No Comment: The MPRE Should Not Test Knowledge of the Comments to the Model Rules

Margaret Raymond[*]

ABSTRACT

This article argues that the Multistate Professional Responsibility Examination (MPRE) should not test knowledge of the Comments to the ABA Model Rules of Professional Conduct. Through textual analysis, the author demonstrates that the Comments have become increasingly long, complex, and difficult to understand over time. The analysis also reveals an inconsistent use of mandatory versus advisory language, creating confusion about the Comments' intended role as interpretive guidance rather than binding rules. The author argues that the role of the Comments is broadly misunderstood, and that requiring MPRE test-takers to master this extensive body of complex advisory material has the potential to compound that misunderstanding. While the article views the Comments as profoundly valuable resources for research and practice, it concludes that new lawyers should not be required to commit them to memory.

INTRODUCTION

My students hate the Comments to the American Bar Association (ABA) Model Rules (the Comments and the Rules respectively).[1] When I

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    1.   *See* MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2024). Actually, I typically do not assign the Comments to the Model Rules, but rather the comments to the rules of professional conduct in the state where my students are attending law school. In recent years, this has been Wisconsin. Wisconsin adopted most of the Model Rules' Comments, writing its own Comments to indicate where the state's Rules deviate materially from the model, so those are the ones I assign. I occasionally point

assign a Rule to them, I typically assign them to read all the Comments to the Rule as well. I'm pretty sure they don't do it. Some occasionally ask me to point out the Comments that are relevant, so they do not have to read them all, because it feels like a waste of time. The Comments are complex, intricate, and wordy; students are not sure which ones are important and which ones are not. They do not want to spend their time wading through a substantial volume of long, complex verbiage, trying to figure out which of the Comments are essential to their mastery of the basic concepts of their professional responsibility course.

I find myself of two minds about this request. On the one hand, taken as a whole, the Comments are essential scaffolding for lawyers who want to be deeply knowledgeable about professional responsibility. They can be useful guides to a particular problem or issue. And there are a lot of great resources in them: examples, exceptions, and general wisdom. They are generated by processes that involve knowledgeable experts in the field,[2] and are worthy of respect, if not universal approval.

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students specifically to Comments to the Model Rules that are pertinent and have not yet been adopted by Wisconsin. For example, in discussing prohibitions on solicitation, Comment [2] to Model Rule 7.3 clarifies the term "live person-to-person contact." MODEL RULES OF PRO. CONDUCT r. 7.3 cmt. 2 (AM. BAR ASS'N 2024). Wisconsin's Rule uses a slightly different term, "live telephone or real-time electronic contact." WIS. SUP. CT. R. § 20:7.3. But neither the Wisconsin Rule nor its Comments define the term "real-time electronic contact." MODEL RULES OF PRO. CONDUCT r. 7.3 cmt. 2 (AM. BAR ASS'N 2024); WIS. SUP. CT. R. § 20:7.3. I accordingly provide my students with the useful definition of the analogous term provided in Comment [2] to ABA Model Rule 7.3. *But cf.* PA. R. PROF. CONDUCT r. 7.3, cmt. [2] (2024) (defining the term "live person-to-person contact" differently than the Model Rules Comment does).

2.   The original Comments were drafted by the Commission on Evaluation of Professional Standards, also known as the Kutak Commission. *See* ABA, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2013, at x–xiv (Art Garwin ed., 2013). The commission was charged by the ABA with proposing revisions of the prior Model Code of Professional Responsibility. *Id.* The Code had a tripartite structure, involving Canons, Disciplinary Rules, and Ethical Considerations. *Id.* The Commission proposed, instead, a Restatement-like structure of Rules and Comments, and drafted the initial set of Comments that were approved by the ABA House of Delegates in August 1983. *Id.* As the history of the Rules demonstrates, changes and additions to the Rules and Comments are typically proposed by a knowledgeable source, either an ABA Commission charged with reviewing a particular issue or by the ABA Standing Committee on Ethics and Professional Responsibility. *See, e.g.*, *id.* at xi (noting changes proposed by "various entities, including the ABA Standing Committee on Ethics and Professional Responsibility"); *id.* (changes recommended by the Commission on Multidisciplinary Practice); *id.* at xii (changes recommended by the Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000)); *id.* (changes recommended by the ABA Commission on Multijurisdictional Practice); *id.* (changes recommended by the ABA Task Force on Corporate Responsibility); *id.* at xiii (changes recommended by the Commission on Ethics 20/20).

On the other hand, the Comments are extremely unwieldy as general education. My anecdotal sense, over the almost thirty years I have been working in this field,[3] is that they have gotten longer, more convoluted, and less straightforward over time. That perception is one of the motivators of this project. I am sympathetic to my students' desire to be pointed only to the Comments that they really need to know about to pass my course, to do their work in the clinic, or get started in their law practices.

There are three reasons why I hesitate to yield to their requests and to assign only specific Comments that I preselect as important for their introductory study of professional responsibility.

First, lawyers regularly need to wade through a lot of irrelevant and lengthy material to get to the point. One of the things we are trying to create in law school is a structured facsimile of the experience of reading, researching, figuring out how to weed out information that is not relevant, and finding an answer from the pertinent sources. I worry that too much pre-sorting will abdicate my obligation to help my students figure out how to learn this skill—to separate the wheat from the chaff— and to extricate from the entirety of the Comments a broad-based education in the essential principles of professional responsibility.

Second, as far as which Comments are essential and which are unnecessary, I am reluctant to rely on my solitary voice in making that choice. If I encourage them only to read the Comments that I think are important, who is to say whether I chose correctly? I might encourage them to skip reading and reflecting on Comments that others would deem essential.[4]

The third reason is less theoretical and much more practical, and that is the Multistate Professional Responsibility Exam, or MPRE.

The bar examination currently includes a free-standing test of

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3. I have been teaching the Rules as part of a full professional responsibility course since 1995. When I began teaching, some states still had Model Code-based rules of professional conduct, while most had embraced a Model Rules-based version. I was involved in one state's conversion of its rules from a Code-based model to a Rule-based model and spent six years on another state's Standing Committee on Professional Ethics, which interpreted the state's rules of professional conduct, drafted ethics opinions in response to inquiries, and was on occasion consulted about rules changes. I accordingly come to this project with substantial experience teaching, adopting, interpreting, and applying the law of professional responsibility and parsing both the Rules and the Comments.

4. In testing my own students, I expect them to know only those Comments we have discussed in class. But there is no guarantee that these Comments I identify as the most important, helpful, and worthy of their attention would universally be viewed that way.

professional responsibility, the MPRE. All but two U.S. jurisdictions require successful completion of the MPRE as a requirement of licensure.[5] Even though the National Conference of Bar Examiners (NCBE) is currently undertaking a fundamental revision of the bar examination, known as the Next Generation bar examination (or "NextGen"), it appears that the MPRE will continue as a separate component of the bar examination.[6]

Bar exam takers who sit for the MPRE are expected to know everything that is discussed in the Comments.[7] This is not immediately obvious from the instructions for the MPRE.[8] To figure out that this is the case, you need to parse the "MPRE Key Words and Phrases," which define the meaning of terms used in MPRE questions.[9] They are available on the NCBE website.[10] Point three in this document states:

> "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.[11]

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5.   *See Multistate Professional Responsibility Examination*, NCBE, https://www.ncbex.org/exams/mpre [https://perma.cc/9XRB-W8EQ].

6.   *See* Press Release, Nat'l Conf. of Bar Exam'rs, NCBE Announces NextGen Exam Structure, Sunset of Current Bar Exam (Aug. 28, 2023), https://www.ncbex.org/news-resources/ncbe-announces-nextgen-exam-structure-sunset-current-bar-exam [https://perma.cc/J5E6-MSWK] ("The Multistate Professional Responsibility Examination (MPRE), a separate attorney ethics test, will not be affected by this change."). There is an extensive conversation underway in a number of states about the value of the bar examination and the potential for alternative pathways for admission to practice that do not rely on high-stakes testing. This paper offers no comment on those valuable conversations. While the profession's engagement with these issues is critically important, this paper asks a much smaller question: whether, if some jurisdictions think that the MPRE is an important part of addressing lawyer readiness for licensure, the memorization of the Comments is an essential part of that enterprise.

7.   *See generally* NAT'L CONF. OF BAR EXAM'RS, MPRE KEY WORDS AND PHRASES (2019), https://www.ncbex.org/sites/default/files/2023-01/MPRE_Key_Words_Phrases.pdf [https://perma.cc/298R-L2CY] (implying that MPRE-test subjects require a knowledge of the Comments).

8.   *See Preparing for the MPRE*, NAT'L CONF. OF BAR EXAM'RS, https://www.ncbex.org/exams/mpre/preparing-mpre [https://perma.cc/NR5Z-324B].

9.   *See* NAT'L CONF. OF BAR EXAM'RS, *supra* note 7.

10.   *See id.*

11.   *Id.*

That means that, in order to answer this category of question on the MPRE correctly, in addition to knowing what is in the Rules and what is in the Preamble to the Rules, an exam taker needs to know everything that is in the Comments in order to analyze whether the conduct of a lawyer in a hypothetical question is "not inconsistent" with them.[12]

While a professional responsibility course is a required feature of all ABA-accredited legal education,[13] law schools and their faculty vary widely in the extent to which preparation for the MPRE is an important feature of their professional responsibility instruction. My course is *not* intended to be an MPRE prep course.[14] Nonetheless, the content of my course is unquestionably important and valuable to students planning to take the MPRE and I am very aware of that as I teach my class.[15]

One might wonder whether it is fair to expect new lawyers seeking admission to practice to retain such an encyclopedic knowledge of the Comments. Are the Comments sufficiently clear, accessible, and important that mastery of their entirety is a legitimate thing to test on the MPRE? This project aims to answer that question. In addressing that question, I use a novel approach, applying textual analysis tools to the Comments. The tools enable us to know how long and complex the Comments are, as well as the prevalence of specific words that are used in them.

This analysis suggests that the length and complexity of the Comments, as well as a lack of clarity about what they are supposed to accomplish, militates against requiring MPRE takers to master and commit to memory everything included in the Comments.

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12.   *See* NAT'L CONF. OF BAR EXAM'RS, *supra* note 7.

13.   Standard 303(a)(1) of the ABA Standards and Rules of Procedure for Approval of Law Schools 2024–25 states, "[a] law school shall offer a curriculum that requires each student to satisfactorily complete . . . one course of at least two credit hours in professional responsibility that includes substantial instruction in rules of professional conduct, and the values and responsibilities of the legal profession and its members." ABA, *Chapter 3: Program of Legal Education*, *in* 2024–2025 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 20 (2024).

14.   I make clear to my students that my course is not an MPRE prep course. I urge my students planning to sit for the MPRE to take a commercial bar preparation course intended specifically for that purpose. Those courses are focused singlemindedly, as they should be, on helping students to pass the MPRE.

15.   Because I currently teach at a Wisconsin law school, many of my students are admitted to practice through diploma privilege and are not required to take the MPRE. WIS. BD. OF BAR EXAM'RS, ADMISSION FAQS 3 (Oct. 2023), https://www.wicourts.gov/services/attorney/docs/admfaqs.pdf [https://perma.cc/8FMD-CHHK]. In fact, Wisconsin does not require even applicants seeking admission through the bar examination to pass the MPRE. *Id.* Yet, I have many students who do choose to sit for a bar examination in other states, and the MPRE's requirements are still important to them.

There is a lot of great substance in the Comments. They are a useful place to start anytime a professional responsibility issue arises in your practice. But I question whether it is a body of material that every new law graduate should be expected to commit to memory.

There is, of course, a bigger question lurking here. Does the complexity of the Comments undermine them as a valuable tool for the profession more broadly and should they be rethought more generally? That is a fair question, but one that goes beyond the scope of this paper. The varied functions of the Comments and their effectiveness are certainly worthy of further investigation and interrogation in future work.

I. THE COMMENTS ARE TOO LONG AND COMPLEX

One reason that we should not expect new law graduates to know everything in the Comments is that there are too many of them.

Some of that is apparent just from looking at them. Each Comment is associated with and follows a specific Rule. The Comments are organized in numbered and bracketed paragraphs following each Rule.[16] Some sets of Comments include subheadings, helping the reader determine which sets of numbered Comments deal with a specific set of issues under the Rule.[17] Model Rule 1.7, for example, which deals with concurrent conflicts of interest, uses fifteen subheadings to guide the reader through its thirty-five Comments.[18] Some sets of Comments do not. Whether there are subheadings or not does not seem consistent and does not seem to turn on the complexity of the Rule.[19]

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16.   *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 2024).

17.   *Id.* The Comments to Model Rule 1.7, which deals with concurrent conflicts of interest, are organized under fifteen headings that roughly track the language of the Rule. *See id.* The organization style might be partly because there are thirty-five Comments under Rule 1.7 and subheadings may help readers of this complex Rule find what they are looking for. *Id*. Rule 1.8, which deals with a specific set of conflicts with the lawyer's own interest, uses eleven subheadings to organize twenty-three Comments. *Id.* at r. 1.8. But Rule 1.9, which is also quite complex, has only one heading and nine Comments. *Id.* at r 1.9.

18.   MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 2024).

19.   For example, Rule 1.18, which deals with duties to prospective clients, has nine Comments and no subheadings. *Id.* at r. 1.18. Rule 5.1, which deals with the responsibilities of supervisory lawyers and the potential for vicarious disciplinary liability, has eight Comments and no subheadings. *Id.* at r. 5.1. And Rule 5.5, which deals with the unauthorized practice of law—and which sets out a default Rule, an explanation of the default Rule, and two elaborate multiple-paragraph exceptions—has twenty-one Comments and no subheadings. *Id.* at r. 5.5.

There are a large number of Comments. Model Rule 1.7 has thirty-five distinct Comments;[20] Model Rule 1.8 has twenty-three.[21] Of course, those Rules deal with conflicts of interest, which are complicated and have many different permutations. So does confidentiality, of course; Model Rule 1.6, which deals with the duty of confidentiality, has twenty Comments.[22] On the other hand, some sections have fewer Comments than one might expect. Rule 1.3, which deals with diligence, has only five Comments;[23] Rule 1.1, dealing with competence, has eight.[24]

The number of Comments alone does not tell us everything we need to know, however. The real problem is that the Comments are too long and complicated to be easily read and understood. And that has become increasingly true over time.

To demonstrate this, I catalogued the evolution of the Comments over the years since they were first created, using a tool that enables us to analyze the text of the Comments.[25] The tool used here was the Voyant Word Analyzer.

Voyant is an open-source tool.[26] You upload a document into the tool, and it does several things: it counts the words in the document, it counts the number of words in each sentence, it provides an average sentence length, and it identifies how many times each word appears in that document.[27] Even that limited functionality produces some very interesting information.

This project analyzed four distinct versions of the Comments. We selected the original Comments that were promulgated in 1983[28] and the most recent Comments, published in 2024.[29] Additionally, two other

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20.   *Id.* at r. 1.7.
21.   *Id.* at r. 1.8.
22.   *Id.* at r. 1.6.
23.   *Id.* at r. 1.3.
24.   *Id.* at r. 1.1.
25.   *See* VOYANT TOOLS, https://voyant-tools.org/ [https://perma.cc/FN5X-TRPD]. All subsequent tables and statistical information related to the Rule and Comment analysis comes from data created by myself and my colleagues using Voyant.
26.   *Tutorial/Workshop*, VOYANT TOOLS, http://www.voyant-tools.org/docs/#!/guide/tutorial [https://perma.cc/M8TD-DYJ8] (within Voyant Tools Help, then Guides tab).
27.   *Id.* The tool also creates a "readability index." *Id.* Discussion of the "readability index" appears *infra* notes 41–44 and accompanying text.
28.   MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 1983).
29.   MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2024).

versions were included: 2003[30] and 2013.[31] These two versions were selected because they were the first editions to include substantial updates that arose out of significant commission revisions to the Rules and Comments. The Ethics 2000 Commission changes to the Model Rules, which became official ABA policy at the completion of the House vote on the Commission Report on February 5, 2002,[32] were subsequently integrated in the 2003 version of the Rules and Comments.[33] The ABA Commission on Ethics 20/20 changes to the Rules and the Comments were adopted by the House of Delegates on August 6-7 2012, and were subsequently integrated into the 2013 Rules and Comments.[34]

These four snapshots accordingly capture moments of transition in the life of the Comments. While more could be done to look in a granular way at year-by-year changes, a look at these substantial revisions provides significant information about where the Comments began and where they have been going.

The first version of the Comments, which accompanied the 1983 Model Rules, contained 22,017 words.[35] If we assume that a standard double-spaced page is approximately 250 words, that means that the first version of the Comments was about eighty-eight pages long.[36]

Every significant change to the Rules has grown the length of the Comments, as shown here:

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30.   MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2003).

31.   MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2013).

32.   *See* Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct*: *Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 444 (2002).

33.   *See* MODEL RULES OF PRO. CONDUCT r. 1.14 (AM. BAR ASS'N 2003). The official text of this version actually omitted Comments to Rule 1.14, so we added back the Comments to make sure that the analysis was performed on a complete version.

34.   *See* MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2013).

35.   *See* Robert B. McKay, *In Support of the Proposed Model Rules of Professional Conduct*, 26 VILL. L. REV. 1137, 1146 (1981) (describing the intention of the Comments, as an improvement from the Canons and Ethical Considerations, to distinguish clearly between the mandatory obligations contained in the Rules and discretionary choices contained in the Comments).

36.   Alan Reiner, *How Many Words in a Double-Spaced Page? [A Word Count Guide]*, WORD COUNTER (Sept. 21, 2022), https://word-counter.com/how-many-words-in-a-double-spaced-page-a-word-count-guide/ [https://perma.cc/W36K-9974].

Table 1: Length of the Comments to the Model Rules

Year of Comments	Words (Pages)
1983	22,017 words (88 pages)
2003	43,544 words (174 pages)
2013	47,741 words (190 pages)
2024	48,544 words (194 pages)

In the years since the Comments were created, their length has more than doubled. We now expect new law graduates to, in effect, commit to memory 194 pages of Comments.

The Comments are not only long, they are also complicated. One measure of that is the average number of words per sentence they contain.

Longer sentences are harder to read.[37] The "plain English for lawyers" movement has encouraged attention to shorter and simpler sentences as an aspect of more readable legal writing.[38] Legal writing experts and instructors recommend that a good average length for sentences is between twenty and twenty-five words.[39]

The first version of the Comments, from 1983, came very close to that

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37. *See Get Your Document's Readability and Level Statistics*, MICROSOFT SUPPORT, https://support.microsoft.com/en-us/office/get-your-document-s-readability-and-level-statistics-85b4969e-e80a-4777-8dd3-f7fc3c8b3fd2 [https://perma.cc/8Q7L-Q6WS]. Counting the average sentence length in your own writing is a humbling exercise. It can be done in a Microsoft Word document by going to the Review tab, clicking the Editor tab, and clicking on the Document Stats box under the Insights heading. *Id.* Be patient, the analysis can take a while. The average sentence length of this paper is 20.1 words.

38. *See* RICHARD C. WYDICK, *Chapter 5: Use Short Sentences*, *in* PLAIN ENGLISH FOR LAWYERS 34–35 (3d ed. 1994) ("Long sentences make legal writing hard to understand . . . [t]he remedy . . . is simple. Instead of one long sentence containing five thoughts, use five sentences, each containing one thought.").

39. Wayne Schiess, *Sentence Length*, AUSTIN LAW., Sept. 2014, at 1–2, https://www.lwionline.org/sites/default/files/Sentence%20Length_SCHIESS.pdf [https://perma.cc/3SUN-BN5A]. What's a good average length? The experts say between twenty and twenty-five words:

> —Below twenty-five, WYDICK, *supra* note 38;
>
> —About twenty-two, ANNE ENQUIST ET AL., JUST WRITING: GRAMMAR, PUNCTUATION, AND STYLE FOR THE LEGAL WRITER (6th ed. 2022);
>
> —About twenty, BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES 19–20 (2001).

recommended average: roughly twenty-five words per sentence (25.8). But additions have made the average sentence length considerably longer, as shown in the next table.

Table 2: Average Words Per Sentence of the Comments
to the Model Rules

Year of Comments	Average Words Per Sentence (WPS)
1983	25.8 WPS
2003	36.0 WPS
2013	36.1 WPS
2024	36.2 WPS

Professional responsibility issues are complicated and can be difficult to understand. But complex topics do not always require complex writing to explain; sometimes it would be better if the writing explaining difficult ideas were simple and clear.

So, we are now asking MPRE takers to commit to memory almost 200 pages of complex text. That text is not written in accordance with best practices for readable and comprehensible legal writing. Some of the Comments are organized in subheadings and captions that guide the reader, but some are not. And mastery of this material is a nonnegotiable condition of licensure in most cases.[40]

Another way to look at the Comments is to assess their readability. Readability assesses how easy it is to understand a document based on its writing.[41] There are a variety of readability indices, and they do not provide readily comparable outputs. Some measure the reading grade level of written materials,[42] while others offer an overall assessment of difficulty.[43] While comparing various tools is of limited value, the analysis provides

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40.   *See Multistate Professional Responsibility Examination*, NAT'L CONF. OF BAR EXAM'RS, https://www.ncbex.org/exams/mpre [https://perma.cc/2N6M-9629].

41.   *See* S. Zhou, H. Jeong, P. Green, *How Consistent are the Best-Known Readability Equations in Estimating the Readability of Design Standards?*, 60 IEEE TRANSACTIONS ON PRO. COMMC'N 97 (2017).

42.   *See id.* (discussing Flesch-Kincaid and SMOG indices).

43.   *See id.* (discussing Gunning Fog Index, which assesses material as "readable," "hard," "difficult," or "very difficult").

another useful window into the complexity of the Comments. For the most part, the tools suggest that the Comments are difficult to read and became more difficult over time.[44]

Not only are the Comments long, complex and difficult to understand, it is not always clear what their role is. And the textual analysis supports this concern.

II. IT IS NOT CLEAR WHAT THE COMMENTS ARE DOING

The Comments to the Rules are intended to explain how the Rules work, not to create new obligations. The Scope Note to the Model Rules of Professional Conduct expressly lays out the role the Comments are intended to play. It makes clear that the Comments are meant to be illustrative and explanatory: "The Comment accompanying each Rule explains and

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44.   The Voyant Tool used for the analysis in this paper has its own readability index. It found the following readability levels for the four sets of Comments analyzed here (year: Voyant readability index score):

> 1983: 14.566
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> 2003: 14.489
>
> 2013: 15.143
>
> 2024: 14.956

Interestingly, while the general trend was toward more challenging readability as the Comments became longer, that is not a uniform result. The 2024 Comments were deemed marginally more readable than the 2013 version. To similar effect, the Flesch-Kincaid results for these four versions were as follows (year: Flesch-Kincaid readability index score):

> 1983: 13.7
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> 2003: 14.9
>
> 2013: 15.0
>
> 2024: 14.9

As noted *supra* note 42, this index measures the grade level of written material. The Gunning Fog Index, which is not a grade-level assessment, but an evaluation of overall difficulty, did not show a process of increasing difficulty at all. That Index—which deems a score of 5 readable, 10 hard, 15, difficult, and 20, very difficult—suggests that the Comments began as difficult and pretty much stayed that way (year: Gunning Fog readability index):

> 1983: 17.9
>
> 2003: 17.61
>
> 2013: 17.36
>
> 2024: 17.35

illustrates the meaning and purpose of the Rule."[45] Comments, the Scope Note says clearly, do not create obligations for lawyers; they are intended to flesh out and assist in the interpretation of the Rules, which do create such obligations.[46] "Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules."[47] Should there be an inconsistency between the Comments and the Rules, the Rules will govern.[48] "The Comments are intended as guides to interpretation, but the text of each Rule is authoritative."[49] The Comments also play a function outside of the interpretation of the Rules. The Scope Note suggests that they can properly be used to "alert lawyers to their responsibilities under . . . other law,"[50] besides the Rules, that may be applicable to their conduct.[51]

Some history helps demonstrate why that is the case. The ABA's approval of the Rules in 1983 replaced the previous Model Code of Professional Responsibility.[52] The Code had a tripartite structure, which included Canons, Disciplinary Rules, and Ethical Considerations.[53] The Disciplinary Rules were intended to create enforceable obligations, violation of which could subject lawyers to discipline.[54] The Ethical Considerations were "aspirational in character and represent the objectives toward which every member of the profession should strive."[55] The Code was intended "both as an inspirational guide to the members of the profession and as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules."[56]

The Rules departed from this structure in part to replace the Code's

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45.   MODEL RULES OF PRO. CONDUCT Preamble. & Scope para. 21 (AM. BAR ASS'N 2024).
46.   *Id.* at para. 14.
47.   *Id.*
48.   *Id.* at para. 21.
49.   *Id.*
50.   *Id.* at para. 15.
51.   *See id.* ("[T]he Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general.").
52.   *See* MODEL RULES OF PRO. CONDUCT xi–xii (AM. BAR ASS'N 2023).
53.   McKay, *supra* note 35, at 1140 (describing structure of Code).
54.   *Id.* (disciplinary rules forbade or required specified conduct, making them "the basis for discipline against lawyers").
55.   MODEL CODE OF PRO. RESP. Preliminary Statement (AM. BAR ASS'N 1980).
56.   *Id.*

multitiered approach with "one set of standards."[57] The reason for this, according to the Reporter to the Commission that drafted the Rules (Professor Geoffrey Hazard), was that the structure of the Code "turned out to be disasterous [sic]."[58] That, in Professor Hazard's view, resulted "from the Code's very structure, that is, by its attempt to speak simultaneously about rules of aspiration and rules of obligation."[59]

To address the perceived concerns of this structural confusion, the Rules were "cast in the familiar and much more reliable form of the restatements,"[60] intended to "provide a black letter rule and an explanatory comment."[61] The goal was clarity: "[t]he Rules . . . seek to be rules of the lawyer's legal obligations and not expressions of hope as to what a lawyer ought to do."[62]

The Comments were thus not created to provide broad ethical guidance. They are meant to help lawyers understand their obligations under the Rules. But they are *not intended* to impose new, enforceable disciplinary obligations; they explain the law, they do not create it.

A. *Using Text Analysis to Determine What the Comments Are Doing*

Since the Comments are not supposed to create obligations, one might imagine that they will use language that contains recommendations rather than prohibitions. The Scope Note makes this clear: "Many of the Comments use the term 'should.'"[63] That makes sense for commentary that is a recommendation rather than a requirement.[64]

Accordingly, you might expect that the Comments would use the term

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57.   COMM'N ON ADVERT., AM. BAR ASS'N, A RE-EXAMINATION OF THE ABA MODEL RULE OF PROFESSIONAL CONDUCT PERTAINING TO CLIENT DEVELOPMENT IN LIGHT OF EMERGING TECHNOLOGIES (July 1998) ("the Model Rules departed from the Code in format and substance. Instead of the Code's two-tiered ethical considerations (EC's) and disciplinary rules (DR's), the Model Rules had one set of standards").

58.   Geoffrey C. Hazard Jr., *Legal Ethics: Legal Rules and Professional Aspirations*, 30 CLEV. ST. L. REV. 571, 571–72 (1981).

59.   *Id*. at 574.

60.   *Id*.

61.   *Id*.

62.   *Id*.

63.   MODEL RULES OF PRO. CONDUCT Preamble. & Scope para.14 (AM. BAR ASS'N 2024).

64.   *See id*. This is distinct from the language the Scope Note says will be used in imperative Rules, which will be "cast in the terms 'shall' or 'shall not.' These define proper conduct for purposes of professional discipline." *Id*.

"should" often. And they do. As the table below shows, the terms "should" and "should not" appear with regularity. That was the case in the initial 1983 version of the Comments. The use of the term "should" increases as the length of the Comments increases, though the use of the term "should not" does not increase.

Table 3: Frequency of the Terms "Should" and "Should Not"
in the Comments to the Model Rules

Year of Comments	Frequency of "Should"	Frequency of "Should Not"
1983	131	23
2003	160	21
2013	179	21
2024	181	20

Interestingly, however, as the length of the Comments grew, the uses of the terms "should" and "should not" did not increase in a manner proportionate to the growth of the Comments. The use of the term "should not" actually decreased slightly and the use of the term "should" increased at a much slower rate.

Consider, for example, the change from 1983 to 2003. The Comments became almost twice as long, going from 22,017 words to 43,544 words.[65] The number of words increased by a factor of 1.98. Were the use of the word "should" growing in proportion to the length of the Rules, you would expect it to appear more often—1.98 times the original use of 131, which would equate to 259. But instead of the proportionate 259 appearances of the use of the word "should," we see only 160. The word count in the 2024 Comments exceeds the 1983 word count by a factor of 2.2. Again, if the use of the word grew in proportion to the length of the Comments, you would expect it to appear 2.2 times as often compared to the 1983 version, or around 288 times. But we see only 181 appearances. What other words are taking the place of the "should" that did not bark?

One word that appears increasingly in later versions is "may," along with its converse, "may not." The word "may" is associated with permissive

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65.   *See, e.g.*, MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 1983); MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2003). That is an increase of 1.98 times.

behaviors,[66] and its use seems entirely consistent with the role of advisory guidance like the Comments.

The term "may not" is different, however. A statement that a lawyer "may not" behave in a certain way is prohibitory language, not discretionary language, more like the sort of language one would imagine appearing in the Rules rather than the Comments.

The usage of the terms "may" and "may not" increases significantly in later versions of the Comments.

Table 4: Frequency of the Terms "May" and "May Not" in
the Comments to the Model Rules

Year of Comments	Frequency of "May"	Frequency of "May Not"
1983	239	29
2003	411	51
2013	429	53
2024	436	54

The term "may not" increases by a factor of 1.76 in 2003 relative to 1983, not quite aligning with the increase in length, but coming closer. This mandatory language appears to be increasing in frequency and infiltrating the Comments, making them sound more directive than the Scope Note suggests they are intended to be.

Another set of terms that significantly increase in frequency are the terms "must" and "must not." Again, "must" is mandatory language. The Comments, in discussing and explaining a lawyer's obligations under the Rules, uses these terms in that way, in the course of explaining mandatory obligations. But the use of these terms increases more than would be proportionate given the increase in length of the Comments as a whole.

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66.   *See* MODEL RULES OF PRO. CONDUCT Preamble. & Scope para 14. Rules "generally cast in the term 'may,' are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion." *Id.*

Table 5: Frequency of the Terms "Must" and "Must Not" in the
Comments to the Model Rules

Year of Comments	Frequency of "Must"	Frequency of "Must Not"
1983	27	0
2003	117	10
2013	125	11
2024	126	11

Unlike the use of the words "should" or "may," the terms "must" and "must not" increase *more* than proportionately given the increase in the number of words. From 1983 to 2003, the use of the word "must" increased by a factor of 4.33.

The use of the term "prohibited" saw a similar increase.

Table 6: Frequency of the Term "Prohibited" in the
Comments to the Model Rules

Year of Comments	Frequency of "Prohibited"
1983	5
2003	34
2013	35
2024	37

The use of the term "prohibited" increased by a factor of 6.3 in the 2003 Comments, a significantly larger increase than would be proportionate given the increase in the length of the Comments.

The language of the Comments may suggest to readers that they are doing more than providing guidance as to the interpretation of the Rules, but instead that the Comments are *themselves* creating obligations.[67]

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67. *See supra* notes 45–49 and accompanying text. States are, of course, welcome to change this presumption and some have done so. The Model Rules, however, states explicitly that the Comments are not intended to create enforceable lawyer obligations. MODEL RULES OF PRO. CONDUCT Preamble. & Scope para. 14 (AM. BAR ASS'N 2024).

B. The Role of the Comments Is Confusing for the
Legal Community As Well

The role of the Comments may be confusing for law students or new graduates, but it is also confusing for the profession.

An example of substantial current relevance is the addition to Comment [8] to Rule 1.1 stating that, to be competent, a lawyer "should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."[68] The language about technology was added to the Comment in 2012.[69] That text, standing alone, is completely consistent with the role of the Comments: adding interpretive guidance to the reader's understanding of the duty of competence articulated in Rule 1.1 by suggesting that competent lawyers should understand the risks and benefits of technology they use. It is plain that lawyers who do not understand relevant technology run the risk of behaving incompetently.[70] Recent analyses of the duty of lawyers using generative artificial intelligence routinely point out the competency issues that arise when lawyers rely on these tools without understanding how they work.[71]

But did the 2012 addition to the Comment change the Rule, adding a separate, *new* requirement of technological knowledge as an aspect of attorney competence? The previously discussed guidance from the Scope Note makes clear that the Comments do not have the power to change the obligations imposed on lawyers by the Rules.[72] From that perspective, the addition to the Comment should be viewed as helpful, but probably unnecessary, guidance for interpreting of the duty of competence. The duty of competence can be violated by a wide variety of lawyer failures,[73] including many that are not expressly named in the Comments to Model

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68.   MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2024).
69.   Lisa Z. Rosenof, *The Fate of Comment 8: Analyzing a Lawyer's Ethical Obligation of Technological Competence*, 90 U. CIN. L. REV. 1321, 1321 (2022).
70.   *See, e.g.*, Mata v. Avianca, 678 F. Supp. 3d 443, 461 (S.D.N.Y. 2023).
71.   *See, e.g.*, TASK FORCE ON ARTIFICIAL INTELLIGENCE, N.Y. STATE BAR ASS'N, REPORT AND RECOMMENDATIONS OF THE NEW YORK STATE BAR ASSOCIATION TASK FORCE ON ARTIFICIAL INTELLIGENCE 29 (2024); STANDING COMM. ON PRO. RESP. & CONDUCT, STATE BAR OF CAL., PRACTICAL GUIDANCE FOR THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW 4 (2023); D.C. Bar Ass'n, Ethics Op. 388 (2024); Fla. Bar, Ethics Op. 21-4 (2024); ABA Comm. on Ethics & Pro. Resp., Formal Op. 512 at 2–5 (2024).
72.   *See* MODEL RULES OF PRO. CONDUCT Preamble. & Scope para. 21 (AM. BAR ASS'N 2024).
73.   *See* Rosenof, *supra* note 69, at 1321.

Rule 1.1. Presumably lawyers who misused technology they did not understand could be deemed to have breached their duty of competence even in the absence of Comment [8] to Model Rule 1.1.

But that is not how everyone understands this addition to the Comment. One author, writing in a state that has not adopted the addition, declared that the addition of Comment [8] to Rule 1.1 constituted a significant change to the Rules:

> In 2012, a sea change occurred in the legal profession, particularly for those who came of age in the "good old days" when you ventured to court armed with a legal pad rather than an iPad. Back then, being competent in representing one's clients meant staying abreast of recent case law and statutory or code changes in one's area of practice. But in August 2012, the American Bar Association . . . formally approved a change in the Model Rules of Professional Conduct to make it clear that lawyers have a duty to be competent not only in the law and its practice, but in the technology relevant to the practice as well.[74]

That change was a change to the Comments, not to the text of the Rule. It is interesting that the author of this article described this as the ABA having "formally approved a change in the Model Rules of Professional Conduct."[75] It did not.

Nonetheless, the author went on, "[f]or a duty of technological competence to apply to lawyers in a given state, that state's particular rulemaking body (usually the state's highest court) would have to adopt it."[76] And the author bemoans the fact that "ten states . . . have lagged behind in terms of adopting a duty of technological competence for attorneys"[77] by not adopting the amended Comment [8] to Rule 1.1, including the author's

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74. Hon. John G. Browning, *The Duty of Technological Competence and Alabama Lawyers: The Time for Adoption is Now*, 14 FAULKNER L. REV. 109, 109 (2022). The starred footnote makes clear that the author is knowledgeable and experienced. It describes the author as a retired judge, a Distinguished Jurist in Residence at a law school, a law firm partner, the author of "multiple books and numerous articles on law and technology," and a graduate of the University of Texas School of Law. *Id.*

75. *Id.*

76. *Id.* at 110.

77. *Id.*

home state of Alabama.[78] The article goes on to urge the adoption of this Comment in order to "formally embrace a duty of technological competence."[79] It describes a series of situations in which technology is involved in lawyer misconduct including: responding to negative online reviews,[80] hitting "reply all" in response to communications that included opposing counsel's client,[81] soliciting clients on social media,[82] or protecting confidential client information.[83]

While the author is correct that "lawyers' failure to use technology in a competent manner can have devastating consequences,"[84] the addition of a sentence fragment in a Comment accompanying Rule 1.1 does not change the duties of lawyers under the Rules. It may be that adopting a Comment adds emphasis, makes an important public statement, provides a useful resource, or encourages compliance.[85] All of those are important functions of the Comments. And it may be that adopting the Comment is a good idea. But doing so cannot create a duty that does not otherwise exist. The dire conclusion that "the protection of Alabama clients—who have the right to insist that their lawyers provide a level of competent representation that includes being conversant in technology's risks and benefits—is at stake,"[86] seems grounded in a fundamental misapprehension of the significance of the Comments. That suggests that what the Comments do and how they should be understood are not clear even to highly sophisticated lawyers.

The failure to adopt the revised Comment [8] could mean that a jurisdiction does not think technological literacy is an essential element of attorney competence under Rule 1.1. But it could equally be the case that

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78.   *See id.* at 111.
79.   *Id.* The author complains, "[n]owhere in the [Alabama] Comments to Rule 1.1 is technological competence mentioned in any way." *Id.* at 116. Additionally, "[a]s to what kind of 'Thoroughness and Preparation' may be required for lawyers to be considered competent, again, the [Alabama] Comment is silent as to technology." *Id.* at 117. Interestingly, the author indicates that some states recognized that lawyer competence included a duty to understand the technology they were using, even before adopting Comment [8]. *See id.* at 110.
80.   *Id.* at 119–20.
81.   *See id.* at 121.
82.   *Id.* at 121–22.
83.   *See id.* at 122–24.
84.   *Id.* at 127.
85.   *See id.* at 124–25. The author argues that "[a]doption of Comment 8 would impress upon Alabama lawyers the importance of being conversant in technology relevant to their practices, and thus mitigate the risk of such adverse consequences." *Id.*
86.   *Id.* at 140.

the jurisdiction is unwilling to refer piecemeal to some obligations rather than others, or that the jurisdiction deems it so obvious that technology is part of a generalized duty of attorney competence that it is unnecessary to say explicitly in the Comments that failure to stay abreast of technology will constitute a failure to comply with the Rule.

The MPRE's own terms create some ambiguity about this issue. The MPRE indicates to exam takers that, to consider a lawyer's conduct "proper," it must not be inconsistent with any of the Comments.[87] The task of remembering them all is Herculean, but the certainty that it would be improper to do anything inconsistent with any of them gives the Comments more authority than they were intended to have, another reason to revisit using them as a basis for testing.

III. A NEW BAR EXAM, AND A NEW REASON FOR CONCERN

A decision to change the expectations of the MPRE with regard to the Comments could be challenging to implement. Even if the established protocols of the MPRE make it difficult to quickly reduce reliance on the Comments as a source of law that must be committed to memory, there is another reason to be attentive to the obligations of bar exam takers with regard to the Comments: the development of a new and substantially revised iteration of the bar exam, the Next Generation bar exam, known as "NextGen."[88]

The NextGen bar exam, currently being developed by the NCBE, will test "foundational concepts and principles," which include core substantive areas, and "foundational lawyering skills," which include "legal research, legal writing, issue spotting and analysis, investigation and evaluation, client counseling and advising, negotiation and dispute resolution, [and] client relationship and management."[89]

While the NCBE intends to continue to offer the MPRE, it has indicated that professional responsibility will also be part of the NextGen exam, as

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87. NAT'L CONF. OF BAR EXAM'RS, *supra* note 7.

88. *See* Marilyn J. Wellington, *The Bar Exam: Past, Present, and NextGen*, 68 BOSTON BAR J. (May 17, 2024), https://bostonbar.org/journal/the-bar-exam-past-present-and-nextgen/ [https://perma.cc/D9E2-RS87].

89. *See NextGen Content Scope Outlines*, NAT'L CONF. OF BAR EXAM'RS, https://nextgenbarexam.ncbex.org/reports/content-scope/ [https://perma.cc/64RE-K5RS] (under Exams tab, then NextGen (July 2026), and NextGen Content Scope).

part of the testing of "foundational lawyering skills."[90] "Because of its importance, professional responsibility may serve as the context for assessing Foundational Skills (e.g., legal analysis, client counseling and advising) on the [NextGen] bar exam."[91] In order to avoid double-counting the content knowledge that is expected for the MPRE, rather than expecting exam takers to know the relevant provisions of the professional responsibility rules, candidates would be provided with "the applicable rules or other legal resources."[92]

Given the ambiguous and often-misunderstood nature of the Comments, it would be worth considering how a test taker's use of both Rules and Comments should be assessed in the NextGen exam. A test taker being asked to apply one of the Rules on the bar exam should be able to understand and demonstrate the differing roles the Rules and the Comments play in governing lawyer conduct. That might be more important than expecting rote memorization and application of the Comments. Since the Comments are intended to provide guidance rather than setting out enforceable rules, we should treat them that way as we assess new lawyers' understanding of them and their ability to analyze situations arising in practice that implicate critically important issues of professional conduct.

CONCLUSION

The Comments to the Model Rules have been and remain a rich source of guidance for lawyers and scholars. But they are not perfect models of concision and clarity. That is understandable; professional responsibility is not an exact science. But, insisting that familiarity with every one of them is an essential element of preparation to practice law overstates their value.

The Comments begin as narrative text; in the 1983 version, they were not even numbered.[93] They were intended to resemble a Restatement, adding explanation, clarification, and examples to aid in the reader's understanding of the Rules.[94] But the Multistate Bar Examination (MBE)

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90. *See* TESTING TASK FORCE, NAT'L CONF. OF BAR EXAM'RS, FINAL REPORT OF THE TESTING TASK FORCE 22 (2021), https://nextgenbarexam.ncbex.org/reports/final-report-of-the-ttf/ [https://perma.cc/X64V-ZXP7].

91. *Id.*

92. *Id*.

93. MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 1983).

94. McKay, *supra* note 35, at 1146 (describing the Model Rules as "consonant" with Restatement

does not expect exam takers to be familiar with the entirety of each relevant Restatement.

It is also worth mentioning that Comments may be added to the Rules as part of a complex calculus involving potential encroachments on the bar's power of self-regulation.[95] The Comments, understood in that context, are an important political tool. The complex balancing that generates some Comments is important for the management of the profession's relationships with outside regulators, but perhaps underscores why recent law graduates need not know them all by heart.

If we want lawyers to know what all of the Comments say, there should not be so many, and their role should be clear. And if we mean them to be a research tool or a rich practice resource, to be used throughout a professional career, we should not expect entry-level lawyers to commit them to memory as a requirement of licensure. This paper provides an opportunity to reflect on the wisdom of this choice and how it might be modified in future. In the end, it is critically important for new lawyers to understand their obligations under the Model Rules. A focus in any assessment on that targeted goal better serves the concerns of new lawyers and the needs of the profession.

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format).

95.   Consider, for example, the ABA's recent revision of both the text of and Comments to Model Rule 1.16. MODEL RULES OF PRO. CONDUCT r. 1.16 (AM. BAR ASS'N 2023). The Report submitted to the ABA House of Delegates in support of the proposed revision, known as "Resolution 100," made clear that the changes were driven by concerns about clients using "lawyer's services to facilitate possible money laundering and terrorist financing activities." STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY & STANDING COMMITTEE ON PROFESSIONAL REGULATION, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 2 (2023). More specifically, the concern was that Congress and regulators would impose regulatory oversight requiring lawyers to report information about their clients' financial transactions, information that would otherwise be protected by the attorney-client privilege or the duty of confidentiality. *Id.* at 5. The report notes, "[t]o date, the ABA has successfully advocated against such incursion on the regulatory authority of state supreme courts." *Id.* The modifications of the Rule and its Comments, in that context, appear to be addressing the concerns of the regulators partly in the hope of avoiding statutory or regulatory interference with the practice of law.