standard ranged from requiring between 48 and 60 percent of the questions correct.

Many people believe that the MPRE passing standard is higher than it is. My guess is that some of these people would be surprised to learn that examinees had to answer only 48 percent of the questions correctly in November 2005 to pass the MPRE in their states. In licensure exams, where the overriding concern is to protect the public, a standard-setting error which passes someone who should have failed is generally viewed as a more serious error than one which fails someone who should have passed.

The pass/fail point for any high-stakes exam should be reviewed regularly. The process used to establish the standard should be credible, the resulting standard should appear reasonable, and every attempt should be taken to ensure that the standard is not arbitrary or capricious. Use of knowledgeable standard-setting panelists is a key element in all standard-setting efforts, regardless of the method used. The panelists should be familiar with the examinee population, and should be knowledgeable about the purpose and context of the test. Finally, using a large enough number of panelists is of paramount importance, because in any standard-setting group, personal standards will vary from very high (the “hawks”) to very low (the “doves”). As the number of panelists becomes larger,

differences of opinion average out, and the resulting standards are more likely to represent a reasonably balanced view.

We are planning to conduct a large standard-setting project focusing on the MPRE this year. We will use the standard-setting approaches that are currently viewed as most appropriate for high-stakes examinations in the professions. We plan to convene a large and diverse group of standard-setting panelists representing many of the constituencies. These panelists will be trained for this process, and will work together for several days to develop an MPRE pass/fail point. I hope the resultant standard will be useful as jurisdictions determine their own MPRE pass/fail points for bar applicants. Dialogue among standard-setting panelists at the national level will provide interesting information, perhaps shedding light on why two different jurisdictions studying the relevant materials might establish two different—though both reasonable—standards by which they measure their newly licensed practitioners.

By the way, the answer to the question posed above is C. 

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