
Joel Logsdon Wiegert
University of Nebraska College of Law, joel.wiegert@kutakrock.com

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* Joel Logsdon Wiegert, B.S. 2003, University of Nebraska; J.D. expected May 2006, University of Nebraska College of Law. Special thanks to my wife Maggi, my mother, and my grandparents for all their support and patience, and to all those who offered their time and insight in review of this Note.
I. INTRODUCTION

September 1, 2005 marked a changing of the guard with respect to the regulation of lawyer conduct in the State of Nebraska. Upon the Nebraska Supreme Court's adoption of the *Nebraska Rules of Professional Conduct* ("Nebraska Rules") through its ruling on *In re Petition of the Nebraska State Bar Association to Adopt Rules of Professional Conduct Governing Attorneys*, the state shed its distinct position as one of only six jurisdictions not yet utilizing some form of the ABA Model Rules of Professional Conduct. The new system represents the first complete revision of the professional ethical standards to which Nebraska lawyers are held accountable since the adoption of the *Code of Professional Responsibility*. The methodology of the *Model Rules* adoption differs from state to state, and no two jurisdictions have implemented identical versions of the new rules. Louise L. Hill, *Electronic Communications and the 2002 Revisions to the Model Rules*, 16 St. John's J. Legal Comment 529, 531 (2002).

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1. No. S-36-040001 (Neb. June 8, 2005). The initiative regarding adoption of the *Rules of Professional Conduct* originally came before the court upon petition by the Nebraska State Bar Association on February 17, 2004. The court's formal adoption occurred June 8, 2005, with the effective date for the implementation of the new system being set for September 1, 2005. *Id.*

of Professional Responsibility ("Nebraska Code"), and embodies a few key departures from the former standards in both substance and structure. While it took the Nebraska Supreme Court more than sixteen months of open consideration and analysis to formulate and formally adopt the new rules once the initiative was raised by the Nebraska State Bar Association, their impact upon practicing lawyers within the state will be immediate and substantial with respect to many of the new provisions.

Lawyers familiar with the Nebraska Code will recognize many of the substantive provisions of the former system, which have been carried forward to the Nebraska Rules relatively untouched. There are, however, substantive and structural changes reflected in the new rules which will require the attention of those practicing within this jurisdiction in order to maintain continued compliance with the ethical considerations inherent in the practice of law. What follows is a topical analysis of some of the key substantive changes reflected in the new rules, as well as an introduction to the organizational structure utilized in the new system.

The new rules depart structurally from the former code by abandoning the canon model, under which the rules themselves were accompanied by guiding canons briefly summarizing the overriding principals with regard to a particular ethical responsibility. These canons were further clarified through a series of ethical considerations, which laid out the duties, responsibilities, and liabilities associ-
ated with the principals falling within the coverage of the canon. 7
Finally, the specific rules were set forth, providing the legal framework which was essentially an embodiment of the ideals contained in the cannons and ethical considerations. 8

In contrast, the Nebraska Rules mirror the structure of the ABA Model Rules of Professional Conduct, and more importantly, they utilize a restatement format which will be nearly universally familiar to those in the legal profession. Under this system, the rules are framed within eight different articles, each of which governs a different ethical duty. 9 This format results in a much more user-friendly interface in terms of accessibility and cohesion once an initial familiarity is gained with regard to the location of the rules within the ethical framework. 10 Commentators also cite the advantages which accompany conformity with a nearly universally accepted method of ethical regulation as necessitating adoption of the Model Rules format, both from an educational 11 and substantive context. 12

As will be evidenced in the forthcoming analysis, the structural framework of the new rules represents a divergence from the Nebraska Code not only with respect to the usability and interface of the system in its totality, but with respect to the individual provisions and the extent to which the invocation of one rule will trigger corresponding duties and ethical considerations through the interwoven framework of the new system. This accumulation of duties resulting from the cross referencing of different articles and specific provisions in the

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7. The Ethical Considerations were aspirational in nature, and set forth the ethical ideals to which the lawyer should aspire. Sisk, supra note 6. This aspirational component was abandoned by the drafters of the Model Rules, who instead opted for a statement of the black letter rules philosophy. Nathan M. Crystal, The Incompleteness of the Model Rules and the Development of Professional Standards, 52 MERCER L. REV. 839, 841 (2001).
8. These disciplinary rules constituted the actual black letter regulations of the code, and proscribed minimum standards of conduct with regard to each area of ethical consideration, below which the lawyer would be subject to sanction. Sisk, supra note 6, at 284.
9. Crystal, supra note 7, at 843.
10. The clarity and precision of the Model Rules format was one of the primary considerations in favor of a departure from the former system. Susan Poser, Foreword, Nebraska and the Model Rules of Professional Conduct, 81 NEB. L. REV. 1315, 1316 (2003).
12. Given that the Model Rules are utilized in the vast majority of United States jurisdictions, they enjoy significant advantages in terms of their level of refinement and modern day applicability. As the principle system of regulation, the Model Rules are more evolutionary in nature, and better able to adapt to the changing face of ethical considerations facing the legal system. See Sisk, supra note 6, at 283.
new rules can create a veritable minefield for the unwitting lawyer who is unfamiliar with the new structure, as the violation of one specific duty may give rise to a number of satellite violations. Thus, the structural divergence of the new rules from the Nebraska Code is of paramount importance, as the comparatively intricate framework will have an impact on the manner in which the ethical considerations contained therein are interpreted and applied.

Another central theme that arises throughout the new rules is a tendency towards a protective mentality with regard to the rights and interests of the client. This is frequently accomplished via semantic departures from the former canon system which used prohibitions on forbidden lawyer conduct to affirmative duties owed to the client with regard to the specific ethical obligation in question. As will be subsequently illustrated, the effects of such a shift can be quite onerous upon the lawyer, and may dramatically alter the light in which the lawyer's conduct is viewed in disciplinary matters. In many of the new provisions, this phenomenon may also be characterized as an attempt to allocate the burden of protecting the legal interests which may be at stake should a particular course of conduct be pursued, or of ensuring compliance with the ethical consideration which has been invoked in a particular situation, upon the party best situated to navigate the complexities of the situation. Under either scenario, the new provisions tend to be skewed in a manner which at times explicitly, and at other times subtly, places the duty of protecting the rights, in-

13. An illustration of this phenomenon, which will be a recurring theme throughout this analysis, can be provided through a brief examination of the provisions relating to communication, informed consent, and current client conflicts of interest. Under Rule 1.4(a)(1), a lawyer shall promptly inform the client of any circumstances with respect to which the client's informed consent (as per Rule 1.0(e)) is required. See Neb. Rules of Prof'l Conduct R. 1.0(e), 1.4(a)(1) (2005). Assuming a situation in which the lawyer is in violation of a seemingly unrelated provision, such as an infraction involving the acceptance of compensation for the representation from one other than the client without first acquiring the client's informed consent as required by Rule 1.8(f)(1), the lawyer will likewise find himself or herself in violation of the Rule 1.4 communication requirement, due to the fact that Rule 1.4(a)(1) renders the rule applicable to all other provisions within the Model Rules in which the informed consent requirement is triggered. See id. at R. 1.4, 1.8(f)(1). Perhaps an even more direct example is Rule 8.4, which makes a violation elsewhere in the rules a separate and distinct violation of this misconduct rule; thus, this rule is automatically triggered in addition to all other applicable violations of the Nebraska Rules. See id. at R. 8.4.

terests, and objectives of the client squarely upon the shoulders of the lawyer.\textsuperscript{15}

\section*{II. \textsc{Nebraska Rules of Professional Conduct}}

\subsection*{A. Preamble}

The concept of a gradual digression from broad based ethical considerations and principals to the specific rules designed to govern the ethical responsibilities of the legal profession has not been abandoned altogether. The \textit{Nebraska Rules} contain a preamble which sets forth "A Lawyer's Responsibilities."\textsuperscript{16} The broad principles set forth in the Preamble carry forward many of the same concepts as the canons and ethical considerations, and similarly provide a type of framework for the system by identifying the ideals sought to be protected and enforced by the rules themselves.\textsuperscript{17}

\subsection*{B. Scope}

Following the Preamble, the Scope section briefly outlines some of the key principles with respect to the interpretation and application of the new rules. This should be the first step of inquiry for the lawyer faced with uncertainty regarding how she should resolve a particular ethical dilemma under the new rules, or for guidance as to the intended purpose of the new provisions. Although the Scope section is primarily restricted to broad based principles of construction and interpretation, it does specifically address the intended relationship between the rules and any potential liability to the client which may arise through the violation of a specific provision. While such a violation does not create an independent cause of action, it may be used as evidence in a malpractice case to establish the breach of an applicable standard of conduct.\textsuperscript{18}

\subsection*{C. Terminology}

Located immediately before the actual substantive rules is a terminology section, which sets forth key definitions and interpretations

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\textsuperscript{15} Commentary suggests that the \textit{Model Rules} seek to place professionals as guardians of the integrity of the legal profession, and preserve its image in the public eye—a goal which could not be accomplished absent the client-based concerns outlined herein. See Julie L. Hussey, \textit{Reporting Another Attorney for Violating the Rules of Professional Conduct: The Current Status of the Law in the States Which Have Adopted the Model Rules of Professional Conduct}, 23 \textsc{J. Legal Prof.} 265, 265 (1999).

\textsuperscript{16} \textsc{Neb. Rules of Prof'L Conduct} Preamble: A Lawyer's Responsibilities (2005).

\textsuperscript{17} Absent this brief introductory section, the new rules provide little in the way of aspirational guidance. See Sisk, supra note 6, at 284.

\textsuperscript{18} \textsc{Neb. Rules of Prof'L Conduct} Scope § 20 (2005).
\end{flushleft}
necessary for proper application and understanding of subsequent rules.¹⁹ This form represents a significant change from the *Nebraska Code*, which did not contain a dedicated definitional section. The terminology section does not serve as an all-encompassing glossary of all the standards and methodology set forth within the rules. Rather, it provides an efficient means of defining some of the key concepts which emerge frequently within the body of rules.²⁰ For example, the specific elements constituting informed consent²¹ and screening,²² both of which arise with respect to numerous provisions in the new rules, may be ascertained within the terminology section, with the definitions of those terms being uniformly applied throughout the rules. Providing a fixed, universal definition of a concept which is embodied within a number of different ethical rules gives the new rules some degree of standardization which may prove to eliminate many of the ambiguities regarding how the rules are to be interpreted and applied. This approach represents a significant divergence from the *Nebraska Code*, as is necessitated by the form of the new rules, which utilize a much more systematic black-letter approach to working through the intricacies of legal ethics. This stands in stark contrast to the broad-sweeping methodology of the *Nebraska Code*, which often required resolution of very narrow ethical considerations by application of a few generalized guiding principals.²³

D. Article 1—Client-Lawyer Relationship

1. Competence

The first black-letter rule within the *Nebraska Rules*, Rule 1.1, sets forth a general duty of competence in the representation of the client. The concept of competent representation is further defined as requiring "the legal knowledge, skill, thoroughness, preparation and judgment reasonably necessary for the representation."²⁴ The idea of a duty of competence was similarly present in the *Nebraska Code*, though with a few variations. The former version, located at Disciplinary Rule 6-101, was phrased as a prohibition against acting in violation of the duty of competence (the lawyer shall not), as opposed to the

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¹⁹. *Id.* at R. 1.0.

²⁰. Despite the limits of the terminology section, any vagueness or interpretive dilemmas stemming from uncertainty regarding standards or definitions under the *Model Rules* is not likely to go unresolved, as the ABA's Committee on Ethics and Professional Responsibility regularly issues opinions offering guidance on the meaning and application of the rules. Sisk, supra note 6, at 289.

²¹. NEB. RULES OF PROF'L CONDUCT R. 1.0(e) (2005).

²². *Id.* at R. 1.0(k).

²³. See Poser, supra note 10, at 1316.

Model Rules phrasing in terms of an affirmative duty (the lawyer shall). 25

With regard to the elements of competence in the representation of the client, the Nebraska Code seemed to maintain a slightly narrower focus as compared to the Nebraska Rules. The disciplinary rule explicitly required only that the lawyer not handle a legal matter she knows she is not competent to handle, not handle a legal matter without adequate preparation, and not neglect a legal matter entrusted to her. It would seem that the competence requirement in the Nebraska Rules, which is further defined to include the full litany of characteristics necessary for competent legal representation, encompasses more than just the adequate legal knowledge, preparation, and diligence explicitly required by the Nebraska Code. 26 Rule 1.1 takes a more expansive view of what competent representation requires. By including the term “judgment” in the list of requirements for competent representation, there is some indication that possessing the requisite legal skills and devoting the necessary time and attention to the matter may not suffice if, for example, the lawyer made decisions during the course of the representation which may later be perceived as imprudent under the circumstances.

Although the new standards with regard to competence in the representation of a client will not require any drastic modifications to the lawyer’s behavior in order to maintain compliance, the phrasing and structure of the provision invites further inquiry into its significance from the vantage point of both lawyer and client. By stating the competence requirement as an affirmative duty owed to the client, as opposed to a prohibition against activities contrary to the competence requirement, the new rules seem to be adopting a more client-oriented approach. The affirmative duty phrasing commonly utilized in the ABA Model Rules, and as incorporated in the new Nebraska Rules, places a more onerous duty upon the lawyer, at least from a theoretical standpoint. 27 As a practical matter, a duty of competence will not

26. The comments to Rule 1.1 do offer some degree of explanatory insight, at least with regard to the knowledge and skill elements, stating that the relevant factors to be considered include:

[T]he relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

27. While certainly significantly more demanding as compared to the former system, Nebraska’s version of the Model Rules does not advance the lawyer’s level of responsibility, to either clients or third parties, to the extremes it has been carried in some states. Compare, for example, New Jersey’s version of the confidentiality exceptions, N.J. Rules of Prof’l Conduct R. 1.6(b) (2004), which requires a law-
differ significantly from a duty not to act in violation of a competence requirement, but in examining the difference as a shift in the theoretical underpinnings of the rules as a whole, the implications could have a greater impact. Analyzing the inquiry in a different context, the duty to save another individual is a far more demanding standard than a duty not to harm, and while the subsequent definitional clarification of the ethical considerations provided for in the Nebraska Rules will prevent such a disparity with regard to the ethical obligations of a lawyer, having an affirmative duty structure as a starting point may prove significant with regard to the courts' interpretation and application of the new rules in disciplinary actions.

2. Scope of the Representation

Rule 1.2 of the Nebraska Rules deals with the "Scope of Representation and Allocation of Authority Between [the] Client and [the] Lawyer." The primary requirements of this rule are that the lawyer abide by the client's decisions concerning the objectives of the representation, and that the lawyer not counsel the client to engage in, or assist a client in, conduct that the lawyer knows is criminal or fraudulent. The rule also grants the lawyer the ability to limit the scope of her representation, as long as the client first gives informed consent to the restriction.

The Nebraska Code, through a variety of different provisions, accomplished fairly similar regulatory coverage. Disciplinary Rule 7-101(A)(1) of the Nebraska Code required that the lawyer not intentionally fail to seek the lawful objectives of her client through reasonably available means permitted by law and the Disciplinary Rules, which is similar to the concept behind the new Rule 1.2(a) that the client should set forth the objectives of the representation, to which the lawyer must subsequently adhere. Disciplinary Rule 7-102(A)(6)–(8) mirrors Model Rule 1.2(c) in its prohibitions against aiding the client in the pursuit of a course of conduct the lawyer knows to be illegal.

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28. This change is largely a result of the frequent use of discretion-based standards throughout the new rules. The use of such standards as "may," as opposed to "shall," reflects the fact that not all of the rules are designed with a direct disciplinary purpose in mind. Instead, some rules seek to fix the applicable level of discretion for the subject ethical consideration. See Crystal, supra note 7, at 842.
30. Id. at R. 1.2(a), (b).
31. Id. at R. 1.2(d).
33. Id. at DR 7-102(A)(6)–(8). In addition, the Disciplinary Rules allow for permissive withdrawal from representation in such instances. See id. at DR 2-110(C)(1)(c).
One difference which lawyers should take note of is the requirement in the Nebraska Rules involving informed consent by the client prior to attempting to limit the scope of the representation. This requirement, which is required in the new rules as a necessary precursor to numerous courses of action a lawyer may take with regard to the representation, further evidences an intent in the new rules to afford greater protection to the client and the pursuit of the client’s objectives. From a client’s perspective, such disclosure requirements are welcome safeguards, especially to those clients who have become immersed in a legal relationship and new environment with which they are unfamiliar, and under which their uninformed acquiescence in their lawyer’s attempt to limit the scope of representation could have significant consequences with respect to their objectives in seeking legal counsel. For lawyers, these requirements represent procedural hurdles which must be identified and complied with prior to engaging in a variety of courses of action which they may have previously pursued without formal documentation or disclosure, in order to avoid the potential for future disciplinary sanctions.

3. Diligence

The requirement of diligence in the course of representation is set forth in Nebraska Rule 1.3, which mandates the use of reasonable diligence and promptness in representing a client. This requirement was similarly embodied in the former Nebraska Code by way of a combination of Disciplinary Rules 6-101(A)(3) and 7-101(A)(1).

Disciplinary Rule 6-101(A)(3) stated that a lawyer shall not neglect a legal matter entrusted to him or her, and the clause in Disciplinary Rule 7-101(A)(1) which required punctuality in fulfilling all professional commitments, effectively encompassed the full gamut of the diligence requirements set forth in Nebraska Rule 1.3.

34. Informed consent requires the client’s acquiescence in the proposed course of action after the lawyer has provided the client with adequate information regarding the material risks of such conduct, and the reasonably available alternatives. See Neb. Rules of Prof’l Conduct R. 1.0(e) (2005).

35. The comments to Rule 1.0 further outline the duties imposed upon the lawyer through the mandate of informed consent. The level of communication required will vary depending on the relevant circumstances and the ethical duty in question, but will ordinarily mandate communication to the client of the circumstances giving rise to the informed consent requirement, and such explanation as is necessary to permit the client to make an informed decision regarding the consent. Id. at R. 1.0 cmt. 6.

36. Id. at R. 1.3.


38. Id. at DR 7-101(A)(1) (requiring punctuality in the fulfillment of all professional commitments).
4. Communication

The new provisions governing communication, which are located at Rule 1.4, represent one of the first major expansions of the ethical regulations contained in the *Nebraska Code*.\(^{39}\) Rule 1.4 contains six different regulations imposing duties on the lawyer concerning client communications: to inform the client of any decisions or circumstances which would require their informed consent; to consult with the client about the means by which the client's objectives are to be accomplished; to keep the client reasonably informed regarding the status of the matter; to promptly comply with reasonable requests for information; to consult with the client regarding any limitations on the lawyer's conduct necessitated by the *Nebraska Rules of Professional Conduct* or other law; and to explain matters to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.\(^{40}\)

In contrast to the broad coverage the *Nebraska Rules* allot to the area of communication, the *Nebraska Code* was surprisingly abrupt on the issue. There was little black letter regulatory support for the issue of communication, which was primarily dealt with under the Disciplinary Rule 6-101(A)(3) admonishment that a lawyer shall not neglect a legal matter entrusted to him or her.\(^{41}\)

The majority of those provisions found in Nebraska Rule 1.4 would seem to fit within the prohibitions against neglecting a legal matter as found in Disciplinary Rule 6-101(A)(3) through a broad interpretation of what constitutes neglect, yet there are some differences which result primarily from the structure of the new rules and the corresponding interplay between various provisions in the new system. The communication requirements set forth herein are rendered applicable to each and every situation throughout the rules which is accompanied by an informed consent requirement. The ramifications of this are a potential triggering of satellite violations when there is a shortcoming with respect to a single ethical duty; if the lawyer is in violation of a particular rule based on a failure to meet an informed consent requirement, the lawyer will almost certainly be in violation of Rule 1.4(a)(1) as well, for failure to communicate to the client a situation requiring the client's informed consent.\(^{42}\)

\(^{39}\) *NEB. RULES OF PROF'L CONDUCT* R. 1.4 (2005).

\(^{40}\) *Id.* at R. 1.4(a), (b). Rule 1.4(a)(1) is of potential relevance with respect to all other provisions within the *Nebraska Rules* in which there is an informed consent requirement. *See supra* note 13.


\(^{42}\) *See supra* note 13.
5. Fees

The ethical considerations regarding legal fees are set forth in Nebraska Rule 1.5.43 The primary focus from Nebraska Code Disciplinary Rule 2-106(A) and (B), that a lawyer shall not charge a fee which is clearly excessive based on a number of criteria relevant to the nature and scope of the representation, is carried forward to the new rules relatively untouched.44 There are, however, some important differences relating to fee disclosure which were not covered in the former disciplinary rules.

Rule 1.5(b) requires the lawyer to disclose to the client the basis or rate of the fee and expenses for which the client will be responsible, preferably in writing, before or within a reasonable time after commencing the representation.45 There is an exception to this requirement in situations involving a regularly represented client, though any changes to the regular representation costs must be communicated to the client as per the previously mentioned requirement.46 By not mandating that the disclosure be in writing and prior to the representation, the new rule stops short of dramatically altering the manner in which lawyers are required to handle their fee arrangements with new or prospective clients, and avoids the difficult situations which may have emerged if clients were required to parse though dense fee disclosures before securing representation in what may be a very traumatic and time-sensitive situation.47

The disclosure requirements in the Nebraska Rules are more stringent with regard to contingent fee arrangements.48 Rule 1.5(c) re-

44. NEB. CODE OF PROF'L RESPONSIBILITY DR 2-106(A), (B) (2000). The explicit requirement of the new rule, in comparison, is that a lawyer may not charge a fee that is larger than reasonable. Ankur Parekh & Jay R. Pelkofer, Note, Lawyers, Ethics, and Fees: Getting Paid Under Model Rule 1.5, 16 GEO. J. LEGAL ETHICS 767, 769 (2003).
45. NEB. RULES OF PROF'L CONDUCT R. 1.5(b) (2005). The primary motivation in requiring the lawyer to be upfront and forthright with regard to fee arrangements is to avoid the fee-related disputes which result from misunderstandings relating to the basis, nature, and extent of the fees charged for legal services. See Parekh & Pelkofer, supra note 44, at 771.
46. NEB. RULES OF PROF'L CONDUCT R. 1.5(b) (2005).
47. Until recently, Model Rule 1.5(b) required the basis and rate of a lawyer's fee to be communicated to the client in writing before the lawyer rendered substantial services in the matter; it was not until the 2002 amendments to the Model Rules that a shift was seen to the more forgiving embodiment adopted in Nebraska, which permits such communication to occur within a reasonable time after the representation has commenced. MODEL RULES OF PROF'L CONDUCT R. 1.5(b) (2002).
48. The higher level of scrutiny the Nebraska Rules of Professional Conduct place upon contingent fee arrangements mirrors the presumption long reflected in the Model Rules, that contingent fees are more susceptible to abusive practices than are other fee arrangements. See Parekh & Pelkofer, supra note 44, at 773–74.
quires that such arrangements be in writing signed by the client and clearly state the method by which the fee shall be calculated. \(^49\) Furthermore, there is a post-representation reconciliation process which must be provided for the client, consisting of a written statement showing whether a fee is owed as a result of the contingent representation, and the calculation method utilized in arriving at the total remittance amount. \(^50\) Although the *Nebraska Code* did include whether or not the fee was a contingent arrangement in the list of criteria it utilized to determine whether a fee was reasonable, it did not contain an explicit black letter rule setting forth the comparatively rigid procedural requirements of Rule 1.5(d). \(^51\)

In many ways, the manner in which the *Nebraska Rules* provide for a uniform procedural system of regulation with regard to both contingent and non-contingent fee arrangements will represent a welcome change from the broad-based reasonableness test set forth in the *Nebraska Code*. Disputes regarding fee arrangements are a prevalent source of contention between lawyers and their clients, \(^52\) and the lack of definitive regulatory standards to define what constituted appropriate conduct with regard to these arrangements most likely played a significant role in perpetuating the problem. The new provisions should help clarify the state's expectations with respect to the documentation and communication of billing practices. This is not to say, however, that disputes will no longer boil down to interpretation of the slippery reasonableness standard; the requirement that the fee be reasonable given the circumstances of the representation remains the core tenant of the new *Nebraska Rules* regarding legal fees. \(^53\) The expansion of the provisions in this area merely establish foundational procedural requirements, which should aid in the avoidance of some conflicts involving fee arrangements which may have been reasonable under the circumstances, but did not correlate with the client's understanding of what she was being held financially accountable for.

\(^{49}\) *Neb. Rules of Prof'L Conduct* R. 1.5(c) (2005).

\(^{50}\) *Id.* Commentary suggests that the prudent lawyer will require the client to sign off on the post-representation reconciliation prior to disbursing any checks from the proceeds of the claim, though this is not explicitly provided for in the rules. Parekh & Pelkofer, *supra* note 44, at 774.

\(^{51}\) Some states have further developed the reasonableness requirement with regard to contingent fee arrangements to incorporate a system of presumptions. Michigan, for example, has a provision which sets a maximum allowable fee of one-third of the amount recovered in personal injury or wrongful death claims; in the event a lawyer receives a contingent fee in excess of this limit, they are deemed to have violated the rule's prohibition against charging a fee which is clearly excessive. *Mich. Rules of Prof'L Conduct* R. 8.121 (2002).


While facially beneficial to the client, these new provisions are probably better viewed in light of an objective to avoid misunderstandings and disputes with regard to legal fees, as opposed to protectionist measures in favor of the client. Although the disclosure and documentation requirements in particular could reduce some billing malfeasance, or at least allow the client to gain prompt knowledge and documented evidence of such, the motivation for the expansion in this area is likely aimed at reducing fee-related disputes to the benefit of both parties. By requiring full disclosure of the basis for the fee at the commencement of the representation, and full documentation of the fee calculation at the conclusion of the matter, at least some of the potential sources of contention giving rise to fee-based disputes will be removed from the transaction.

6. Confidentiality

Nebraska Rule 1.6 embodies some changes to the ethical rules governing confidentiality which will substantially impact Nebraska lawyers. The expansion of the communications protected by the confidentiality rules represents one of the more significant revisions from the corresponding provisions of the Nebraska Code. The changes are not, however, all addressed at expanding confidentiality protections. Although the rules stopped short of creating new mandatory disclosure situations, there are provisions granting Nebraska lawyers greater latitude with regard to permissive disclosure in particular situations.

The most striking difference with respect to confidentiality between the old Nebraska Code and the new Nebraska Rules is in the definitional standard of the confidential communication itself. Disciplinary Rule 4-101(A) of the Nebraska Code utilized the term “confidence” as referring to information protected by the lawyer-client privilege under applicable law, as well as the term “secret,” as refer-
ring to information gained in the professional relationship which the client has asked, or reasonably would expect, not to be disclosed.58 In contrast, the new rules concerning confidential communications operate under a much broader view of what constitutes communication. Nebraska Rule 1.6(a) sets forth the standard of protected communication as being all information relating to the representation of the client.59 The ramifications of this alteration are quite significant, as the concept of confidential communications has been expanded far beyond that of the lawyer–client privilege, or "secrets" of which disclosure to outside parties would be against the client's interest. A great deal of client communication which would fall outside that privilege or the additional "secret" information standard, of which the lawyer formerly had some discretion to divulge irrespective of the client's consent, will be ensnared by the broad new "relating to the representation of a client" standard.

The revisions to the confidentiality rules are not restricted to the definitional expansion of what constitutes protected communication. The provisions governing when a lawyer may or may not reveal these confidential communications have also been modified. Disciplinary Rule 4-101(B) stated that a lawyer may not knowingly reveal a confidence or secret of the client, use such confidence or secrets to the client's disadvantage, or use the same to her own advantage unless full disclosure is provided.60 Nebraska Rule 1.6(a) is much more abrupt, mandating that the lawyer abstain from revealing information relating to the representation unless the client provides informed consent, or is impliedly authorized to do so in order to carry out the representation.61 Each regulatory system then sets forth a corresponding set of circumstances in which disclosure of the confidential communication is permissible. Disciplinary Rule 4-101(C) of the Nebraska Code permitted a lawyer to reveal that communication which the client had consented to after full disclosure (therefore creating a scenario similar to that of informed consent prior to disclosure as set forth in the Nebraska Rules).62 In addition, the lawyer was able to reveal confidential communication when such revelation was permitted under the Nebraska Code or required by law or court order, when the communication regarded the intention of the client to commit a crime and such information as may be necessary to prevent said crime, and such communication as may be necessary to establish the lawyer's defense against an accusation of wrongful conduct.63

63. Id. at DR 4-101(C).
There are two significant areas where the new rules regarding revelations of confidential communications diverge from the code. The crime prevention exception in the *Nebraska Rules* permits the lawyer to disclose confidential information as necessary to prevent the client from committing a crime, and as necessary to prevent reasonably certain death or substantial bodily harm at the hands of either client or third party alike.64 The addition of the reasonably certain death or substantial bodily harm requirement gives the lawyer some latitude to reveal information in situations where doing so would previously have been prohibited, where the acts in question would not rise to the level of a crime. The second addition to the confidentiality exceptions is permissive disclosure in situations where the lawyer is securing legal advice regarding compliance with the ethical rules.65 It should be noted that the *Nebraska Rules* stopped short of the approach adopted by some jurisdictions, which mandates disclosure in situations involving communication relating to the perpetration of a crime, or as necessary to prevent substantial death or bodily harm.66 In addition, Nebraska declined to adopt the so called “Enron” exceptions67 of the *ABA Model Rules of Professional Conduct*, which permit disclosure in order to prevent substantial financial harm to a third party in situations where the lawyer’s services have been utilized.68 In refusing to acquiesce in the trend towards mandatory disclosure in certain circumstances, the *Nebraska Rules* avoid possible negative ramifications resulting from a degradation of the concept of the confidentiality of client communications.69 It would seem that by allowing this long standing duty to be carved out with numerous protective devices for

65. Id. at R. 1.6(b)(2).
66. *See supra* note 27.
67. The theory underlying these exceptions was that the consequences of the Enron debacle could have been mitigated had the lawyers involved been capable of disclosing information relating to the fraudulence while it was still in progress. Kristy Brewer, Note, *Tax Shelter Information and How the Confidentiality Rule Protects Clients: The Relevance of Recent Changes to ABA Model Rule of Professional Conduct 1.6, 13 U. Miami Bus. L. Rev. 31, 37 (2004).*
68. *Model Rules of Prof’l Conduct* R. 1.6(b)(2), (3) (2003). These additions, which were added to the *ABA Model Rules* as part of the 2003 Amendments, were recognized as a potential source of controversy prior to Nebraska’s adoption of the *Model Rules*. *See Poser, supra* note 10, at 1316. While Nebraska is not alone in their refusal to explicitly place the protection of financial interests paramount to the concept of confidential communication, some states have gone even further in the other direction; the New Jersey rule, for example, carries forward the same mandatory disclosure requirement to include communication necessary to protect the financial interests of another. *N.J. Rules of Prof’l Conduct* R. 1.6(b)(1) (2004).
69. Commentators suggest that strong confidentiality protection is necessary to maintain trust between the client and the lawyer; conversely, those in favor of breaking down the walls of confidentiality protection feel that doing so will foster an improved image of the legal profession in the public eye. Amanda Vance &
the benefit of third parties, the client–lawyer relationship, especially with regard to criminal representation, would be detrimentally affected.\textsuperscript{70}

These new provisions governing confidential communications strike some semblance of a balance between the interest of both client and lawyer. The new "relating to the representation standard" affords a client considerably more protection regarding her rights to confidentiality. While this is a formidable right which has significantly increased the safeguards in place to secure confidentiality for the client with regard to the representation, these concessions are mitigated to some degree by the expansion of the confidentiality exceptions for permissive disclosure.\textsuperscript{71}

7. Conflicts of Interest

Concurrent conflicts of interest are dealt with in \textit{Nebraska Rules} 1.7 and 1.8, which set forth the duties owed and proper courses of action in situations where conflicts exist. The handling of current client conflicts is fairly similar across both the previous and the new regulatory systems. Disciplinary Rule 5-101(A) of the \textit{Nebraska Code} required withdrawal when the interests of the lawyer would impair her professional judgment, and in situations involving conflicting interests resulting from the representation of adverse interests.\textsuperscript{72} The former rules permitted the representation of potentially adverse or impaired interests upon consent after full disclosure by the clients, or upon consent by all clients after full disclosure of the risks of multiple representation in situations involving potentially adverse interests.\textsuperscript{73} Rule 1.7 of the \textit{Nebraska Rules} permits the representation of a client

70. One of the primary justifications offered in support of maintaining the concept of confidential communication, that its preservation promotes efficiency in the legal system, would logically permit an exception to the confidence only as would be necessitated in order to restore or promote effective operation of the system of justice. \textit{See Martyn & Fox, supra} note 52, at 152. Nebraska's decision to stop short of incorporating the full litany of confidentiality exceptions contained in the \textit{Model Rules} would indicate that, at least for the time being, Nebraska views the consequences of a degradation of the confidential communication protection as outweighing the potential benefits of allowing a lawyer to disclose information as necessary to prevent harm to the financial interests of another.

71. Given that the primary purpose of the new exceptions is to bolster the rights of third parties who may be harmed as a result of the client's malfeasance, the conceptualization of the lawyer's duty to the client may be subject to an important caveat; such duty does not trump the rights of innocent parties to the matter. Shannan E. Higgins, \textit{Ethical Rules of Lawyering: An Analysis of Role-based Reasoning from Zealous Advocacy to Purposivism}, 12 \textit{Geo. J. Legal Ethics} 639, 661 (1999).


73. \textit{Id.} at DR 5-105(C).
despite the existence of a concurrent conflict of interest upon receiving informed consent, confirmed in writing.\textsuperscript{74} This confirmed-in-writing requirement, which is imposed within a number of provisions in the \textit{Nebraska Rules}, adds an additional procedural hoop to the traditional consent and disclosure requirements by requiring formal documentation of the full dissemination of the risks of accepting representation under such circumstances.\textsuperscript{75} The rules governing the lawyer's participation in business transactions with clients contain similarly slight differences. Disciplinary Rule 5-104(A) of the \textit{Nebraska Code} permitted such transactions only after consent and disclosure,\textsuperscript{76} while the new \textit{Nebraska Rules} again go a step further, requiring that the lawyer advise the client in writing of the desirability of retaining independent counsel to represent the client in the transaction, and acquire informed consent in a writing signed by the client as to the essential terms of the transaction.\textsuperscript{77}

Rule 1.8 outlines specific personal interest conflicts, the majority of which are in keeping with the guidelines found in the \textit{Nebraska Code}.\textsuperscript{78} New to the \textit{Nebraska Rules} is Rule 1.8(j), which forbids a lawyer from having sexual relations with a client unless such a relationship existed before the client–lawyer relationship commenced.\textsuperscript{79} The final provision of the rule serves to impute all of the Rule 1.8 conflicts, with the exception of the new sexual relations provision, to all other lawyers in the firm.\textsuperscript{80}

The rules governing conflicts of interest with respect to former clients are located in Nebraska Rule 1.9.\textsuperscript{81} As was the case with concurrent conflict situations there is a significant difference between the previous rules governing former client conflicts and the present provisions with regard to the method of disclosure necessary prior to continuance of the representation when such a conflict exists. Under Disciplinary Rule 5-108 of the \textit{Nebraska Code}, a lawyer could not represent a client in the same or substantially related matter in which the current client's interests were materially adverse to those of a former client, nor could a lawyer represent a client in a substantially related matter in which the lawyer's former firm represented the for-

\textsuperscript{74} \textit{NEB. RULES OF PROF'L CONDUCT} R. 1.7 (2005).
\textsuperscript{75} \textit{Id.} at R. 1.0(b). By coupling the informed consent and confirmed in writing requirements, the rules bestow the highest possible burden upon the lawyer attempting to justify the representation in a situation where a conflict was present; only a fully documented account reflecting full disclosure will satisfy this standard.
\textsuperscript{76} \textit{NEB. CODE OF PROF'L RESPONSIBILITY} DR 5-104(A) (2000).
\textsuperscript{77} \textit{NEB. RULES OF PROF'L CONDUCT} R. 1.8(a) (2005).
\textsuperscript{78} \textit{Id.} at R. 1.8.
\textsuperscript{79} \textit{Id.} at R. 1.8(j).
\textsuperscript{80} \textit{Id.} at R. 1.8(k).
\textsuperscript{81} \textit{Id.} at R. 1.9.
mer client, unless the former client consented after consultation. This pre-representation consent on the part of the former client is strengthened to some degree with the addition of the dual requirement of informed consent and confirmation in writing by the Nebraska Rules. If, however, the lawyer did not acquire confidential information regarding the client while employed with the first firm, Rule 1.9(b) would permit representation of a client with interests adverse to those of the first client by the lawyer while employed with the second firm; this is a scenario which would not have been permissible under the Nebraska Code unless the consent of the prior client could was secured. Under the former system, there was an irrebuttable presumption that the lawyer had acquired confidential information while employed with the first firm; this is an unusual position which served as the basis of a bright-line rule which constituted a "thorn in the side of Nebraska attorneys and law firms" prior to the shift to the Model Rules. The bright-line conflict policy was originally adopted in First Tier Bank v. Buckley, and though its effects had been mitigated to some degree with regard to support personnel, it was frequently cited as one of the more powerful arguments in favor of Nebraska's shift to the Model Rules.

In addition to the explicit overruling of the bright-line conflict rule of the previous system, the Nebraska Rules also adopt a more lenient approach to the imputation of conflicts with regard to support personnel, allowing representation in situations where the entire firm would have been conflicted out under the Nebraska Code. According to Nebraska Rule 1.9, support personal may be screened from the matter to avoid what would otherwise constitute a conflict of interest resulting from the representation of a client by that support personnel's former firm. This screening provision was not explicitly set forth in the former Nebraska Code, which permitted the support personnel's new firm to continue with the representation only if confidential information received by the personnel while associated with the former firm was not likely to be significant in the current matter. The addition of this screening provision should make it significantly easier for law

84. Id. at R. 1.9(b).
86. Buescher, supra note 3, at 718.
89. Buescher, supra note 3, at 731–33.
clerks, as well as lawyers who had previously been employed in a clerking position while in school, to move freely between firms without risk of having that new firm conflicted out of a potential or existing representation.

The combination of this screening provision for support personnel and, more importantly, the alleviation of the bright-line conflict rule with regard to subsequent representation of a client whose interests are adverse to those of a client represented by the lawyer's previous firm, represents one of the few junctures within the new rules in which the interests of the lawyer have been favored over those of the client. These rules will greatly facilitate the ability of lawyers, law clerks, or other support staff members to move freely from firm to firm in pursuit of new career opportunities by reducing the risk of themselves and their firms being conflicted out of a potential representation. These concessions are clearly in conflict with interests of the client, as they favor the ability of the lawyer and support personnel to move freely in search of new employment opportunities at the expense of the client's interests with regard to conflict situations, representing a break from the tendencies toward provisions offering increased protection for client interests which permeate the new rules. At least with regard to the ability of a lawyer to move freely in pursuit of her career objectives, the Nebraska Supreme Court has indicated, through the adoption of the rule in the present incarnation, that the interests, rights, and well-being of the client will not be held paramount to those of the lawyer across the full spectrum of ethical considerations and duties regulated under the Nebraska Rules.

8. Organizational Representation

The Nebraska Rules provide a detailed framework of regulation regarding organizational representation which was not directly set forth in the former Nebraska Code. The guiding principle of these provisions is set forth in Rule 1.13(a), which states that a lawyer employed or retained by the organization represents the entity itself. The rules then proceed to state the means through which a lawyer representing an organization must report indiscretions of corporate personnel relating to the representation which may reasonably be imputed upon or result in harm to the organization. The rule sets forth an up-the-ladder reporting requirement under which the lawyer must pro-

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92. The interest of the client in this situation would aptly be characterized as "the former client's interest in assuring that protected information not be used to its disadvantage," while the conflicting interests of the lawyer would be the "departing lawyer's interest in job mobility." See Kalish, supra note 11, at 1354.

ceed to the organization's highest authority as is reasonably necessary to protect the interests of the organization.\textsuperscript{94}

9. Clients with Diminished Capacity

The next area of the \textit{Nebraska Rules} relating to client communications which diverges from the provisions found in the \textit{Nebraska Code} is Rule 1.14, which identifies the ethical considerations involved in representing a client with diminished capacity.\textsuperscript{95} The rule requires that the lawyer first attempt to maintain a normal client–lawyer relationship, though it permits the lawyer to take protective action for the client, including consultation with individuals or entities capable of protecting such client, or seeking appointment of an appropriate guardian.\textsuperscript{96} In addition, Rule 1.14(c) impliedly authorizes the lawyer, via Rule 1.6(a), to reveal confidential information regarding the representation of the client while in the course of taking protective action, to the extent reasonably necessary to protect the client's interests.\textsuperscript{97}

10. Duties to Prospective Clients

The final rule within Article 1 of the \textit{Nebraska Rules} sets forth the duties to prospective clients.\textsuperscript{98} In addition to prohibiting the lawyer from revealing information learned during the consultation, it states that a lawyer may not represent a client with interests materially adverse to those of a prospective client in the same or substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter.\textsuperscript{99} In the event of such disqualification, the conflict is imputed to

\textsuperscript{94} Id. at R. 1.13(b).
\textsuperscript{95} Id. at R. 1.14. Determining what exactly constitutes diminished capacity is a significant problem which may not be resolved with reference to the terminology section, or, as of yet, definitive case law. See Gallagher & Kearney, \textit{supra} note 14, at 611.
\textsuperscript{96} Despite this alleviation of the traditional client–lawyer relationship conception, the primary consideration in taking any such action is still rooted in a determination of the client's best interest. See Gallagher & Kearney, \textit{supra} note 14, at 602.
\textsuperscript{97} This represents another situation in which inter-dependant structure of the new system plays a significant role in the substantive duties reflected in the new rules, though in this case it operates to broaden the lawyer's discretion under the rules, not to impose satellite liability. Permissive disclosure in order to protect the interests of clients with diminished capacity is not listed amongst the confidentiality exceptions of Rule 1.6; here, as is the case in many junctures throughout the new system, the full breadth of the ethical consideration in question can be ascertained only after an examination of the corresponding duties elsewhere in the code which may expand or contract the lawyer's responsibilities in a given situation.
\textsuperscript{98} \textit{Neb. Rules of Prof'L Conduct} R. 1.18 (2005).
\textsuperscript{99} Id. at R. 1.18(c).
all other lawyers in the firm.\textsuperscript{100} This is mitigated to some degree by Rule 1.18(d), which permits representation by the firm when the disqualified lawyer is properly screened, or when informed consent in writing has been obtained from all parties.\textsuperscript{101}

E. Article 2—Counselor

The second article of the \textit{Nebraska Rules} relates to the lawyer's responsibilities while acting in the role of counselor. The new rules offer guidance with respect to two new circumstances not explicitly provided for in the \textit{Nebraska Code}, which are set forth in Rules 2.2 and 2.3.

1. Evaluation for Use by Third Parties

Rule 2.2 governs evaluations by the lawyer for use by third parties.\textsuperscript{102} The lawyer may provide evaluations of matters affecting the client for use by someone other than the client if the lawyer reasonably believes doing so is compatible with other aspects of the representation. When, however, such evaluation is likely to affect the client's interests in a material and adverse matter, the lawyer must obtain the client's informed consent prior to disseminating such information. This provision will require particular attention with regard to a variety of business relationships, where the lawyer may be asked to render opinions to third parties relating to their clients financial or legal condition.

2. Third-Party Neutrals

Rule 2.3 relates to situations in which the lawyer is serving as a third-party neutral, whether in the role of arbitrator, mediator, or other such capacity.\textsuperscript{103} When acting in such capacity, a lawyer is required by the rule to inform any unrepresented parties that the lawyer is not representing that party, and explain the difference between the lawyer's role and responsibilities when acting as a third-party neutral and in an advocate relationship.

The provisions of Article 2 of the \textit{Nebraska Rules} offer substantially more protection for clients who have enlisted the help of a lawyer to act in the capacity of a counselor, and represent another situation in which the rules utilize more stringent disclosure requirements as a means of ensuring the client's interests are preserved. From the vantage point of a client unfamiliar with the ramifications of allowing her lawyer to provide an unqualified objective assessment of

\textsuperscript{100} \textit{Id.}
\textsuperscript{101} \textit{Id.} at R. 1.18(d).
\textsuperscript{102} \textit{Id.} at R. 2.2.
\textsuperscript{103} \textit{Id.} at R. 2.3.
her current state of affairs to third parties, or who does not understand the limits on the confidentiality privileges she is entitled to when utilizing a lawyer's services in a mediation or arbitration capacity, the new rules favorably shift the burden of these considerations onto the shoulders of the lawyer.\textsuperscript{104} This approach seems indicative of an underlying policy of the new rules to require the lawyer, through disclosure and consent requirements, to take the necessary steps to protect the client's rights and interests in recognition of the fact that the inexperience or incapacity of the client may render her unable or ill-prepared to recognize the consequences of her decisions regarding the course of their legal representation.

F. Article 3—Advocate

The \textit{Nebraska Rules} set forth the responsibilities of a lawyer acting in the role of an advocate in Article 3. Few of the principle requirements in the new rules regarding the lawyer's role as an advocate are significantly modified from their form in the \textit{Nebraska Code}, with the exception of the same expansion and extended clarification of the former system's broad all-encompassing provisions, as has been the case with the previously discussed rules.

Perhaps the most significant deviations of the rules governing the advocate relationship in the new system are found in Rule 3.3's requirements governing candor toward the tribunal.\textsuperscript{105} Both the new and former rule systems prohibit the lawyer from knowingly allowing the client to perjure herself before a tribunal, or offering evidence or statements the lawyer knows to be false; the difference emerges in the respective provisions governing what steps must be taken in the event such testimony or falsehood has taken place. Disciplinary Rule 7-102(B) of the \textit{Nebraska Code} required that the lawyer reveal frauds perpetrated by the client in the course of the representation, unless such information was protected as a privileged communication.\textsuperscript{106} Under the \textit{Nebraska Rules}, the lawyer has a duty to remedy such situation despite applicable confidentiality protection, as Rule 3.3(c) explicitly provides that the duties regarding candor towards the tribunal apply even if compliance requires disclosure of communication which

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{104} The \textit{Code of Professional Responsibility} endured frequent criticism for being directed primarily towards the lawyer acting in the capacity of a litigator; the \textit{Model Rules} have, through these provisions, attempted to fill this perceived void by extending regulatory coverage to the additional capacities in which lawyers may operate, thereby ensuring the protection of client interests in these situations enjoy the same protections as would those of a client involved in a litigation scenario. Sisk, \textit{supra} note 6, at 288.
\item \textsuperscript{105} \textit{NEB. RULES OF PROF'L CONDUCT} R. 3.3 (2005).
\item \textsuperscript{106} \textit{NEB. CODE OF PROF'L RESPONSIBILITY} DR 7-102(B) (2000).
\end{enumerate}
\end{footnotesize}
would otherwise be protected by Rule 1.6.\textsuperscript{107} While there would be some situations in which the crime exception of Rule 1.6 would have made disclosure permissible, the disclosure requirement under Rule 3.3 states such as an affirmative duty to disclose, as opposed to the "may" language utilized in Rule 1.6.

The merits of such a change invite considerable debate. On one hand, placing the burden of correcting the client's malfeasance squarely upon the lawyer's shoulders would seem to be at odds with the concept of dedicated and zealous representation, and may serve to undermine the represented party's trust in her legal counsel. Conversely, the only lawyers who would potentially be subject to sanction as a result of this change are those who choose to place an unbridled pursuit of the client's objectives ahead of the interests of the public, third parties, and the integrity of the justice system at any cost. By utilizing the mandatory standard, the Nebraska Supreme Court has indicated a reluctance to allow the public interest to be cast aside in order to preserve the lawyer's ability to abstain from reporting perjury on the part of her client.

G. Article 4—Transactions with Persons Other Than Clients

As was the case with the preceding article, the rules governing transactions with those other than clients, as set forth in Article 4, have not undergone significant substantive alterations from their comparative Nebraska Code provisions. The primary change of which Nebraska lawyers should take note is found in Rule 4.4, which sets forth duties relating to respecting the rights of third persons.\textsuperscript{108} The new rule mandates that a lawyer who receives a document relating to the representation of her client, and knows or reasonably should know that such document was inadvertently sent, shall promptly notify the sender.\textsuperscript{109} Curiously, the rule does not broach the subject of whether or not the lawyer may read further information from the document than is necessary to ascertain its mistaken delivery; these considerations would presumably be matters within the scope of the lawyer's professional judgment as per Rule 1.2.\textsuperscript{110}

\textsuperscript{107} This situation mirrors that present with regard to the Rule 1.14 provisions governing clients with diminished capacity; for an analysis of the structural implications involved, see supra subsection II.D.10. Nebraska's approach regarding the candor toward the tribunal requirement being excepted from compliance with confidentiality requirements is not universal; in Washington, for example, Rule 3.3 does not permit disclosure of information protected by Rule 1.6. \textit{Wash. Rules of Prof'L Conduct} R. 3.3(b) (2005).


\textsuperscript{109} \textit{Id.} at R. 4.4(b).

\textsuperscript{110} \textit{Id.} at R. 4.4 cmt. 3. Other states have provided a definitive resolution of the lawyer's responsibilities with respect to this quandary. In keeping with their comparatively stringent obligations with respect to ethical regulations, New
H. Article 5—Law Firms and Associations

Ethical considerations relating to the law firm and its associates are set forth in Article 5. There are some provisions of the new rules which represent an expansion or modification of the regulations found in the Nebraska Code, including significant expansions of the rules governing the responsibilities of subordinate and supervising lawyers.

1. Responsibilities of Partners & Supervisory Lawyers

Supervising lawyers are now subject to a particularly onerous obligation under Nebraska Rule 5.1, which contains a provision holding a lawyer accountable for another lawyer's violations of the rules in certain circumstances. The rule provides that a lawyer shall be responsible for such violation if the lawyer orders or ratifies the conduct involved, or if the lawyer acting as a partner or one who has comparable managerial authority over another lawyer fails to take reasonable remedial action to avert such conduct at a time when its consequences can be avoided or mitigated. While the former Nebraska Code did require that lawyers report violations of the ethical rules committed by other lawyers or be subject to discipline themselves as per Disciplinary Rule 1-103(A), they did not contain equivalent provisions creating the potential for violations resulting from a failure to mitigate or remedy the consequences of a violation by another if they were able to do so. These same requirements of lawyers in supervisory positions are rendered applicable to support personnel through the subsequent provisions of Article 5.

Rule 5.2, which sets forth the responsibilities of subordinate lawyers, provides a somewhat more lenient standard for lawyers in a subordinate position regarding compliance with the ethical rules. The rule first states that a lawyer is still bound by the Nebraska Rules irrespective of the lawyer acting at the direction of another person; the subsequent provision, however, adds an important caveat to this principle. Rule 5.2(b), of which there was no comparable provision in the Nebraska Code, states that a subordinate lawyer is not in violation of the Nebraska Rules if she is acting in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional

112. Id. at R. 5.1(c).
115. Id. at R. 5.2.
116. Id. at R. 5.2(a).

Jersey provides that the lawyer who receives an inadvertently sent document shall not read such document, or, in the event they have begun to do so, shall stop reading and promptly notify the sender. N.J. Rules of Prof'L Conduct R. 4.4(b) (2004).
By absolving the subordinate lawyer of some degree of responsibility under the Nebraska Rules, the concepts of Rule 5.1 involving the supervisory lawyer's responsibility to minimize harm resulting from a subordinate lawyer's lack of compliance with the rules are further enforced.

While the aforementioned provisions do not directly involve the recurring theme of the new rules offering protectionist treatment with regard to client interests, they do embody the similar ideal of placing the burden of adherence to the relevant ethical objective upon the party best situated to do so. From the perspective of the lawyer in a managerial or partner capacity, accepting the burden of responsibility for the ethical indiscretions of those under their supervision in certain circumstances represents an extremely onerous duty resulting as a byproduct of the allocation principles of the new rules, which seem to offer great deference to the preservation of client interests, and seek to shift the burden of the ethical obligation to those best informed as to the ramifications of a chosen course of conduct.

2. Multijurisdictional Practice

The Nebraska Rules, and more specifically Rule 5.5, set forth a far more detailed system of regulation regarding the unauthorized practice of law and multijurisdictional practice than did the former Nebraska Code. Most significantly, the new rules contain an exception to situations which would otherwise constitute an unauthorized practice of law, allowing a lawyer licensed to practice in another state to provide legal services on a temporary basis in this jurisdiction. The remaining principles of Rule 5.5, while certainly more detailed and explicit than the former version, would probably fit within the broad provisions of Disciplinary Rule 3-101 of the Nebraska Code, which required that the lawyer not aid a non-lawyer in the unauthorized practice of law, or practice law in a jurisdiction where doing so would be in violation of the regulations of the profession in that jurisdiction.

I. Article 6—Public Service

The ethical considerations governing public service are located in Article 6 of the Nebraska Rules. The new regulations under this subheading provide significantly more coverage with respect to pro-bono

117. Id. at R. 5.2(b).
118. Id. at R. 5.5. For a more in-depth analysis of the implications and application of the Model Rule's approach to multijurisdictional practice, see Susan Poser, Multijurisdictional Practice for a Multijurisdictional Profession, 81 Neb. L. Rev. 1379 (2003).
service, the acceptance of representation appointments, and participation in legal service organizations.

1. **Pro-Bono Activities**

Promotion of the ideal of voluntary pro-bono public service is set forth in Rule 6.1, which states that a lawyer should aspire to render such legal services.\textsuperscript{121} The rule subsequently elaborates upon the manner in which the lawyer should provide such services, specifically mentioning the delivery of free or reduced cost legal services directly to individuals without the means to pay for such services, to non-profit or charitable organizations who are in need of such services, or through direct financial contribution to organizations providing free legal services to low-income individuals.\textsuperscript{122} It should be noted that new rule's use of the word "should" within each of these provisions does not constitute an affirmative duty. Rather, they are suggested duties to which an attorney seeking to fulfill the ethical considerations of the *Nebraska Rules* should aspire to. Although the former *Nebraska Code* did not contain such admonishments stated within black letter rules, there were similar ideals embodied within EC 2-25 and 2-33, which advanced the idea that lawyers should render free legal services to those who are unable to pay reasonable legal fees, and should cooperate with qualified legal assistance organizations, respectively.\textsuperscript{123}

2. **Appointments of Representation**

Rule 6.2 governs the acceptance of appointments of representation.\textsuperscript{124} The primary consideration advanced by the rule is that a lawyer shall not seek to avoid appointment except for good cause, and subsequently sets forth three specific circumstances in which declining such representation is permissible.\textsuperscript{125} If the representation would result in the violation of the *Nebraska Rules*, would result in an unreasonable financial burden for the lawyer, or involves a cause so repugnant to the lawyer as to be likely to impair the lawyer’s ability to represent the client, the lawyer would presumably have good cause to avoid such appointment. The former *Nebraska Code* advanced similar ideals in EC 2-29, which stated that the lawyer should not seek to avoid such appointments barring the existence of compelling reasons.\textsuperscript{126} There is some significance in the use of the term "shall" in Rule 6.2 with respect to not seeking the avoidance of appointment, as

\textsuperscript{121} NEB. RULES OF PROF’L CONDUCT R. 6.1 (2005).
\textsuperscript{122} Id. at R. 6.1(a), (b).
\textsuperscript{123} NEB. CODE OF PROF’L RESPONSIBILITY EC 2-25, 2-33 (2000).
\textsuperscript{124} NEB. RULES OF PROF’L CONDUCT R. 6.2 (2005).
\textsuperscript{125} Id. at R. 6.2(a)-(c).
\textsuperscript{126} NEB. CODE OF PROF’L RESPONSIBILITY EC 2-29 (2000).
compared to the “should not” term utilized in the *Nebraska Code*. Through this provision, the *Nebraska Rules* place a higher level of importance on the duty to accept legal appointments, as well as providing more onerous requirements regarding the lawyer’s duties with respect to appointments.

In adopting more stringent requirements regarding the acceptance of legal appointments, the *Nebraska Rules* again seek to protect the legal rights and interests of the client, specifically, the rights of those clients who would presumably be unable to acquire representation without the support of court-appointment policies. In addition to structuring the provision so as to make avoidance of appointments more difficult, the use of the affirmative duty phrasing elevates the obligation placed upon the lawyer, and as previously discussed, the potential ramifications in how the courts will interpret and apply the rules governing ethical considerations when these affirmative duties exist will likely be skewed in favor of the client.

The final rule within Article 6, Rule 6.5, provides some exceptions to the conflict and imputation rules for lawyers rendering services for nonprofit and court-annexed limited legal service programs. In order to encourage participation in these types of free legal service programs, the rule provides that the conflict rules of Rule 1.7 and Rule 1.9(a), as well as the imputation rules of Rule 1.10 operating in conjunction with the former, are inapplicable unless the lawyer knows the representation of such client would constitute a conflict of interest, or if the lawyer knows that another lawyer in her firm is disqualified with respect to the applicability of Rule 1.10. These provisions offer substantial leeway for lawyers to participate in legal service programs without being subject to the potential economic disincentives of having themselves or their firms conflicted out of an existing or potential representation. Such safe-harbors within the rules allow for the furtherance of desirable public policy considerations, such as providing pro-bono legal services for the indigent, by both explicitly stating the expectation of lawyer participation in such endeavors, and providing specific means through which lawyers may pursue such objectives without exposing themselves to undue hardship.

128. *Id.* at R. 6.5(a), (b). These provisions further evidence the key consideration emphasized throughout this Note, that resolution of a given ethical quandary under the *Model Rules* system may not always be resolved through an analysis focusing exclusively on the provision applicable to that specific duty; the structure of the new system is such that the operation of provisions elsewhere in the rules will directly impact the lawyer’s obligations with regard to the original rule.
J. Article 7—Information About Legal Services

The Nebraska Rules deal with communications regarding a lawyer’s services in Article 7. These provisions probably reflect the fewest changes between the version embodied in the Nebraska Code and their present incarnation. While the provisions relating to lawyer and law firm advertising, as well as those dealing with communication directed at prospective clients, have been expanded and clarified in keeping with the structural nuances and form modifications reflected throughout the new rules, the general principals governing these ethical considerations have not undergone significant change aside from those necessary to accommodate new advancements in communication methods.

K. Article 8—Maintaining the Integrity of the Profession

The final article of the Nebraska Rules relates to maintaining the integrity of the profession. The provisions contained within Article 8 set forth rules governing a broad range of ethical considerations regarding bar admission, the reporting of misconduct under the Rules of Professional Conduct, and issues relating to the administration of sanctions for violations of the rules.

1. Candor

Rule 8.1 provides the general requirements governing candor during both the bar admissions process, and with respect to a disciplinary matter. Under these provisions, the lawyer is prohibited from knowingly making a false statement of material fact, failing to disclose a fact necessary to correct a misapprehension the lawyer knows has arisen, or failing to respond to a demand for information from either an admissions or disciplinary authority. These requirements do not differ significantly from the bar admission provisions found in the Nebraska Code, as reflected in Disciplinary Rule 1-101(A) and (B). The new rule, however, utilizes the same candor and disclosure requirements with respect to a lawyer involved in a disciplinary

129. This comparability of the two systems in this area stems from the fact that the Nebraska Code provision governing advertising and solicitation, Neb. Code of Prof’l Responsibility DR 2-101 (2000), was revised in the 1990’s to mirror the approach utilized in the Model Rules. Poser, supra note 10, at 1316-17.

130. One important issue which is certain to garner much discussion with regard to these provisions is the problem resulting from web-based electronic advertising, and how the conflicting standards adopted in various jurisdictions should be applied to this type of borderless medium. See Hill, supra note 2, at 533 (discussing the new advertising rules and their applicability to electronic communication).


132. Id. at R. 8.1(a), (b).

matter. A corresponding provision relating to this duty in the Nebraska Code is located at Disciplinary Rule 1-103(B), which required a lawyer to fully reveal knowledge or evidence concerning another lawyer upon a proper request by a tribunal or other authority empowered to regulate the conduct of lawyers. The combination of the aforementioned Nebraska Code provisions thus approximates the regulatory effect of Rule 8.1, and should not significantly affect the lawyer's duties and responsibilities with respect to candor in both the admissions and disciplinary processes.

2. Duty to Report

The duty to report professional misconduct is stated in Rule 8.3. The circumstances under which a lawyer is required to disclose a violation of the Nebraska Rules differ from those set forth in the former Nebraska Code. Under the new rules, a lawyer is required to inform the appropriate professional authority when she has knowledge that another lawyer has committed a violation of the Nebraska Rules that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. The rule subsequently states that such disclosure is not required if the information is protected by the confidentiality rules or if the information was gained while participating in a lawyer's assistance program. The Nebraska Code contained a comparable provision at Disciplinary Rule 1-103(A), which required a lawyer possessing knowledge of a violation of Disciplinary Rule 1-102 to report such knowledge to the relevant tribunal. Disciplinary Rule 1-102, in turn, set forth the actions constituting lawyer misconduct, and specifically listed the violation of a disciplinary rule as an incident of misconduct.

In contrasting the two rules, the addition of the "honesty, trustworthiness or fitness as a lawyer" qualifier in the new rule seems to require more than just a violation of the Nebraska Rules before disclosure is required, while a violation under the Nebraska Code would seem to be a per se trigger of the Disciplinary Rule 1-103(A) reporting requirement. As a practical matter, there will likely be few violations of the Nebraska Rules which would fail to raise a substan-

134. Id. at DR 1-103(B).
136. Id. at R. 8.3(a). Whether these "duty to tell" provisions represent a successful means of identifying ethical violations in real world application is questionable. As one commentator puts it: "Most attorneys will agree with this rule on the surface, simultaneously knowing that they would never report a colleague. The same rule governs not only an attorney's courtroom enemy, but also close friends and even senior partners." Hussey, supra note 15, at 265.
137. NEB. RULES OF PROF'L CONDUCT R. 8.3(b) (2005).
139. Id. at DR 1-101(B).
tial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer, so the effects of the newly modified reporting requirement may prove to be negligible in real-world application.

3. Misconduct

Closely related to the professional misconduct reporting requirements are the provisions of Rule 8.4, which set forth such misconduct itself as giving rise to a violation. Of specific interest under this rule is 8.4(a), which makes the violation, or attempted violation, of the Nebraska Rules a separate and distinct violation. As a result of this provision, the existence of at least one satellite violation accompanying all other violations of the Nebraska Rules is virtually guaranteed.

4. Choice of Law

The final provision of the Nebraska Rules, Rule 8.5, governs the applicable disciplinary authority, and sets forth a choice of law provision. The rule first provides that a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority in force herein, regardless of where such conduct occurs. If the lawyer is not admitted to practice in this jurisdiction, yet offers to provide legal services in this jurisdiction, that lawyer is held subject to the same disciplinary authority. The rule then sets forth a choice of law provision, with the location of the conduct being the determining factor in deciding which rules will be in force; if the conduct occurred in connection with a matter pending before the tribunal, the rules of the jurisdiction in which the tribunal sits shall govern.

III. CONCLUSION

The recently adopted Nebraska Rules of Professional Conduct represents a significant change in the interpretation and regulation of many of the ethical considerations previously discussed, and signal a structural and substantive departure from the tenets of the long standing Nebraska Code of Professional Responsibility. Differences between the two systems are significant in many respects, and are largely attributable to both the interrelated structure of the new system, which will result in the accumulation of satellite violations upon

141. Id. at R. 8.5. The goals with regard to the choice of law provisions are twofold: to provide a bright-line rule allowing the lawyer to determine what the applicable rules are from jurisdiction to jurisdiction; and to abstain from making a judgment regarding which jurisdiction's rules are best formulated and applicable. David Luban, A Friendly Amendment to Model Rule 8.5, 36 S. Tex. L. Rev. 1015, 1015 (1995).
143. Id. at R. 8.5(b).
the violation of a seemingly independent ethical duty, as well as the more client-oriented approach adopted in the new rules, which often place additional burdens on the lawyer in order to protect client interests. Gaining familiarity with the greatly expanded black-letter rules of the new system, which has resulted in a more systemic and detailed governance of the same broad ethical mandates set forth in the *Nebraska Code*, will require a thorough examination by Nebraska lawyers with regard to at least those provisions arising in their day-to-day practice; the summary contained herein merely represents an analysis of the key junctures from which the new and the former systems diverge, and an introduction to the significant themes which underlie and will likely influence the interpretation and application of the new provisions contained within the *Nebraska Rules of Professional Conduct*.

*Joel Logsdon Wiegert*