

# **Core Professional Responsibility**



# Core Professional Responsibility

Learning through Multiple-Choice Questions

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# Introduction

## Welcome and Overview

This guide is designed to supplement and build your knowledge around the topic of legal ethics and professional responsibility. It does so through multiple-choice questions designed to test and deepen your understanding of these topics through the concept of *deliberate practice*, which is work toward an obtainable but far-off goal, with constant feedback. As you work through the material in this guide, you will slowly build your understanding of the core concepts of legal ethics and professional responsibility and move on to the next topic area once you have done so. Use this guide to supplement a class on legal ethics, as preparation for the national Multi-State Professional Responsibility Exam (MPRE), or simply to brush up on or solidify your understanding of a lawyer's professional ethics. This guide focuses mostly on the Model Rules of Professional Conduct promulgated by the American Bar Association (ABA), and, to a lesser extent, the Model Code of Judicial Conduct, also promulgated by the ABA. As their names imply, these are model rules that are adopted, as appropriate, by the various states. In order to prepare for the national MPRE, one should study their application. They do not have the force of law in any given state, however. To consider a state's rules regarding a particular question of a lawyer's professional responsibility in a given state, one must consult that state's rules and accompanying authorities interpreting those rules. This guide is designed to give you a firm grounding in core concepts related to legal ethics and professional responsibility, but it cannot be used to answer a specific question about a particular practice in a particular state.

While many of the questions in this guide are a bit more complex and challenging than what one might find in a typical legal ethics exam, their relative difficulty will prepare you well to spot the key issues, identify the knowledge a particular question is testing, and select the correct answer in the sometimes more straightforward questions you might typically see in an ethics examination. Working with these questions will also facilitate your ability to read critically and effectively and train you to do so more quickly, which are all skills you will need in any examination.

In addition to the questions themselves, at the end of each chapter there is a Formative Assessment Quiz which helps you gauge your understanding of the material in that chapter. The answer key in Chapter 10 provides only the correct answer to each question in the book, whereas Chapter 11 provides an in-depth explanation for each answer. Those explanations contain not just the answer but also the sources for the answer, such

as the Model Rules of Professional Conduct, the Model Code of Judicial Conduct, and relevant case law, as appropriate. Use these explanations not only to understand the questions you got wrong and identify the concepts with which you may struggle but also to ensure you are understanding the things you got right. Think of them as a coach along the way. This coaching is a particularly important aspect of deliberate practice.

You can use the Formative Assessment Quiz when you have concluded your work in a given chapter. You can also wait to take the Formative Assessment Quiz until you have finished a few chapters and then take a series of them collectively, and let them serve as a “midterm,” to test your understanding of the issues at different points in the semester or during the course of your studies. Note that instead of a Formative Assessment Quiz, Chapter 9 contains a Summative Assessment Quiz. This is an excellent way to review the material contained in the entire guide and to prepare for a final examination as well as the MPRE.

This guide is structured by chapters devoted to different topics and sub-topics related to a particular chapter’s broad subject matter. You can work through the material in each chapter and follow along with a course or bar review based on the topical sections in each chapter. You do not have to follow the order of the chapters. Only the Summative Assessment Quiz is cumulative.

## What This Guide Covers, and What It Does Not

This text is designed to introduce the reader to the issues that are typically covered in a course on professional responsibility, which is taught in virtually every law school in the United States. Because of that, there are comprehensive chapters on core concepts such as forming the attorney-client relationship, conflicts of interests, and confidentiality. There are also chapters on attorney’s fees, ethics in advocacy, and judicial ethics. This guide does not cover state-specific rules nor does it include a comprehensive analysis of all potential sources of authorities related to professional responsibility, like treatises or the ethics opinions of state bar associations or state disciplinary authorities. The information here is more a starting point than an end point in your understanding of legal ethics and professional responsibility. Nevertheless, it will give you a firm grounding in these topics to prepare you to take the MPRE and to assist you in understanding the core concepts related to these topics.

## A Note to Students

This book is designed to be *modular*. You can follow along with whatever course plan or casebook your instructor may utilize, aligning your work in this guide with the structure and order of materials your instructor uses. Try to refrain from diving into material you have not yet learned in whatever course you are taking. The understanding and skills you will gain from working through this guide will occur through

testing your knowledge of the information learned in a traditional course. It will also strengthen that learning. At the same time, it is no substitute for what you will learn in a traditional course.

First and foremost, you should use the information you learn from these exercises to deepen your understanding of the knowledge you are supposed to be developing. In addition, you can also use these exercises to gather information about *you*: how well you are absorbing the material, the effectiveness of your study strategies, etc. Use this second-order information to hone in on not only your strengths but also your weaknesses, so you can build on the former and shore up the latter.

One more important note: given the format of the answers, it is very difficult to take these questions and then look for the answer after each question. You will invariably see the answer to the next question. At a minimum, it is recommended that you take the questions in a particular section before looking up the answers.

## Taking Multiple-Choice Exams

Multiple-choice questions are challenging. It is easy to get lost in the weeds of the fact pattern: you may think it is taking you in one direction, and then you find the question is completely different from what you were anticipating. Once you start on that other direction, certain facts and issues will seem important to you, and when you get to the call of the question, you find that you might have to read the question all over again. I am sorry to report that this is often the express design of the questions you will face. Figuring out how to sort out the signal from the noise is a critical skill you will need to develop. In addition, having potential answers available to you might give you some degree of comfort, but those can be deceptive, and just because the wording of a potential answer might seem *familiar* to you does not mean that it is *correct*. The key question to ask with every multiple-choice question is “What knowledge is this question testing?” There can be many false paths and potential mis-directions and distractions in a typical multiple-choice question. When trying to answer a multiple-choice question, you must identify the specific nugget of knowledge, regarding a very particular issue, that is the focus of the question. A question cannot cover every possible issue under the sun, and practically every question is trying to assess your understanding of a very discrete topic. In order to ensure you can focus on what knowledge a particular question is testing, use the following approach, one that I call, with a nod to popular culture, *using the F.O.R.C.E.*

F. *Find* the question:

Turn first to the call of the question to get a general sense of what the exam question is asking. It might require you to read the last sentence or two of the fact pattern if the question itself is opaque, such as when it says something like “Is the lawyer subject to discipline for their conduct?” Finding the question first helps you avoid turning down a distracting and diverting path in the fact pattern.

O. *Observe:*

What are the facts of the fact pattern and how do they relate to the call of the question?

R. *Re-Orient:*

This is the most important step. Once you have read the call of the question and understand the facts, you now ask yourself, “What knowledge is this question testing?” Once you can focus on that, it will likely make certain facts more salient and important than others. Then you can focus on the important ones and orient yourself toward the direction in which the question is truly going.

C. *Codify:*

Here, you are going to identify the applicable rule that addresses the question presented. It is the next logical step following Step 3. Once you have re-oriented yourself to understand what knowledge the question is testing, you can then align the question, facts, and the appropriate rule that governs the situation. And when we say “rule” in the context of a professional responsibility exam, sometimes it means a specific model rule, sometimes it refers to a more general principle, and sometimes it might mean a rule that derives from case law relevant to a particular setting. It can even come from the U.S. Constitution itself. For example, if the knowledge the question is testing is the limits placed on a lawyer’s right to advertise or solicit clients (*see* Chapter 7), the “rule” to apply in that situation may be derived, at least in part, from the First Amendment to the U.S. Constitution as interpreted in case law. Whatever the situation, apply the correct and appropriate “small-r” rule to fact pattern and question presented. At the same time, sometimes the “small-r” rule may actually be a “capital r” rule: for example, answering a question might require that you apply Model Rule 4.2, which deals with the prohibition on a lawyer’s contacting a represented party without the consent of the lawyer who represents that party, to a given situation.

E. *Execute:*

Finally, it is time to look at the potential answers offered to you. Here, you will choose the answer that best matches your identification of the knowledge tested in Step 3 and your codification of the answer in Step 4. Really try to figure out what the answer should be before you look at the potential answers. And be aware of “traps”—for example, you might see an answer with wording that sounds familiar and want to choose it as a result, but the answer might only be familiar because it relates to a legitimate rule in the pantheon of professional responsibility rules, not because it is actually the proper rule to apply in a given situation.

Once again, the most important step in this process is Step 3. Every multiple-choice question is testing specific knowledge. Once you can hone in on what specific knowledge a particular question is testing, the extraneous issues melt away, and the answer should become clear. It takes some practice to utilize this approach (deliberate practice,

in fact), and you can experiment with it without time constraints at first. Eventually, it will become habitual. You will find that it actually makes reading less time-consuming (with less time spent re-reading the question), and your answering the question will go more quickly.

## Using Multiple-Choice Questions to Deepen Your Learning and Prepare for Essay-Based Questions

First, while the questions in this guide stand on their own and you can utilize them to develop your understanding of particular issues at face value, you can also use them creatively to further deepen your learning. First, you can take apart a particular question and manipulate the facts to determine whether a change in facts might change the outcome. For example, when it comes to questions of confidentiality (Chapter 3), a client's consent to release particular information is likely dispositive: the lawyer can release it. But what happens if the client does not give such consent? Are there situations in which a lawyer might still be able to release particular information without such consent? Are these situations in which that release is permissive? Are there situations in which the lawyer is required to release it? What change(s) to the fact pattern might change the outcome? Which will not? You can play around with each of the fact patterns in each question to help you develop a deeper understanding of the application of the different rules in particular situations. This can also help prepare you for anything—any iteration of a range of general facts that dictate the results in a particular situation. Pull together a study group of your colleagues. Have each of you change the fact pattern of a few questions and then share those changed fact patterns within the group. (Study groups are highly recommended generally.)

On a related note, you will probably notice that for a small percentage of questions, the fact patterns appear very similar. That is by design. For a few questions, this guide uses this method to test your knowledge and understanding of the material, borrowing some facts from a previous question and changing them up a bit. The basic elements of the question may even come from a different chapter altogether. Do not be fooled into thinking the question is the same, and, as a result, the answer and outcome are the same as well. Sometimes the facts change, but it does not necessarily change the outcome. At other times, the facts will change, and it *will* change the outcome. If you develop an ability to identify these situations and determine what changes to the outcome, if any, may occur as a result of those changes, you are on the road to mastery.

Second, since many law school exams and bar examinations include essay questions, any one of the questions contained in this guide can be converted into an essay question. Just ignore the potential answers and ask yourself, "How would I answer this question if it were an essay?" You can elaborate on the given facts and expand the issues you want to address (or have a colleague do so), but you can certainly use these fact patterns as prompts for an essay-based question and answer. Again, pull together a

study group to help expand your capacity to do this by tackling a number of questions in this way.

## A Note to Instructors

The chapters in this guide are presented in a particular order, one commonly used in an introductory professional responsibility course. At the same time, as described above, the chapters and the sections found within them are modular. You can align them with your course syllabus and assign them by chapter and even section within specific chapters to correspond to the structure and order of your course. Students can use the Formative Assessment Quizzes that conclude each chapter as a way to chart their progress on a particular topic, or you could recommend that students group those quizzes together as a “midterm” of sorts. If, for example, after the first month or so of class, you have covered forming the attorney-client relationship, conflicts, and confidentiality, you can recommend that students take the Formative Assessment Quizzes at the ends of Chapters 1, 2, and 3 together, as a way to assess their progress and understanding of the material. The Summative Assessment Quiz (Chapter 9) can also serve as a good review prior to your final exam. Once again, I do not see the materials in this guide as supplanting anything you are teaching, or as a substitute for it, but rather as a way to supplement the important work you are doing inside and outside the classroom.

## Acknowledgments

Since becoming a lawyer, issues of professional responsibility have been core to my practice, but they have also become central to my teaching. I first taught a course on professional responsibility in the early 2000s as an adjunct professor at New York Law School. But I have been teaching professional responsibility every year since 2007, when I began teaching full-time at Albany Law School. This teaching has been informed by the many mentors I have had along the way: professors in law school, my colleagues and supervisors in practice, and my academic colleagues today. While in law school, Harold Hongju Koh, Michael Ratner, Bob Solomon and Steve Wizner were incredible mentors and role models. Once in practice, Andrew Lehrer, David Weinraub, and Michael Bournas-Ney all taught me much, and well, as a young attorney. In more recent years, working collaboratively with colleagues at the Urban Justice Center helped me develop and hone my understanding of professional responsibility, including Wendy Bach, Molly Biklen, Madeline Garcia-Bigelow, Susan Hazeldean, Doug Lasdon, Harvey Epstein, Kim Hawkins, Carmen Huertas-Noble, Megan Lewis, Andrew Kashyap, Gowri Krishna, Annie Lai, Tony Lu, Serge Martinez, Anika Singh Lemar, John Whitlow, and Haeyoung Yoon.

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