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Symposium: Nebraska and the *Model Rules of Professional Conduct*

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Symposium: Nebraska and the *Model Rules of Professional Conduct*

Foreword*

On November 15, 2002, the University of Nebraska College of Law held an ethics conference to explore some of the important issues involved in replacing the Nebraska Code of Professional Responsibility ("Nebraska Code") with the *Model Rules of Professional Conduct* ("*Model Rules*").¹ Speaking at the conference were Professor Susan Martyn of the University of Toledo College of Law, Professor Bradley Wendel of the Washington and Lee University Law School, Professor Geoffrey Hazard, Jr. of the University of Pennsylvania Law School, and Professor Stephen Kalish and myself of the University of Nebraska College of Law.

Over the past few years, both the bench and bar in Nebraska have acknowledged that it may be time to replace the Nebraska Code with the *Model Rules*.² This Symposium Issue of the *Nebraska Law Review* is intended to facilitate the discussion and debate that will accompany this transition.

Nebraska is currently one of only four states that still uses a version of the 1969 *Model Code of Professional Responsibility* ("*Model Code*").³ Joining the vast majority of other states would give Nebraska the opportunity to learn from those states' experiences with the *Model Rules* and would allow Nebraska to seek guidance in the ethics opinions of other states and of the American Bar Association ("ABA"). The *Model Rules*, adopted by the ABA in 1983, and recently

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1. Support for the ethics conference was provided by Dean Steve Willborn of the University of Nebraska College of Law, as well as by the University of Nebraska's Center for the Teaching and Study of Applied Ethics, of which Professor Stephen Kalish is a director, and the Law College Education Services, Inc., of which Professor William Lyons is the President.
2. A subcommittee of the Ethics Committee of the Nebraska State Bar Association is currently studying the *Model Rules* and will propose their adoption to the Nebraska Supreme Court, which has the sole power to regulate lawyers. *In re* Integration of Neb. State Bar Ass'n, 133 Neb. 283, 275 N.W. 265 (1937); see also John V. Hendry, *Opening Remarks*, 81 NEB. L. REV. 1319 (2003).
3. See W. Bradley Wendel, *Conflicts of Interest Under the Revised Model Rules*, 81 NEB. L. REV. 1363, 1365 (2003). Iowa is in the process of adopting the *Model Rules*, which will then leave only three states with the *Model Code*.

revised in 2002, cover ethics issues in a clearer and more comprehensive way than the Nebraska Code, which is based on the 1969 *Model Code*. Furthermore, adopting the *Model Rules* would allow Nebraska to incorporate into its ethics jurisprudence some ethical rules and considerations that are simply absent from the *Model Code*. Finally, the Multistate Professional Responsibility Examination ("MPRE"), which Nebraska requires bar applicants to pass in order to be admitted to the bar, is based on the *Model Rules*. Thus, at present, Nebraska lawyers must learn two sets of ethical rules—those on which they will be tested and those governing their conduct as lawyers. Professors Kalish and Wendel discuss these and additional practical and pedagogical benefits that bolster the case for the *Model Rules*.⁴

Consideration of the *Model Rules* is particularly appropriate at this moment in time because the *Model Rules* were very recently revised. In 1997, the ABA created the Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") and charged it with reviewing and revising the *Model Rules*. This process was completed in August 2002, when the ABA House of Delegates adopted most of the proposed revisions. Two of the participants in the ethics conference, Professor Hazard and Professor Martyn, were members of the ABA's Ethics 2000 Commission.

In addition to the recently revised *Model Rules*, the American Law Institute published in 2000 the first-ever *Restatement (Third) of the Law Governing Lawyers*. The *Restatement* is a comprehensive treaty, encompassing ethics opinions and decisional law on the regulation of lawyers in the United States. These new resources have led many states that long ago adopted the *Model Rules* to reexamine their own rules.

Adoption of the *Model Rules* in Nebraska would not result in a significant substantive change in the duties and responsibilities of Nebraska lawyers. One of the primary benefits of adoption would be to make the language of the ethical rules clearer and more precise.⁵ Many of the differences in language between the Nebraska Code and the *Model Rules* do not represent differences in substance. For example, as Professors Martyn and Wendel point out here, confidentiality and conflicts of interest, two of the most important topics in any code of conduct for lawyers, would not undergo radical change if the *Model Rules* replaced the Nebraska Code. In fact, a few of the provisions in the Nebraska Code, such as DR 2-101, concerning attorney advertis-

4. Stephen E. Kalish, *To Provide a Common Conceptual and Linguistic Vocabulary in Order to Foster Ethics Dialogue and Education: The Nebraska Supreme Court Should Adopt the Revised Model Rules—The "Bright-Line" Rule Example*, 81 NEB. L. REV. 1351 (2003).

5. See, e.g., Wendel, *supra* note 3, at 1365.

ing and solicitation,⁶ and DR 5-108(B), concerning conflicts of interest,⁷ were revised in the 1990s and are now worded identically to, or very much like, the *Model Rules*.⁸

There are, however, some ways in which the transition from the Nebraska Code to the *Model Rules* would be more than an exercise in linguistics. There are some topics not directly addressed in the Nebraska Code that are addressed by the revised *Model Rules*. There are also a few topics on which the revised *Model Rules* and the *Model Code* take disparate positions. Among the issues that are addressed by the revised *Model Rules* but not by the current Nebraska Code are duties to prospective clients,⁹ an explicit prohibition on sexual relations between lawyers and clients,¹⁰ and a new rule on lawyers serving as third-party neutrals.¹¹ One topic that the 1983 *Model Rules* and the Nebraska Code treated the same way, but has since undergone substantial change in the *Model Rules*, is the issue of multijurisdictional practice, which is discussed by this author here.¹² These provisions will require careful attention and likely will spark substantial debate.

As Nebraska's consideration of the *Model Rules* proceeds, it is important to keep in mind that the *Model Rules* are just that: *model* rules. Any state adopting them has many choices to make in deciding whether to adopt the *Model Rules in toto* or to alter them to reflect

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6. DR 2-101 uses the same language as Model Rule 7.1 did before the latter was revised in 2002. The Ethics 2000 Commission noted that some of the language in Model Rule 7.1 was criticized as being overly broad, and, thus, the 2002 revisions move that language from the text of the rule itself to the comments. REPORT ON THE EVALUATION OF THE MODEL RULES OF PROFESSIONAL CONDUCT, MODEL RULE 7.1, REPORTER'S EXPLANATION OF CHANGES, http://www.abanet.org/cpr/e2k-final_rules3.html (last visited Feb. 19, 2003). These changes do not appear to have substantially changed the meaning of the provision.
 7. DR 5-108(B) uses substantially the same language as revised Model Rule 1.9(a). Professor Kalish, however, points out the very unique interpretation that the Nebraska Supreme Court has made of that language. Kalish, *supra* note 4, at 1357-61.
 8. In at least one instance, the Ethics 2000 Commission put back into the revised *Model Rules* a provision of the *Model Code* that was taken out when the *Model Rules* were first adopted in 1983. Compare MODEL RULES OF PROF'L CONDUCT R. 4.3 (1983) (failing to mention explicitly that the lawyer shall not give legal advice to an unrepresented person), with MODEL RULES OF PROF'L CONDUCT R. 4.3 (2002), and NEBRASKA CODE OF PROF'L RESPONSIBILITY DR 7-104(A)(2) (1996) (each setting forth explicitly that the lawyer shall not give advice to an unrepresented person).
 9. MODEL RULES OF PROF'L CONDUCT R. 1.18 (2002).
 10. See MODEL RULES OF PROF'L CONDUCT R. 1.8(j) (2002).
 11. See MODEL RULES OF PROF'L CONDUCT R. 2.4 (2002). For a comprehensive discussion of all of the substantive changes to the *Model Rules* in 2002, 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 (2002).
 12. Susan Poser, *Multijurisdictional Practice for a Multijurisdictional Profession*, 81 NEB. L. REV. 1379 (2003).

more accurately the philosophy and expectations of lawyers and clients in the particular state. Included in these choices are a few rules proposed by the Ethics 2000 Commission that were not ultimately adopted by the ABA, but are still worthy of consideration. The most controversial of these are a requirement that all fee agreements be put in writing;¹³ an exception to the confidentiality rule that would permit a lawyer in some circumstances to reveal information in order to “prevent, mitigate, or rectify” substantial financial harm to others caused or reasonably certain to be caused by a client’s crime or fraud;¹⁴ and the use of a “screen” in some circumstances to avoid the imputation of conflicts of interest.¹⁵

The process of adopting the *Model Rules* will provide Nebraskans with the opportunity to take a fresh look at the professional responsibilities of lawyers and whether the principles behind, and the effects of, current regulation need to be reconsidered and updated. Professor Martyn’s discussion of the underlying philosophical justifications for lawyer-client confidentiality and its exceptions provides an excellent analytical framework for such consideration.¹⁶

The main topics discussed at the ethics conference and reflected in the pieces presented here are confidentiality (Professor Susan Martyn), conflicts of interest (Professor Bradley Wendel and Professor Stephen Kalish), and multijurisdictional practice (Professor Susan Poser). Although his remarks are not reprinted here, Professor Geoffrey Hazard, Jr. also participated in the conference and spoke about the duties of corporate counsel, both in-house and outside, under Model Rule 1.13. These are among the key topics that will need to be thoroughly considered, and will undoubtedly be thoroughly debated, as Nebraska proceeds to consider adopting the *Model Rules*. Chief Justice John Hendry of the Nebraska Supreme Court graciously agreed to open the ethics conference with a few remarks, which are also included here.

13. MODEL RULES OF PROF’L CONDUCT R. 1.5(b) (Proposed Draft 2000), available at <http://www.abanet.org/cpr/e2k-rule15.html> (last visited Feb. 19, 2003).

14. MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(2) & 1.6(b)(3) (Proposed Draft 2000), available at <http://www.abanet.org/cpr/e2k-rule16.html> (last visited Feb. 19, 2003); see also Susan R. Martyn, *In Defense of Client-Lawyer Confidentiality . . . and Its Exceptions . . .*, 81 NEB. L. REV. 1320 (2003).

15. MODEL RULES OF PROF’L CONDUCT R. 1.10(c)(2) (Proposed Draft 2000), available at <http://www.abanet.org/cpr/e2k-rule110.html> (last visited Feb. 19, 2003).

16. See Martyn, *supra* note 14.