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Strategies & Tactics for the MPRE *Seventh Edition*

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A quick easy-to-use guide that tells you exactly what you need to know to pass the MPRE!

& Strategies Tactics for the MPRE

(Multistate Professional Responsibility Exam)

Seventh Edition

ASPEN PUBLISHING

Strategies & Tactics for the MPRE

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Multistate Professional Responsibility Exam

Seventh Edition

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This book is dedicated to Jimmy and Mary.

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Strategies & Tactics for the MPRE

Part One

Plan of Attack for the MPRE

A. Introduction

Along with graduating from law school and passing a state bar exam, you must pass the Multistate Professional Responsibility Examination (MPRE) if you want to practice law in most jurisdictions in the United States (all but three). The MPRE is designed to test your knowledge of two relatively short documents, the American Bar Association (ABA) Model Rules of Professional Conduct and the ABA Model Code of Judicial Conduct, as well as your "understanding of the generally accepted rules, principles, and common law regulating the legal profession in the United States." Any amendments to the ABA Model Rules or Model Code will not appear on the MPRE until one year after the ABA's approval of those amendments.

The exam consists of 60 multiple-choice questions, 10 of which are not included in your final score (these are questions being tested by the examiners — you won't be able to tell the difference between a scored question and a test question). Each question has only one correct answer out of the four options.

The standard score scale ranges from 50 (low) to 150 (high). The conversion of your raw score (the number of questions you get right) to a scaled score (the score reported by the MPRE) involves a statistical process that adjusts for variations in the difficulty of different MPRE exams so that any particular scaled score will represent the same level of knowledge from test to test. For example, if a particular MPRE exam is considered easier than previous exams, the raw scores will be adjusted downward to account for this difference. The passing grade is different from state to state, but it is generally a scaled score between 75 and 86. To find the passing grade for your state, contact the state board of bar examiners.

By the time you finish your law school course in ethics or professional responsibility, you will have developed a general sense of the range of

ethical problems lawyers face every working day. However, to get past the MPRE, you need to know how to apply this general sense to specific fact patterns created by the MPRE examiners.

PEOPLE FAIL THE MPRE ALL OF THE TIME! You can't simply wander into the exam room on test day and hope for the best. Thus, there are two things that you need to do: one is to get familiar with the ethics rules, and the other is to get a sense of the kinds of questions that appear on the MPRE.

That's what this book is intended to do. Part One shows you how to attack MPRE questions, and in Part Two, you'll get a chance to put this plan of attack into practice on some model MPRE Questions and Answers. Part Three contains an additional four practice exams (240 questions) and corresponding answers to help you hone your skills.

If you were expecting to review thousands of questions for the MPRE—relax. This book is designed to teach you the law and analysis you will need to pass the MPRE through the use of the practice questions contained herein.

Incidentally, many of the questions in this book are real MPRE questions, although some have been modified to reflect recent changes in test format. They're in this book courtesy of the National Conference of Bar Examiners (NCBE). So you don't have to worry that the questions in this book may not resemble the ones you'll see on your MPRE—many were written by the very same people! Questions 11–60 in Practice Exam 3 are not actual MPRE questions, but they closely resemble the NCBE questions in content and style.

B. Basic Information About the MPRE

Background—The MPRE is created and administered by the NCBE, which is also responsible for the Multistate Bar Examination and the Uniform Bar Examination. The MPRE is currently administered in virtually every state, as well as the District of Columbia. All but two jurisdictions require the MPRE for admission (only Wisconsin and Puerto Rico do not require the test). Additionally, Connecticut and New Jersey accept successful completion of a professional responsibility course in lieu of a passing MPRE score.

When Offered—The MPRE is administered three times a year—in Spring, Summer, and Fall (usually March, August, and October, although it has been known to vary). In many states, you can take the MPRE before you finish law school. Generally, you should take the MPRE as soon as you complete your course on Professional Responsibility (since you will have just studied the subject). However, check with your local bar or your school's Academic Support or Bar Preparation Program to get advice on the best time to take the exam. Some jurisdictions allow you to take the MPRE long after you have taken the bar exam. Some jurisdictions require a minimum amount of law credits before accepting an MPRE score. Some jurisdictions will not allow you to take the MPRE until after you have taken the bar exam. Importantly, some jurisdictions have time limitations for how long a test score remains valid (sometimes less than two years), so if you are not sure where you are planning to practice, you might want to wait until your third year in the event you have to take more than one bar exam to find a job. However, if you are planning to sit for the bar in a state where you have to have a passing score on the MPRE before you can sit for the bar exam, it's a good idea to take it early enough so that, if you do fail, you'll have another chance to take it before the time you were planning to sit for the bar.

Format and Length—The MPRE is made up of 60 multiple-choice questions. It lasts two hours. It is similar to the Multistate Bar Examination in the sense that each question includes a fact pattern followed by four answer choices, from which you are supposed to choose the "best" response. Later in Part One, you'll see lots of examples of this question format, and you'll learn to analyze it down to its most essential elements.

Coverage—The MPRE covers the ABA Model Rules of Professional Conduct, as well as the ABA Model Code of Judicial Conduct. It doesn't attempt to cover the code of any individual state. (In actual practice you may find that the codes governing professional responsibility in your state differ in substantial respects from the ABA Rules and Code.)

The MPRE also tests the applicant's "understanding of the generally accepted rules, principles and common law regulating the legal profession"; in these items, the correct answer will be governed by the view reflected in the majority of cases, statutes, or regulations on the subject. In testing issues such as litigation sanctions or the attorney-client

evidentiary privilege, the Federal Rules of Civil Procedure and the Federal Rules of Evidence apply.

The entire subject of legal malpractice, which is of vital concern to lawyers and which is tested on the MPRE, is not mentioned as such in the Model Rules.

Scoring—Your MPRE score is determined by how many questions you answer correctly; there's no penalty for incorrect answers. The lesson to be learned from this is that it pays to answer every question, even if you're not exactly sure what the correct answer is.

How to Register for the MPRE—To register for the MPRE, visit the website online: http://www.ncbex.org/exams/mpre/registration/

C. What the MPRE Tests

1. Scope of Questions

Questions on the ABA Model Rules and related sources dealing with the conduct of lawyers and law firms make up 90–94 percent of all the questions on the MPRE. The remaining questions test the applicant's knowledge of the Model Code of Judicial Conduct.

The outline of subjects published by the NCBE lists the items tested. Occasionally, other items are added, but the NCBE's outline is a good guide to the weight you should give each subject as you study. Not all of the items are tested each time, but if you've covered them all in your studies, you can't miss.

The NCBE's outline of MPRE subjects, and the approximate weight given to each, follows:

I. Regulation of the Legal Profession (6–12 percent)

- A. Powers of Courts and Other Bodies to Regulate Lawyers
- B. Admission to the Profession
- C. Regulation After Admission—Lawyer Discipline
- D. Mandatory and Permissive Reporting of Professional Misconduct
- E. Unauthorized Practice of Law—by Lawyers and Nonlawyers

F. Multijurisdictional Practice

G. Fee Division with a Nonlawyer

H. Law Firm and Other Forms of Practice

I. Responsibilities of Partners, Managers, Supervisory, and Subordinate Lawyers

J. Restrictions on Right to Practice

II. The Client-Lawyer Relationship (10–16 percent)

A. Formation of Client-Lawyer Relationship

B. Scope, Objective, and Means of the Representation

C. Decision-Making Authority — Actual and Apparent

D. Counsel and Assistance Within the Bounds of the Law

E. Termination of the Client-Lawyer Relationship

F. Client-Lawyer Contracts

G. Communications with the Client

H. Fees

III. Client-Confidentiality (6–12 percent)

A. Attorney-Client Privilege

B. Work-Product Doctrine

C. Professional Obligation of Confidentiality — General Rule

D. Disclosures Expressly or Impliedly Authorized by Client

E. Other Exceptions to the Confidentiality Rule

IV. Conflicts of Interest (12–18 percent)

A. Current Client Conflicts — Multiple Clients and Joint Representation

B. Current Client Conflicts — Lawyer's Personal Interest or Duties

C. Former Client Conflicts

D. Prospective Client Conflicts

E. Imputed Conflicts

F. Acquiring an Interest in Litigation

G. Business Transactions with Clients

H. Third-Party Compensation and Influence

I. Lawyers Currently or Formerly in Government Service

J. Former Judge, Arbitrator, Mediator, or Other Third-Party Neutral

V. Competence, Legal Malpractice, and Other Civil Liability (6–12 percent)

A. Maintaining Competence

B. Competence Necessary to Undertake Representation

C. Exercising Diligence and Care

D. Civil Liability to Client, Including Malpractice

E. Civil Liability to Nonclients

F. Limiting Liability for Malpractice

G. Malpractice Insurance and Risk Prevention

VI. Litigation and Other Forms of Advocacy (10–16 percent)

A. Meritorious Claims and Contentions

B. Expediting Litigation

C. Candor to the Tribunal

D. Fairness to Opposing Party and Counsel

E. Impartiality and Decorum of the Tribunal

F. Trial Publicity

G. Lawyer as Witness

VII. Transactions and Communications with Persons Other than Clients (2–8 percent)

A. Truthfulness in Statements to Others

B. Communications with Represented Persons

C. Communications with Unrepresented Persons

D. Respect for Rights of Third Persons

VIII. Different Roles of the Lawyer (4–10 percent)

A. Lawyer as Advisor

B. Lawyer as Evaluator

C. Lawyer as Negotiator

D. Lawyer as Arbitrator, Mediator, or Other Third-Party Neutral

E. Prosecutors and Other Governmental Lawyers

F. Lawyer Appearing in Nonadjudicative Proceeding

G. Lawyer Representing an Entity or Other Organization

IX. Safekeeping Funds and Other Property (2–8 percent)

A. Establishing and Maintaining Client Trust Accounts

B. Safekeeping Funds and Other Property of Clients

C. Safekeeping Funds and Other Property of Third Persons

D. Disputed Claims

X. Communication About Legal Services (4–10 percent)

A. Advertising and Other Public Communications About Legal Services

B. Solicitation — Direct Contact with Prospective Clients

C. Group Legal Services

D. Referrals

E. Communications Regarding Fields of Practice and Specialization

XI. Lawyers' Duties to the Public and the Legal System (2–4 percent)

A. Voluntary Pro Bono Service

B. Accepting Appointments

C. Serving in Legal Services Organizations

D. Law Reform Activities Affecting Client Interests

E. Criticism of Judges and Adjudicating Officials

F. Political Contributions to Obtain Engagements or Appointments

G. Improper Influence on Government Officials

H. Assisting Judicial Misconduct

XII. Judicial Ethics (2–8 percent)

A. Maintaining the Independence and Impartiality of the Judiciary

B. Performing the Duties of Judicial Office Impartially, Competently, and Diligently

C. Ex Parte Communications

D. Disqualification

E. Extrajudicial Activities

2. Important Terminology

Model Rule 1.0 defines the important terminology you will need to understand in order to answer a question:

> (a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.
>
> (b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.
>
> (c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.
>
> (d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.
>
> (e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these rules or other law.

(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

The MPRE also lists several key words and phrases you should know:

(1) "Attorney" usually refers to the particular lawyer whose conduct is at issue. "Lawyer" in the same question usually refers to a different lawyer whose conduct is not at issue. Specific functional names for a lawyer, e.g., "litigator," "judge," "managing partner," "associate," "prosecutor," etc., may also be used if those names do not create ambiguity.

(2) "Subject to discipline" asks whether the conduct described in the question would subject the attorney to discipline under the provisions of the ABA Model Rules of Professional Conduct. In the case of a judge, the test question asks whether the judge would be subject to discipline under the ABA Model Code of Judicial Conduct.

(3) "May" or "proper" asks whether the conduct referred to or described in the question is professionally appropriate in that it (a) would not subject the attorney or judge to discipline; (b) is not inconsistent with the preamble, comments, or text of the ABA Model Rules of Professional Conduct or the ABA Model Code of Judicial Conduct; and (c) is not inconsistent with generally accepted principles of the law of lawyering.

(4) "Subject to litigation sanction" asks whether the conduct described in the question would subject the attorney or the attorney's law firm to a sanction — such as a fine, fee forfeiture, punishment for contempt, or other sanction — by the relevant tribunal.

(5) "Subject to disqualification" asks whether the conduct described in the question would subject the attorney or the attorney's law firm to disqualification as counsel in a civil or criminal matter.

(6) "Subject to civil liability" asks whether the conduct described in the question would subject the attorney or the attorney's law firm to civil liability arising from, for example, claims of malpractice, misrepresentation, or breach of fiduciary duty.

(7) "Subject to criminal liability" asks whether the conduct described in the question would subject the attorney to criminal liability arising from, for example, prosecution for insurance or tax fraud, destruction of evidence, or obstruction of justice.

(8) "Disciplinary authority" refers to the appropriate entity in the jurisdiction with authority to enforce the rules of professional conduct.

(9) "Lawyer-client relationship" and "client-lawyer relationship" are used interchangeably and have the same meaning.

You should make sure you have a clear understanding of how the MPRE defines its terms. Otherwise, answering questions correctly will be extremely difficult.

D. Attacking the MPRE

1. Getting Familiar with the Question Format

MPRE questions are arranged in this way: They start with a fact pattern set around a common problem in legal ethics. This is followed by the "call" of the question, which directs you to what point of ethics the examiners are trying to test you on. Finally, there are four answer options. You are expected to choose the one that best answers the call. Here's a typical example:

An attorney represented a buyer in a real estate transaction. Due to the attorney's negligence in drafting the purchase agreement, the buyer was required to pay for a survey that should have been paid by the seller. The attorney fully disclosed this negligence to the buyer, and the buyer suggested that he would be satisfied if the attorney simply reimbursed the buyer for the entire cost of the survey.

Although the buyer might have recovered additional damages if a malpractice action were filed, the attorney reasonably believed that the proposed settlement was fair to the buyer. He sent the buyer a letter stating that the buyer should consider seeking independent representation before making a decision. Then, in order to forestall a malpractice action, the attorney agreed to make the reimbursement. The attorney drafted a settlement agreement, and it was executed by both the attorney and the buyer.

Was the attorney's conduct proper?

(A) Yes, because the attorney advised the buyer in writing that the buyer should seek independent representation before deciding to enter into the settlement agreement.

(B) Yes, because the attorney reasonably believed that the proposed settlement was fair to the buyer.

(C) No, because the attorney settled a case involving liability for malpractice while the matter was still ongoing.

(D) No, because the buyer was not separately represented in negotiating and finalizing the settlement agreement.

In this question, the first and second paragraphs make up the fact pattern. The final sentence, "Was the attorney's conduct proper?" is the "call" of the question—it tells you specifically what to look for in the answer options. Items A through D are the "answer options." One of these is the best response, and the other three are "distracters"—basically, answer options that are trying to "distract" you away from the right one. (Incidentally, the best response is A.)

2. How Questions are Written

Generally, the way to write a multiple-choice question is to start out with a discrete legal idea that I, as the test writer, want you to know. As an example, suppose I want you to know that an attorney has a duty to provide competent representation to clients under Model Rule 1.1. Competent representation requires having the legal knowledge and skill necessary for the representation. To maintain the required level of knowledge and skill, a lawyer should keep abreast of changes in the law through continuing study and education, as well as comply with any continuing education requirements to which the lawyer is subject. Model Rule 1.1.

To test you on this rule, I need to come up with some type of valid question. I couldn't just ask, "Is it proper for a lawyer not to know what he or she is doing?" because that is a stupidly easy question. I have to ask the question in such a way that the right answer is "hidden." Because the right answer is actually in the answer choices, I have to hide it well enough that it's a valid question. I can either hide the correct answer with "foils," wrong answers that make the right answer look bad, or "distracters," wrong answers that look right.

For this legal idea, I decide that a good way to hide the correct answer is to make the attorney look both good and bad. First, I'll have the attorney practice in a state that doesn't require participation in continuing legal education courses (so the state isn't making him go to continuing legal education, which looks good), but then I'll also

make him look bad by having him tell his partners that he's not going to attend continuing legal education because it costs money (which makes him look cheap). I'll make him look good again by saying he'll independently study the law, and then throw in something about malpractice insurance. After these facts, my call of the question is, "Is it proper for the attorney to refuse to attend any continuing legal education courses?"

My question set up gives me two potential wrong answer choices right off the bat. My first wrong answer choice will be, "Yes, because the state does not offer free continuing legal education courses." Some students will choose this because I said the state does not require continuing legal education. This choice is a foil. My second wrong answer choice will be that the attorney has to go to continuing legal education courses because he can't remain competent without them. The students who thought the attorney was being cheap might go for this one, making it another foil because it seems like the attorney should be going to courses. Students might also pick this one because they think the MPRE has a vested interest in continuing legal education courses.

At this point, I've got two answer choices, but I need four. For the correct answer, I'm going to hide it a little by having the choice read, "Yes, because the attorney will independently undertake continuing study and education in the law." This foils the correct legal idea of maintaining competence by making it seem a little too easy to do.

Finally, since I need four answer choices, I tossed in the thing about malpractice insurance. My last wrong answer choice will say something about malpractice insurance to entice students who feel shaky on their studying and might choose some term they recognize but do not completely understand. My last choice about malpractice insurance is a distracter.

And that's how I make a valid question.

3. Reading the Fact Patterns

On the MPRE, you have two minutes to read each question, answer it, and move on. This means you have to grasp the ethics rules and understand how to apply them, and you need to read and respond quickly. Most of all, you need to know what to look for. The most important thing to keep in mind about the MPRE is that it's very

limited in the range of questions that it can raise. As with all standardized multiple-choice tests, the MPRE simply cannot test gray areas; the facts must clearly point toward one and only one correct answer for the question to be "psychometrically" sound—that is, for the question to be a valid measure of competence. In other words, there can't be a reasonable argument about which answer is the right answer. Although a question might ask for the "best" answer, there is really only one answer.

Ultimately, although the examiners may be knowledgeable and crafty, there are only so many fact patterns they can concoct. They are testing you and every other law student in the country on your knowledge of the ethical rules, and they need to make sure that you understand the most important ones and follow them in your later practice. In making the exam, they don't try to find the most obscure point or comment in the rules simply to trick you. In many ways, the MPRE is more similar to a driving test than a typical law school exam. In a driving test, the test-maker's goal is to make sure you know what a stop sign means, not what the paint on the sign is made from. What this means in practical terms is best shown by example.

Let's say that you and your best friend study for the MPRE together, and you both have an equally detailed knowledge of the rules of ethics; in fact, your knowledge of the rules is identical. For any given question on the MPRE to be valid as a testing device, you would both have to choose the same answer when confronted by any particular question. If you *didn't,* the question cannot be said to have tested your knowledge. Because you both had the same knowledge of the rules, the facts and the questions should have led you to the same result. If you each answered differently, and if this one question were the difference between passing and failing the MPRE, one of you would pass and the other would fail, *even though your knowledge of the rules was identical.* From the examiners' point of view, this would make the test invalid, because the test would fail its own purpose of distinguishing among students on the basis of their knowledge.

For instance, say a question involves a lawyer's representation of multiple parties who may have a conflict of interest. The issue is: Can the lawyer represent all of them in light of this potential conflict? Clearly, before a lawyer can properly ask the consent of the parties to a multiple representation, he or she must *reasonably believe* he or she can

represent all the parties adequately. "Reasonableness" is a standard that is totally fact-dependent. Therefore, if the examiners wanted to test you on whether the lawyer *could* properly represent all the parties in this basic circumstance, they would have to write the question to make it unmistakably clear in the facts that the lawyer's belief was reasonable.

If the examiner didn't do this, the question would not be a valid test of the rule requiring consent in advance of all parties to a multiple-party representation. In fact, if a question that is offered on the MPRE doesn't "perform as intended"—a term describing an ambiguous question that sneaks by the drafting committee—it is dropped from the exam.

If this theory for testing the validity of a test question isn't all that clear to you now, don't worry. The only thing that really matters is that you appreciate its impact on what you should look for in MPRE fact patterns. Looking at some of these points individually may clarify matters.

a. Pay special attention to statements about the lawyer's or the client's state of mind

In many ethics rules, the propriety of a lawyer's conduct depends on whether he or she *knows* or *believes* something. His or her knowledge or belief will determine whether some act on his or her part is mandated or prohibited. Pay special attention to words or phrases like "knows," "knowingly," "concludes," "becomes convinced," "believes," and "reasonably believes." In fact, on many ethical issues, the attorney's belief about a fact or an event is more important than the fact or event itself.

Take a typical question about a lawyer's role in recommending a candidate for admission to the bar. According to the Rules, a lawyer cannot "*knowingly* make a false statement of material fact" in connection with an applicant's admission to the bar. Model Rule 8.1.

Looking at the Rule carefully, you should notice that it doesn't matter whether the person the lawyer recommends later turns out to be a drug dealer; as long as *the lawyer didn't know the true facts* at the time he or she made the recommendation, he or she will not be subject to discipline.

Take another example—the problem of conflicts of interest. In most conflict cases, the conflict can be remedied by obtaining the

informed consent of the affected clients whether they are prospective, current, or former clients. However, before the lawyer can even *seek* a client's consent, he or she must *reasonably believe* he or she can carry on the representation of that client without adverse affect on his or her representation of another client. Model Rule 1.7. Here again, it doesn't really matter whether his or her belief ultimately proves to be sound; as long as the lawyer *reasonably believed* at the time that he or she undertook the representation that he or she could do so without adversely affecting either party, the lawyer will not be subject to discipline.

The lesson here is that it's important to pay attention to the MPRE's description of the attorney's state of mind — i.e., his or her beliefs and knowledge — in determining whether he or she has acted ethically.

b. Pay attention to the lawyer's motivation when he or she acts or fails to act

Just as the extent of an attorney's knowledge can determine the propriety or impropriety of his or her behavior, so too can his or her reasons for undertaking, or failing to undertake, the behavior. You should always make special note of the reason for an attorney's actions. Often, that will help you in assessing the propriety of his or her conduct.

For example, on a question dealing with permissive or mandatory withdrawal from representation, the attorney's reasons for withdrawing will be crucial in determining whether the withdrawal is ethical. Some questions will raise obvious issues of motivation, but others will insert more insidious circumstances in which motivation may play a less obvious but equally critical role.

Take, for instance, the question of whether to call a particular witness at trial. Ordinarily, whether to call a particular witness is the exclusive decision of the attorney, not the client. Model Rule 1.2. Under ordinary circumstances, the attorney has acted perfectly properly if he or she decides *not* to call a particular witness after careful deliberation.

But suppose he or she decides not to call a particular witness because it would take too much time and energy on his or her part

to find and prepare the witness. Then his or her motives would raise issues both of incompetent representation under Model Rule 1.1, and of a lack of reasonable diligence under Model Rule 1.3. When the lawyer's behavior raises questions about his or her *motivation,* you have to analyze that motivation carefully to determine whether the behavior itself was proper.

c. Ignore "window dressing" — pay attention to the lawyer's core behavior

In some MPRE questions, the examiners test your knowledge of the ethical rules by surrounding unethical behavior with the "trappings" of propriety. This is to test whether you can tell the trees from the forest — that is, to see if you can find evidence of unethical conduct when it's surrounded by misleading "goodies."

For example, lawyers have a duty to provide competent service to their clients. Model Rule 1.1. A question that asked only, "Is a lawyer subject to discipline for providing incompetent service," free of other facts, wouldn't lead anyone into answering "No," however little the test-taker actually knew about the rules of ethics.

So this simple question, without more, wouldn't make a very good MPRE question. But suppose the lawyer *tells* the client that he is not competent to handle the matter, and the client insists that he handle it anyway, because the lawyer is the only lawyer she really trusts. Say also that the client is the lawyer's biggest client, and that the client says she will take her business elsewhere if the lawyer doesn't accept the matter. Now suppose that the client signs an affidavit acknowledging that the lawyer has advised her that he doesn't believe that he is skilled enough to handle the matter competently, and promising that she will not sue him for malpractice regardless of the outcome of the case. Even though the facts have been embellished, the "nub" of the matter is still the same — the lawyer is incompetent to handle the matter. Simply by adding seemingly relevant new facts — namely, the client's insistence on the lawyer's handling the work, her waiver of the right to competent representation, and her agreement not to sue — a question that was too easy to use has been transformed into a more appropriate one.

Ultimately, the way to insulate yourself against the trap that's been set for you by these kinds of embellishments is to strip them all away and ask yourself what's really going on. Start with the undisputed fact that, underneath it all, the lawyer will provide incompetent service. Then work your way up from there to see if any of the additional facts—here, those additional facts are client consent and waiver—change the nature of that core issue. The answer here is "No." A lawyer who provides incompetent service cannot take comfort in client consent. The requirement of competent representation is unqualified and inflexible.

If you maintain your focus in this way, you will make it extremely difficult for the examiners to confuse you by layering on facts that don't really change the underlying issue. In fact, the most common way that the examiners try to distract you from the right answer is to "fix" the Rule violation with a good outcome, client consent, or the fact that the attorney or judge would have done things the same way even if there was not a potential breach of ethics. Thus, always be wary of such "no-harm, no-foul" fact scenarios and answer options.

4. Reading the "Call" of the Question

The "call" of the question contains the instructions that you are expected to follow in choosing among the answers. The call flows logically from the facts, but it can take many forms. It can be very general—for instance, it can ask simply if the attorney's conduct was proper, improper, or subject to discipline—or it can be specific, inquiring into a particular aspect of the attorney's conduct. The call of the question is critical, because your answer cannot be correct unless it is responsive to what the question is asking. In writing a question, an examiner is trying to get you to choose a response that shows you understand a specific point of law. As previously stated, if the question cannot lead a prepared student to respond correctly, the question (and ultimately the test) is invalid. Importantly, the call tells you specifically what that examiner is looking for by limiting issues or highlighting specific facts or relationships. If you do not pay close attention to the call, you cannot possibly get a question correct. Just to

make this point absolutely clear, here is a somewhat silly example of a question without a call:

A student wants to start a successful law firm.

(A) Pass the bar.

(B) Recommendations.

(C) Name it "SUE THEM ALL, WIN BIG BUCKS!"

(D) Dogs.

As you can see, a question without a call is impossible to answer. Does this question want you to pick the first thing the student has to do? Does this question want you to pick the thing the student can't do ethically? Does this question want you to pick the way the student should market the firm? Does this question want you to pick the least likely thing the student will need? Without the call, this question is worthless.

a. "General" call

When a general call is used, the prevailing issue should spring to mind as you read the fact pattern. Here's an example:

> An attorney is a member of the bar and a salaried employee of the trust department of a bank. As part of his duties, he prepares a monthly newsletter concerning wills, trusts, estates, and taxes that the bank sends to all of its customers. The newsletter contains a recommendation to the customer to review his or her will in light of the information contained and, if the customer has any questions, to take the will to the bank's trust department where the trust officer will answer any questions without charge. The trust officer is not a lawyer. If the trust officer is unable to answer the customer's questions, the trust officer refers the customer to the attorney.
>
> Is the attorney subject to discipline for the foregoing?
>
> (A) Yes, because the attorney is giving legal advice to persons who are not his clients.
>
> (B) Yes, because the attorney is aiding the bank in the unauthorized practice of law.

(C) No, because no charge is made for the attorney's advice.

(D) No, because it is the attorney's duty to carry out the bank's instructions.

As you read this fact pattern, the one fact that should have popped out at you is that the attorney is helping a nonlawyer (the bank) to practice law. Consequently, the prime issue is the unauthorized practice of law.

If, for whatever reason, you have a problem spotting the issue in a "general call" question, try the following tactic: Rephrase the questions by turning it around. Here, you might ask yourself: "Why *shouldn't* the attorney be subject to discipline on these facts?" Or, "Why *would* he be?"

Take note: If a question asks you whether a particular act is unethical, you can be *pretty* sure that the attorney's done something that fits a particular clause of one of the ethics rules, or one of the exceptions to the rule, or that the conduct itself is unethical—otherwise, the question wouldn't be a very good testing item.

b. "Specific call"

Most MPRE questions call for more specific answers. For example: "Is it proper for the attorney to represent both parties in the contempt proceedings?" "Is the attorney subject to discipline if he asserts such a defense?" "Is it proper for the attorney to supply the judge with the requested list of writings on the subject of custody?" "Is it proper for the attorney to grant the extension of time without consulting the client?" Unlike a general call, the specific call will usually define the issue you're looking for. Looking at these particular calls more closely should help to clarify this point.

"Is it proper for the attorney to represent both parties in the contempt proceedings?"

The issue here is almost certainly *conflict of interest,* because you're being asked whether it would be proper to represent two people in the same proceeding at the same time.

"Is the attorney subject to discipline if he asserts such a defense?"

Here, the issue probably relates to frivolous claims or fraud. The Rules specify that an attorney shall not knowingly make a false statement of material fact or law to a tribunal. Model Rule 3.3. They also prohibit a lawyer from bringing or defending a proceeding unless there is a nonfrivolous basis for doing so. Model Rule 3.1.

> "Is it proper for the attorney to supply the judge with the requested list of writings on the subject of custody?"

The issue here is obviously ex parte contact with judges.

> "Is it proper for the attorney to grant the extension of time without consulting the client?"

The issue is undoubtedly the relative control of the attorney and the client over the process of decision making during the representation or trial. The issue is given away by the words *"without consulting the client."*

If you found this exercise difficult, it's probably because you aren't — not yet, anyway — sufficiently familiar with the Model Rules. Once you've learned them and how they relate to MPRE fact patterns, it will be easier for you to find the issues raised by the MPRE, especially when the call of the question is specific.

c. Spotting the issue when it's not obvious from the fact pattern

In either general or specific call questions, if you can't find the issue in the facts, study the answer options. They will usually give the issue away. Obviously, the right answer will suggest the issue, but at least one or two of the other answers may suggest it as well.

That's because the examiners go to great lengths to craft some of the wrong answers as distracters. While these also point to or suggest the main issue, they manage to avoid it, however narrowly. Here's an example:

> A plaintiff and defendant are next-door neighbors and bitter personal enemies. The plaintiff is suing the defendant over an alleged trespass. Each party believes, in good faith, in the correctness of his position. After the plaintiff had retained an

attorney, he told the attorney, "I do not want you to grant any delays or courtesies to the defendant or his lawyer. I want you to insist on every technicality."

The attorney has served the defendant's attorney with a demand to answer written interrogatories. The defendant's attorney, because of the illness of his secretary, has asked the attorney for a five-day extension of time within which to answer them.

Granting the extension would not hurt the plaintiff in any way.

Is the attorney subject to discipline if she grants the defendant's attorney's request for a five-day extension?

(A) Yes, because the attorney is acting contrary to her client's instructions.

(B) Yes, because the attorney did not first inform the plaintiff of the request and obtain the plaintiff's consent to grant it.

(C) No, because granting the extension would not prejudice the plaintiff's rights.

(D) No, because the defendant's attorney was not at fault in causing the delay.

Look carefully at the language in the various answer options here: "granting the extension"; ". . . the plaintiff's consent"; ". . . client's instructions." All of them suggest that this is an inquiry into the relative decision-making roles of the lawyer and the client. The best response is C. Why? Because it recognizes that the underlying reason for assigning different levels of control over decision making to the lawyer and the client *is to avoid prejudice to the client's basic rights.* At the same time, it recognizes that lawyers may take such action as is impliedly authorized to carry out representation and that clients normally defer to the special knowledge and skill of their lawyer regarding technical and tactical issues during litigation. Model Rule 1.2, Comments [1] and [2].

The other options are skillful distracters. Answer A suggests that a lawyer always has to get his or her client's consent on issues of litigation tactics. This is not the case. Answer B is wrong for the same reason as A. Answer D is easy to eliminate. The issue is

whether a delay would prejudice the plaintiff's rights, regardless of what caused the delay. Whether the defendant's attorney was at fault in causing the delay is immaterial to the attorney's decision to grant the request for an extension.

5. Reading the Answers and Choosing the Best Response

As with any standardized test, the best — and sometimes the only — way to arrive at the best response is to eliminate all the options that are *definitely wrong.*

This means that the most important skill you can apply to the MPRE is the ability to perceive when an answer is definitely wrong. There are several ways to hone this skill:

- Learn the general principles for determining when an answer is wrong,
- Review the substantive rules that are most likely to trip you up, and
- Learn the traps the examiners expect you to fall into.

You'll learn all three of these skills in the next few pages. But one point you simply can't ignore is this — the most important element in your success is early and constant review of the Rules themselves. Unlike the LSAT and most other standardized exams, the MPRE is not a test of general intelligence or knowledge. It's based on your intimate knowledge of a specific set of rules, which, stripped to their bare bones, cover less than 100 pages of text. That is, it's designed to test your knowledge of a limited subject, and you can't expect to pass it without having at least a reasonable familiarity with the Model Rules and the Model Code of Judicial Conduct. The advice on the next few pages assumes that you've already done your substantive review.

The instructions below will do two things for you. First, they'll ensure that you aren't tripped up by the MPRE's format, and that you'll always get the right answer if you know the rule. Also, these instructions will help you find your way to the right answer when you're not really sure what that answer ought to be. The bottom line is, if you are reasonably familiar with the ethics rules, understand how to apply the rules, and you apply the principles in this chapter, *the* MPRE *cannot beat you!*

a. General principles of elimination

The most important skill you can take to the MPRE is the ability to identify when an answer is clearly wrong. What makes this more difficult than you may think is the extraordinary skill applied by the examiners in creating the wrong answers. Perhaps you've heard it said that you can tell the quality of a superhero movie by watching the bad guy—the better the villain, the better the movie. Well, on standardized exams, the better the wrong answers, the more difficult the exam. The MPRE is difficult exactly because the examiners are exceptionally successful in masking the wrong answers to make them seem right. In this section, you'll learn how to "unmask" the wrong answers and make them easier to spot. Once you know how to eliminate the wrong answers with skill and confidence, you'll be able to pick out the *right* answer every time. Here, then, are the rules you need to know.

(1) If you know the right answer for sure, ignore these instructions.

If there is no question in your mind that one answer is correct, choose it and move on. If you've studied the substance of the Rules and read and practiced with this book, you should find the right answer on a first or second reading. If you do spot the right answer right away, mark your answer sheet and go on to the next question.

(2) Eliminate any answers you know are wrong, and then concentrate on the remaining answer choices.

In many cases you will immediately recognize that at least one and perhaps two of the answer choices are wrong. If you can spot three, great—you're left with the one option that has to be right. Don't bother to look a second time at answer options that are clearly wrong; cross them off in your test booklet if necessary to take your mind off them, and concentrate on the other possibilities.

(3) Remember that many of the answers will seem to draw on the same issue.

This rule isn't set in stone, but the nature of the exam makes it likely that several answers will focus on the same issue.

Remember, what makes a standardized test difficult is the seeming resemblance between the *wrong* answers and the *right* one. This leads to one simple rule: *in general,* if there is a single answer option that seems very different from the other options, it's probably not the best answer. For example, if a multiple-choice exam was trying to test whether you knew that the sun was a star, and the answer options were "star," "nebula," "constellation," and "duck," you can generally get rid of "duck" immediately.

(4) Analyze the ways in which a particular answer can be wrong.

There are several clues to concluding that an answer is wrong. An answer is wrong if:

(a) It misapplies a rule of ethics to the facts. This is far and away the most common type of distracter; this will be discussed this in detail under "Traps Set by the Examiners."

(b) It misstates the ethics rules. This is also relatively common.

(c) It misstates or deliberately confuses the facts. An answer of this kind is so clearly wrong that it fools only the least prepared applicants; for this reason, it's not used very often.

b. A few general rules to remember

Here are a few general rules you should keep in mind. They will save you a lot of time in choosing the right answer.

(1) Don't be confused by a question that suggests that the lawyer's conduct, though questionable, has not prejudiced the client.

This is a very common MPRE trap — the facts describe conduct by a lawyer that is wrong, but then tell you that the misconduct has not affected the client adversely. When this happens in an MPRE fact pattern, you can bet your bottom dollar that at least one of the distracters will suggest that the

lawyer's conduct was proper because his client wasn't "prejudiced," or "adversely affected," or the like. For this reason, it's important to keep the following basic rule in mind—even if things work out all right for the client, the lawyer may still be subject to discipline for violating the Rules in the first place. To avoid picking the wrong answer in this kind of question, you need to know the Model Rules in all their subtleties. (Note: *To recover in a malpractice case, the client has to show not only that the lawyer's conduct was negligent or improper, but that the conduct was the direct cause of the client's loss or injury.*)

For example, say a lawyer allows a paralegal in his office to conduct a deposition or perform some other act that constitutes the practice of law. The lawyer will be subject to discipline for assisting a person who is not a member of the bar in the unauthorized practice of law (Model Rule 5.5(a)) *even if* that person renders competent service. As another example, suppose a lawyer neglects the client's work over an extended period; he or she may be subject to discipline *even if* he or she finally manages to file the client's claim before the statute of limitations runs out.

The way to think of this behavior is that it is similar to the crime of burglary: Once a person's broken into a dwelling of another at night with the intent to commit a felony therein, it doesn't matter what he or she does after that—he or she can change his or her mind and exit without touching anything—he or she is still guilty of burglary. It's the same with some lawyer infractions. Once a lawyer has engaged in unethical conduct, it doesn't really matter what the consequence of that conduct is to the client; the lawyer has violated the ethics rules and he or she is subject to discipline.

(2) When it comes to fees, less is better.

Occasionally the MPRE will ask about the propriety of a fee that is in dispute. Remember that the Model Rules specify that a lawyer's fee shall be reasonable (Model Rule 1.5(a)); it's a safe bet, therefore, that a lower fee will be perceived as more reasonable than a higher one. Thus, when a question asks what part of a fee a lawyer may properly keep, you're generally safe

if you opt for the choice that best protects the client's interests in the money under dispute. Here's an example:

> A client retained an attorney to appeal the client's criminal conviction and to seek bail pending appeal. The agreed fee for the appearance on the bail hearing was $50 per hour. The attorney received $800 from the client, of which $300 was a deposit to secure the attorney's fee and $500 was for bail costs in the event that bail was obtained. The attorney maintained two office bank accounts: a "Fee Account," in which all fees were deposited and from which all office expenses were paid, and a "Client Fund Account." The attorney deposited the $800 in the "Client Fund Account" and expended six hours of time on the bail hearing. The effort to obtain bail was unsuccessful. Dissatisfied, the client immediately demanded return of the $800.

It is now proper for the attorney to:

(A) transfer the $800 to the "Fee Account."

(B) transfer $300 to the "Fee Account" and leave $500 in the "Client Fund Account" until the attorney's fee for the final appeal is determined.

(C) transfer $300 to the "Fee Account" and send the client a $500 check on the "Client Fund Account."

(D) send the client a $500 check and leave $300 in the "Client Fund Account" until the matter is resolved with the client.

With no other thought in mind than the general rule that "less for the lawyer, more for the client" is better than the alternative, you can see that the best response would have to be D, because it's the one in which the attorney gets to keep less than he does in any other response.

(3) If a Rule forbids communication between two persons, it doesn't matter who initiates the communication.

The Model Rules contain many provisions that forbid communication between a lawyer and someone else. Examples:

A lawyer shall not communicate with a person he or she knows to be represented by another attorney without that attorney's consent; a lawyer shall not communicate *ex parte* with a judge, juror, or prospective juror; or a lawyer shall not contact or solicit professional employment either in person or by a live communication from any person who is not a lawyer, family member, or former client. Model Rules 4.2, 3.5, & 7.3.

The rule to remember is that when communication by a lawyer is banned, it's banned in almost every instance regardless of who contacts whom first. (Except, of course, that the lawyer may discuss a matter with a prospective client who initiates the contact.) Thus, for instance, if a juror tries to strike up a conversation with one of the lawyers in a case, the lawyer has to terminate the conversation immediately. It's quite common on the MPRE for a distracter to suggest that a communication is proper because someone other than the lawyer in the fact pattern initiated the contact. Don't be fooled by this device!

(4) An attorney may not engage in conduct that would cause a judge to violate the Model Code of Judicial Conduct.

Sometimes an MPRE fact pattern will point to a judge who has violated the Model Code of Judicial Conduct with the help of a lawyer. A common example concerns a judge who contacts a lawyer because he or she happens to be an expert on a particular issue in a case, instead of relying solely on the briefs submitted by counsel.

Although there's nothing in the Model Rules that discourages a lawyer from advising a judge on the law, the Model Code of Judicial Conduct itself requires that a judge refrain from relying on the advice unless the judge first tells the lawyers in the case the name of the expert consulted and the substance of his or her advice, and gives the lawyers a chance to respond. Model Code of Judicial Conduct, Rule 2.9(A)(2). Remember, therefore, that it's not enough to know the Model Rules. When a judge is involved, you have to include the Model Code of Judicial Conduct in your analysis of a lawyer's conduct. Under Model Rule 8.4(f), a lawyer can't knowingly aid a judge in

violating the law *or the Model Code of Judicial Conduct.* Thus, if a judge's conduct violates the Model Code of Judicial Conduct and a lawyer has helped the judge in that conduct, the lawyer has violated the ethics rules.

(5) A client's insistence on a course of conduct doesn't relieve the lawyer of the responsibility to observe the Rules.

Sometimes an MPRE fact pattern will feature an attorney who has violated the Rules at the insistence of the client—for example, asserting an unmeritorious or baseless claim for the sake of harassing the adversary, or taking on work when the lawyer isn't competent to handle it. Rule to remember: The client's insistence on improper conduct by the lawyer doesn't relieve the lawyer of the obligation not to engage in the conduct.

c. Traps set by the examiners

Knowing the tricks the examiners use to lure you into choosing the wrong answer can save you from the temptation to pick them instead of the right answer. When the examiners create an MPRE, their central concern is to preserve the integrity of the exam. They want people who know the Rules to pass the exam, and people who don't know the Rules to fail. (In fact, this is the only way they can convince the states to include the exam as part of their licensing requirements.) So, what they do is to set "traps" for the unwary.

It's almost as though they deliberately calculate and anticipate the mistakes students are likely to make and build around them. They design and construct "distracters precisely to lure everyone into making these very mistakes.

(1) The "Hmmm, that sounds familiar" trap

This is the most common—and most insidious—trap on the MPRE. Many law students have a tendency to review for exams only until they can respond by rote. They don't bother to analyze the material to the point of real understanding, and they especially don't bother to apply the material to real facts.

The MPRE examiners know this about law students, so they construct answers that seem right because they correctly state a Rule or a part of a Rule—*EXCEPT THAT* the Rule they state is not the Rule that applies to the facts. Here's an example:

> An attorney represented a landlord in a variety of matters over several years. The attorney's engagement letter did not specifically state that he would provide anything other than legal advice. An elderly widow living on public assistance filed suit against the landlord alleging that the landlord withheld without justification the security deposit on a rental unit that she had vacated three years ago. She brought the action for herself, without counsel, in small claims court. The attorney investigated the claim and learned that it was legally barred by the applicable statute of limitations, although the widow's underlying claim was meritorious. The attorney told the landlord of the legal defense, but emphasized that the widow's claim was just and that, in all fairness, the security deposit should be returned to the widow. The attorney told the landlord:
>
> > "I strongly recommend that you pay her the full amount with interest. It is against your long-term business interests to be known in the community as a landlord who routinely withholds security deposits even though the tenant leaves the apartment in good condition. Paying the claim now will prevent future headaches for you."
>
> Ultimately, the landlord paid the widow's claim. Was the attorney's conduct proper?
>
> (A) Yes, because the landlord did not object to the attorney's advice and paid the widow's claim.
>
> (B) Yes, because the attorney may refer to both legal and nonlegal considerations in advising a client.
>
> (C) No, because the attorney's engagement letter did not inform the landlord that the attorney's advice on the matter would include both legal and nonlegal considerations.

(D) No, because in advising the landlord to pay the full claim, the attorney failed to represent zealously the landlord's legal interests.

Look at option D. This is a tempting choice because it sounds familiar; you may even say to yourself, "I've seen something like this in one of the Rules, so it must be right." In fact, that language is contained in Model Rule 1.3, Comment [1]. The problem is that the language used—the responsibility of a lawyer to act with zeal—is not what the facts are getting at. Ultimately, option D is wrong because it's not directed at whether the attorney's advice, which went beyond purely technical legal advice, was proper, and that's the issue here.

Option C does the same thing, but this time it suggests a different but equally inapplicable Rule. The idea of an engagement letter will ring a bell, but such a letter to the client is concerned with fees. Its purpose is to make clear what services the lawyer will provide and what he or she will charge for them, not in what form he or she will render advice. Model Rule 1.5.

Ultimately, these answer options are tempting because they reference the Rules in a way that is familiar, and unless you realize that the pivotal issue here concerns the appropriate scope of a lawyer's advice to a client, you might choose C or D. Don't think examiners don't realize this when they create answer options like this! (Incidentally, the best response is B. A lawyer should exercise professional judgment and give candid advice, which may rely on considerations other than purely technical legal advice.)

The only way to insulate yourself against this kind of trap is to study and know the Rules. If you are sufficiently familiar with the Rules, you'll be able to distinguish one Rule from another.

(2) Stating part of a Rule, and omitting a part that would change the result

A frequent trick in distracters is the partial statement of a Rule, or the statement of a Rule without including a relevant or controlling exception. For example:

An attorney filed an action on behalf of a client for breach of contract. In fact, the client had no legal basis for the suit, but wanted to harass the defendant. To induce the attorney to file the action, the client made certain false statements of material fact to the attorney, which the attorney included in the complaint filed against the defendant.

At the trial of the case, the client took the stand and testified as set forth in the complaint. The trial court ordered judgment for the client. After entry of judgment, the client wrote the attorney a letter marked "Confidential," in which the client admitted that she had lied to the attorney and had testified falsely in the case.
Upon complaint of the defendant, who claimed the attorney had knowingly used false testimony in the case, disciplinary proceedings were instituted against the attorney.
Is it proper for the attorney to use the client's letter in the attorney's defense in the disciplinary proceedings?

(A) Yes, because it is necessary to do so in order to protect the attorney's rights.

(B) Yes, because the client had committed a fraud on the court in which the case was tried.

(C) No, because the attorney learned the facts from the client in confidence.

(D) No, because disclosure by the attorney could result in the client's prosecution for perjury.

Look at option C. It suggests the *general* Rule prohibiting a lawyer from revealing any information relating to the representation of a client without the client's consent, but it ignores the *exception* to this Rule, which is core to these facts. The exception is that a lawyer *may reveal* a client confidence to defend him- or herself in a controversy with the client or against a criminal charge or civil claim for conduct involving the client, or to respond to allegations in any proceeding concerning the

representation. Model Rule 1.6(b). Because the exception is the important point here, the correct answer is A. Thus, *whenever* an answer option seems to state a prevailing Rule, be on your guard — don't accept the statement at face value — scan your memory to verify that the Rule has been stated either completely or in *pertinent* part, and pay special attention to all the exceptions you know.

(3) Focusing on an issue that wasn't addressed in the "call" of the question

Sometimes when you read a fact pattern on the MPRE, an issue you've learned well will jump off the page at you. You'll immediately assume that's the issue on which the question is focusing, but don't let yourself be distracted. Focus *only* on what's asked in the *call* of the question. If it's a specific call, and it doesn't elicit the issue that first jumped out at you, you can be sure that one of the distracters will rely on that very issue — and, of course, it's one of the three wrong answers. (Remember, this rule applies only to questions following a *specific* call. If the call of the question is general — for example, "Is the attorney subject to discipline for his conduct?" — then the issue you first spotted may well be the basis for the correct answer.)

d. "Because" is your friend

Most answer choices will say "yes" or "no," followed by "because." The word "because" is a *definite,* as opposed to a *conditional,* modifier. Simply put, when "because" is the modifier, it must *necessarily* be true that the reasoning leads to the result. For an answer beginning with "because" to be correct, the following three elements must exist.

(1) Resolve central issue

The reasoning must address and resolve an issue central to the call of the question — or, at least, an issue more central than any other response.

(2) Unequivocally reflect facts

The facts in the reasoning must *completely* and *unequivocally* confirm the facts in the basic fact pattern. For instance, if an option states, "because there was a conflict between two of his clients," the facts must *clearly* show a conflict between the two clients.

(3) Agreement between result and reasoning

The result must be consistent with the reasoning. For instance, if the reasoning tells you, "because the representation was competent," the result must be that the representation is proper. Keep in mind, however, that if the lawyer's competence isn't the central issue, this element *alone* will not necessarily make the option the best response.

Although this is fairly technical, the example below should illustrate this further.

> Four years ago, an attorney was a judge in a state court of general jurisdiction and heard a plaintiff's civil case against a defendant. The plaintiff prevailed and secured a judgment for $50,000, which was sustained on appeal. Since then, the attorney has resigned from the bench and returned to private practice. The defendant has filed suit to enjoin enforcement of the judgment on the grounds of extrinsic fraud in its procurement. The plaintiff has now asked the attorney to represent the plaintiff in defending the suit to enjoin enforcement. The attorney's conduct of the first trial will not be in issue, and he did not believe the present suit was brought in bad faith.
>
> Is it proper for the attorney to accept the representation of the plaintiff in this matter?
>
> (A) Yes, because the attorney would be upholding the decision of the court.
>
> (B) Yes, because the attorney's conduct of the first trial will not be in issue.
>
> (C) No, because the attorney does not believe the present suit is brought in bad faith.

(D) No, because the attorney had acted in a judicial capacity on the merits of the original case.

You should have determined that the *problem* here is the conflict of interest that can arise when a lawyer moves from the judiciary to private practice. The Rule is that a lawyer can't represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge, unless all parties to the proceeding give informed, written consent. Model Rule 1.12(a).

Let's look at option D. Now, go through the three elements for the "because" modifier to see if D is correct. Remember, the shorthand for those three elements is: (1) resolves a central issue; (2) unequivocally reflects the facts; and (3) shows agreement between result and reasoning.

First, does option D address and resolve a central issue? Yes, it does; the issue is whether the attorney can properly represent the plaintiff, and this turns on whether his conflict of interest prevents him from doing so. D cites the Rule on conflicts of interest for former judges, the central issue, so D passes the first hurdle.

The second hurdle is determining whether the reasoning unequivocally reflects the facts. It does. You're told that the attorney was the judge in the original suit, and the new suit deals with the enforceability of that judgment. Thus, as option D indicates, the attorney did in fact participate "personally and substantially" as a judge in the original case.

Finally, the result and the reasoning must agree. Because the reasoning in D is true, then a conflict of interest must exist that would prevent the attorney from representing the plaintiff. Option D tells you that it would not be proper for the attorney to represent the plaintiff under these facts. Thus, the result and the reasoning agree. (Note, incidentally, that representing the plaintiff would not only be improper—it would subject the attorney to discipline; but, then, every disciplinable act or omission is necessarily improper.)

Now that you've seen how you can determine if a "because" option is correct, you can see how you can conclude that some

"because" answers are *incorrect.* Look at option A, which also begins with the modifier "because." Look directly at the three "hurdles," the first one first. Does the reasoning of the option address and resolve a central issue? *No.* The central issue is conflict, so it doesn't matter whether the attorney is upholding his decision or not; what matters is that he was acting as judge in the first trial and that this creates an irreconcilable conflict in the second trial.

Because option A fails to clear the first hurdle, you can move on to the next option; you've eliminated A as an acceptable response.

If you have difficulty determining whether a "because" option is correct, there is a way that may help you. Combine the reasoning of the answer with the call of the question to create an "if-then" statement. If the "if-then" statement is true, the answer is correct. If you do this with answer A, you wind up with the following statement: "If the attorney is upholding the decision of the court, then it would be proper for the attorney to represent the plaintiff." As you can see, the "if" clause is the reasoning in the original answer, and the "then" statement restates the call of the question. For the statement to be true, the "if" clause must provide a valid reason for the resulting "then" element. In answer A, it doesn't—the fact that the attorney isn't challenging the judgment doesn't resolve the conflict of interest in favor of his representing the plaintiff.

Incidentally, did you notice what kind of a "distracter" option A is? It's one in which the reasoning evokes a Rule that seems correct but *doesn't apply* to the facts. Option A evokes the lawyer's duty of loyalty to former clients—i.e., the Rule that states a lawyer can't represent a new client with interests adverse to a former client in a substantially related matter. Model Rule 1.9(a). (For instance, a lawyer can't seek to rescind on behalf of a new client a contract he or she drafted for an old client, or challenge the validity of a will for a descendant that he or she prepared and witnessed for the decedent.) Option A suggests that because the attorney isn't challenging his own judgment, his representation of the plaintiff is proper. Of course, this is wrong, because the conflict exists

independently of whether the attorney is challenging his own decision. Nonetheless, you can see why bringing up another Rule makes A a good distracter.

E. Finding the Right Answer

Learning how to analyze answers correctly can do more for you than simply help you avoid pitfalls. If you put to work all of the principles discussed here, you'll frequently be able to pick the right answer to an MPRE question on first reading! Of course, you shouldn't rush to judgment, because the MPRE is an important exam; the point is that you can learn to increase your confidence and trust your instincts. Your ability to do this is built on something mentioned earlier—namely the tension between the flexibility inherent in the ethics rules and the need for concrete answers to standardized multiple-choice questions. As a result of this tension, the answer options often contain so many qualifying facts that they lead you directly to the one best choice. For example, here are the four answer options to a past MPRE question:

(A) Yes, because the attorney's time was not completely occupied with work for other clients.

(B) Yes, because the attorney neglected the representation of the passenger.

(C) No, because the passenger's suit was filed before the statute of limitations ran.

(D) No, because the attorney returned the $1,000 retainer to the passenger.

Without first having read the corresponding fact pattern, you should be able to guess the best response. A quick glance at each of the options should tell you that the facts probably revolve around a lawyer who didn't act promptly enough in representing his or her client. Remember, good distracters often focus on the same issue as the best response does. This should suggest to you that the issue raised by the fact pattern requires an analysis of the standard set by Mode Rule 1.3 to determine whether a lawyer has acted diligently and promptly in representing the client. You know that the Rule requires a lawyer to act with "reasonable

diligence and promptness." You also know that a lawyer should control his or her workload to avoid neglecting one client in favor of others and that unreasonable delay is unacceptable even if the client's interests are not affected in substance. That makes it easy to eliminate options A and C. Option D cannot be the right answer because the issue is neglect of the passenger's interests, not the retainer. With all of that in mind, the best answer is almost certainly option B.

To prove the validity of this approach, here are the facts to this same question:

> An attorney was retained by a passenger on a bus who had been injured in a collision between the bus and a truck. Although he was busy, his time was not completely occupied with work for other clients. The passenger paid the attorney a retainer of $1,000 and agreed further that the attorney should have a fee of 25 percent of any recovery before filing suit, 30 percent of any recovery after suit was filed but before judgment, and 35 percent of any recovery after trial and judgment. The attorney promptly called the lawyer for the bus company and told him she was representing the passenger and would like to talk about a settlement. The attorney made an appointment to talk to the lawyer for the bus company, but did not keep the appointment. The attorney continued to put off talking to the lawyer for the bus company.
>
> Meanwhile, the passenger became concerned because she had heard nothing from the attorney. The passenger called the attorney's office but was told the attorney was not in and would not call back. The passenger was told not to worry because the attorney would look after her interests. After 10 months had passed, the passenger went to another attorney for advice. The other attorney advised the passenger that the statute of limitations would run in one week and, with the passenger's consent, immediately filed suit for the passenger. The attorney, upon the passenger's demand, refunded the $1,000 the passenger had paid.
>
> Is the attorney subject to discipline?

As you can see, the facts confirm that B is the best response. This should give you the confidence to trust your instincts as you measure the answer options under facts such as these. Here is another example of four answer options.

(A) Yes, because the attorney has no interest in the case.

(B) Yes, because the judge believes that the attorney's advice is needed to serve the interests of justice.

(C) No, because all parties in the case did not first give their written consent to the judge's consultation with the attorney.

(D) No, because the judge did not inform the parties of the attorney's identity and the substance of the attorney's advice and ask for responses.

Try to deduce what facts are behind these options. You can logically assume that the judge has consulted the attorney (who is probably not an attorney for one of the parties — option A tells us that he has no interest in the case). That's implied by all of the answer options, and, as you know by now, distracters are only effective if they contain elements common to the correct answer. Consequently, it seems Model Code of Judicial Conduct Rule 2.9(A)(2) is at issue here. It permits a judge to consult a disinterested party on applicable law providing he or she follows certain guidelines. The answer options should tell you that the fact pattern probably concerns a judge who asked an uninterested party for advice concerning a proceeding before him or her and that option D is probably the best answer. Here are the facts from that question:

> A judge is presiding in a case that has, as its main issue, a complicated point of commercial law. The lawyers have not presented the case to the judge's satisfaction, and the judge believes she needs additional legal advice. The judge's former partner in law practice is an attorney and expert in the field of law that is at issue. The attorney has no interest in the case. The judge believes the advice is necessary, so she contacts the attorney without telling any of the parties involved.
>
> Was it proper for the judge to consult the attorney?

As you can see, reading the facts, as in the last example, only reinforces your judgment that the best answer is option D. Here is one more set of options:

(A) Yes, because the client instructed the attorney not to tell anyone about the jewelry box.

(B) Yes, because the disclosure would be detrimental to the client's interests.

(C) No, because the jewelry box was not involved in the dispute between the client and his partner.

(D) No, because the disclosure is necessary to enable the attorney to defend against a criminal charge.

Looking at these options, you can reasonably assume that the facts revolve around confidentiality. A lawyer has a duty not to reveal information relating to the representation of a client without the client's consent. Model Rule 1.6(a). An exception to the Rule, however, is the lawyer's right to defend himself or herself against a criminal charge based on conduct in which the client was involved. Model Rule 1.6(b)(5). Because option D clearly outlines this exception to the client-confidentiality rule, it is very likely the best answer.

The facts to this question bear this out:

> An attorney had been representing the client for several months in a matter involving the ownership of some antique jewelry. The client claimed he purchased the jewelry for his wife with his own funds. The client's business partner claimed the jewelry was a partnership purchase in which he had a one-half interest. While the matter was pending, the client brought a valuable antique jewelry box to the attorney's office and said:
>
> > "Keep this in your vault for me. I bought it before I went into business with my partner. Do not tell him or anyone else about it until my matter with my partner is settled."
>
> Later that same day, a police officer, who was in the attorney's office on another matter, saw the jewelry box when a clerk opened the vault to put in some papers. The police officer recognized it as one that had recently been stolen from a collector. The attorney was arrested and later charged with receiving stolen property.
>
> Is the attorney subject to discipline if the attorney reveals that the client brought the box to her office?

If you are sufficiently well versed in analyzing answer options to MPRE questions and relating them to the facts, you'll be so well prepared for

the MPRE that you could well pass the exam just by reasoning your way through the options without reading the questions! But don't get the wrong idea. In no way should you skip the facts.

On the contrary, you should read and reread every fact pattern before you consider the options. And then trust the skills and the instinct you've developed by reviewing and understanding the Rules, studying this book, and reasoning your way to the right answers.

Good luck!