Nebraska Law Review

Volume 81 | Issue 4 Article 5

2003

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

Stephen E. Kalish
University of Nebraska College of Law

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

TABLE OF CONTENTS

I. INTRODUCTION

Thirty years ago, the Nebraska Supreme Court adopted the American Bar Association's 1969 *Model Code of Professional Responsibility*. The *Model Code's* structure was unique. There were nine axiomatic Canons, and, under each Canon, there were aspirational Ethical Considerations and mandatory Disciplinary Rules. In 1983, the ABA recommended states abandon its old *Model Code* and adopt its new *Model Rules of Professional Conduct*. There were important policy, conceptual, and linguistic changes in the new *Model Rules*. In 2002, the ABA revised the 1983 version of the *Model Rules*, and it now recommends states adopt these revisions to the *Model Rules*. Nebraska has kept the old *Model Code*.

There are many reasons why Nebraska ought to adopt the revised *Model Rules*. First, the ABA has carefully drafted the rules. They are the product of serious thought, investigation, comment, and deliberation. Nebraska, alone, could never duplicate this effort. Since there is

* Margaret R. Larson Professor of Legal Ethics, University of Nebraska College of Law.

nothing unique about Nebraska lawyering, Nebraska should defer to the ABA unless it has a well-considered reason for not doing so. Second, lawyers, including Nebraska lawyers, practice nationally. In today's world, geographic and political boundaries are increasingly unimportant. It makes sense that all American lawyers have the same ethical standards regardless of where they practice. There ought to be a common law for lawyers. Third, Nebraska lawyers need guidance in resolving important ethical and professional dilemmas. Nebraska is a small state, and it does not generate much judicial or advisory committee assistance. Practitioners must look elsewhere for guidance. Since most states have adopted the *Model Rules*, these jurisdictions will generate a large corpus of interpretive literature to guide Nebraskans.

Of course, there are responses to these positions. First, not everyone believes the ABA considered the *Model Rules* carefully or objectively. These commentators not only disagree with the ABA's perspective and policies, but they also note the *Model Rules* reflect extensive lobbying and compromise. Second, many states that have adopted the *Model Rules* have amended certain important Rules. There has been a "Balkanization," and the goal of a set of uniform lawyer ethics seems illusory. Third, if the *Model Rules* were not objectively and deliberately promulgated, or if there is too much variation among other states, then interpretive guidance from other jurisdictions will be unhelpful to Nebraska practitioners.

Regardless, the most important reason Nebraska should adopt the revised *Model Rules* is they provide a conceptual and linguistic vocabulary for ethics dialogue and education. Ethics codes are not merely regulatory rules. They have little impact on a lawyer's behavior.[1] They reflect, rather than construct, professional values and priorities. True ethics and professional attitudes come before any written codes. How zealous, for example, an advocate ought to be in a particular case will be resolved, one way or another, without resort to written ethics codes. How conflicting interests must be before they are disabling will also be decided without reference to a written code. Lawyers' trained intuitions will guide them to answers.

A vibrant ethics dialogue and education are important elements in the training of these professional intuitions. A written ethics code can generate and concentrate issues for thoughtful discussion. Discussions will not ramble, and the written code can provide a common conceptual and linguistic vocabulary. Debate and disagreements will be clear. The revised *Model Rules* will provide both.

1. Stephen E. Kalish, *How to Encourage Lawyers to Be Ethical: Do Not Use the Ethics Codes As a Basis for Regular Law Decisions*, 13 GEO. J. LEGAL ETHICS 649 (2000).

Ethics education begins early in a lawyer's career. Law students are introduced to professional ethics in mandatory law school courses, and it is the *Model Rules*, not Nebraska's version of the *Model Code*, that supplies the conceptual vocabulary. All teaching books use the *Model Rules* as the base for inquiry. Students are required to take a Multistate Professional Responsibility Examination that focuses on the *Model Rules*.

Early in their careers, lawyers develop conceptual and linguistic tools to help them engage important issues. It is not uncommon to hear students and lawyers talk about "information protected by Rule 1.6," rather than secrets and confidences. With the adoption of the revised *Model Rules*, students and lawyers will soon be debating the meaning of "informed consent," a word of art borrowed from medical ethics.

Students and lawyers, even Nebraska lawyers, are unfamiliar with the *Model Code's* format. They stumble as they work through untaught Canons, Ethical Considerations, and Disciplinary Rules. They do not grasp the meaning of the unfamiliar concepts and language. The *Model Code's* language is therefore not a working part of a Nebraska lawyer's conceptual framework. It is difficult to use it in discussion with others.

Nebraska ought not adopt the revised *Model Rules because* these rules better reflect appropriate professional norms. This is a matter for substantive debate elsewhere. Rather, the Nebraska Supreme Court ought to adopt the revised *Model Rules* in order to facilitate Nebraska lawyers' involvement in the national educational discussion. If the Nebraska Supreme Court insists on keeping its archaic version of the *Model Code*, Nebraskans will be left out of national ethics dialogue and education. At the least, they will be disadvantaged in these discussions because they are not adequately conversant with the common national vocabulary.

Of course, if Nebraska does adopt the revised *Model Rules* in order to provide a common vocabulary, it is important that identical expressions in the Nebraska Model Rules and in other states' versions of the *Model Rules* have the same meaning. If the same words are used in different ways, conversation will be confused and impeded rather than facilitated. I will discuss one example of a case in which the Nebraska Supreme Court adopted the *Model Rules'* common vocabulary but interpreted its language in an uncommon way. The court ventured on its own to adopt a "bright line" rule to resolve conflicts that arise when a lawyer or student law clerk leaves one firm to work on her own or with another firm. I have previously written about the application of

this rule to student clerks, and I was involved in persuading the court to adopt Disciplinary Rule 5-109.[2]

Here, I will examine the "bright line" rule's application to a lawyer who departs from a law firm and who represents a client against a former client of the lawyer's old law firm, when the lawyer did not personally represent the former law firm's client. The Nebraska Supreme Court did not follow the prudent course of adopting the relevant Model Rule in its entirety. It first articulated a "bright line" rule in a judicial opinion. It then reiterated the rule in Disciplinary Rule 5-108(B), using the common vocabulary of the *Model Rules*. It then interpreted the common language in its own way. Why was the common language used? Why the different interpretation? What was the court trying to do? What policy was it trying to advance? Were its goals similar to the ABA's goals? None of this is clear.

II. THE ISSUE

Whether a lawyer can represent a client against her firm's former client, even if she were not personally involved with the former client's matter, is a complicated conflict of interests issue. This problem is compounded if the lawyer migrated from her former law firm to a new law firm, and the question is whether her new colleagues can represent the new client. This imputed disqualification problem is not discussed in this Paper.

Litigants, premising their arguments on the existence of improper conflicts, have frequently moved to disqualify opposing counsel. Sometimes there are genuine issues of concern; other times the motions are strategic ploys. Satellite litigation, focusing on these issues, can take extraordinary amounts of time and resources.

As one would expect, judges and commentators have examined a number of interests and significant policies in resolving the problems in particular cases. Most agree, however, that the most important factors to consider are (1) the former client's interest in assuring that protected information not be used to its disadvantage versus, (2) a departing lawyer's interest in job mobility, and (3) the new client's prerogative to choose a lawyer.

Model Rule 1.9(b), to which the revised Model Rule 1.9(b) is identical in relevant parts, provides:

2. Stephen E. Kalish, *The Side-Switching Staff Person in a Law Firm: Uncomplimentary Assumptions and an Ethics Curtain*, 15 HAMLINE L. REV. 35 (1991); Harvey S. Perlman & Stephen E. Kalish, *Has the Supreme Court Modified the Bright Line Rule?*, NEB. LAW., May 1997, at 16; Harvey S. Perlman & Stephen E. Kalish, *How Lawyers Can Help Student Clerks Avoid Disqualification*, NEB. LAW., Mar. 1998, at 8.

> A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client,
>
> (1) whose interests are materially adverse to that person; and
>
> (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client consents after consultation.

Assuming the interests of the new client are materially adverse to the former client, and assuming the former client does not consent, the Model Rule provides a sensible and natural two-step process. The first important question (I will not examine the meaning of "same matter") is whether the former firm's client's matter and the lawyer's new client's matter are "substantially related." It calls for a focus on the two matters in an objective way. In this step, there is no inquiry into what the lawyer actually learned about her former firm's client's case. Rather, the inquiry is more objective. Is there a substantial risk that an ordinary lawyer, working on the former client's matter, might have acquired protected information relevant to the new client's matter? If so, courts will conclude the two matters are substantially related.[3] Without more, the lawyer would be disqualified from

3. The comments to the Rule do not directly address this. Comment 3 to revised Model Rule 1.9 does. It provides:

> Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or *if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.* For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. *A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.*

representing the new client. The former client's information would be protected. It need not worry about what the lawyer might know. Indeed, if the Rule were otherwise, the former client would have to disclose protected information in order to disqualify the lawyer who might have acquired this protected information.

The Model Rule, however, insists that other important interests be taken into account. The lawyer is only presumptively disqualified. In the second step, the Model Rule refocuses, and it permits the lawyer to establish that she, in fact, did not acquire any protected information. If the lawyer can establish this, then the lawyer's interests in mobility and the new client's prerogative to choose a lawyer are promoted. If the lawyer can establish that she "had [not] acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter," then she can represent the new client.

From the above, it is apparent the two steps assure that all important interests are taken into account. The first step, whether the two matters are substantially related, is an objective comparison of two situations, without a focus on the particular lawyer's acquired knowledge. It is a prophylactic test designed to assure the former client that its information will be protected in marginal cases.

This objective analysis of the meaning of substantially related matters makes linguistic sense. Normally, we would say that two matters are, or are not, substantially related. The answer would not differ because one participant in the situation knew something in one case and not in another. For example, suppose Driver had been in an accident and had injured Victim 1, Victim 2, and Victim 3. Lawyer A and Lawyer B were associated with the law firm that represented Driver in

---

MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 3 (2002) (emphasis added). Moreover, the *Restatement (Third) of the Law Governing Lawyers* also addresses this issue. It provides:

> *The substantial-relationship test avoids requiring disclosure of confidential information by focusing upon the general features of the matters involved and inferences as to the likelihood that confidences were imparted by the former client that could be used to adverse effect in the subsequent representation.* The inquiry into the issues involved in the prior representation should be as specific as possible without thereby revealing the confidential client information itself or confidential information concerning the second client. *When the prior matter involved litigation, it will be conclusively presumed that the lawyer obtained confidential information about the issues involved in the litigation. When the prior matter did not involve litigation, its scope is assessed by reference to the work that the lawyer undertook and the array of information that a lawyer ordinarily would have obtained to carry out that work.* The information obtained by the lawyer might also be proved by inferences from redacted documents, for example. On the use of in camera procedures to disclose confidential material to the tribunal but not to an opposing party, see § 86, Comment *f*.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 cmt. d(iii) (2000) (emphasis added).

Victim 1's case, but neither A nor B personally worked on the matter. Lawyer A now represents Victim 2 against Driver. Lawyer B represents Victim 3 against Driver. On the one hand, if Lawyer A learned prohibited information, she may be disqualified for policy reasons. On the other hand, if Lawyer B can establish she learned nothing about Driver's matter, she might not be disqualified for policy reasons. It would be a strange use of language, however, to conclude the Driver 1 and Driver 2 matters were substantially related, but the Driver 1 and Driver 3 matters were not. It was, after all, the same accident, the same defendant, the same facts, and the same legal issues.

III. THE NEBRASKA RULE

The Nebraska Supreme Court fashioned its own substantive rule, using the ABA's *Model Rules'* concepts and language. How did this happen?[4] In 1993, the Nebraska Supreme Court was apparently frustrated with the satellite litigation related to disqualification motions. In *State ex rel. FirsTier Bank v. Buckley*,[5] in order

> [t]o avoid the necessity of agonizing over this type of decision, to aid the bar in its coping with situations such as this, to properly preserve not only the actual existence, but also the appearance, of propriety, and to eliminate as nearly as possible unnecessary and unwarranted criticism of the legal profession,[6]

the court adopted a "bright line" rule.[7] It said,

> We now hold that an attorney must avoid the present representation of a cause against a client of a law firm with which he or she was formerly associated, and which cause involves a subject matter which is the same as or substantially related to that handled by the former firm while the present attorney was associated with that firm.[8]

The court's stated ground for the rule was, *inter alia*, "to avoid the necessity of [judicial] agonizing over this type of decision." Given the complexity of law practice and the importance of the interests at stake, it is difficult to imagine how the court could avoid such agonizing. Still, it tried.

As a conceptual and linguistic matter, the Nebraska Supreme Court borrowed the *Model Rules'* "substantially related matter" vocabulary. But the Nebraska rule had only one step. If two matters were substantially related, regardless of what the lawyer did or did not

4. *See* Brian C. Buescher, Note, *Out with the Code and in with the Rules: The Disastrous Nebraska "Bright Line" Rule for Conflict of Interest: A Direct Consequence of the Shortcomings in the Model Code*, 12 GEO. J. LEGAL ETHICS 717 (1999); Polly M. Faltin, Note, *"Agonizing" over Disqualification Decisions: Fractionalizing the Nebraska "Bright Line" Rule in* State ex rel. Wal-Mart Stores, Inc. v. Kortum, 31 CREIGHTON L. REV. 279 (1997).

5. 244 Neb. 36, 503 N.W.2d 838 (1993).

6. *Id.* at 45, 503 N.W.2d at 844.

7. *Id.*

8. *Id.*

know, then the lawyer was disqualified. The court apparently decided to protect the former client's information in all situations where there was a genuine threat that the lawyer might have acquired information. The former client's interest would not be weighed against the lawyer's interest in mobility and the new client's prerogative to choose a lawyer. The departing lawyer would not have an opportunity to establish that she acquired no protected information at her former firm. As a policy matter, this is certainly a defensible position.

Of course, many disagreed with the court's single-step approach. The Nebraska Bar Association petitioned the court for a change—to adopt a two-step rule, modeled on the Model Rule.[9] The court rejected the proposed rule. It instead adopted Disciplinary Rule 5-108(B):

> When a former client is represented by a lawyer's firm but not personally by the lawyer and the lawyer leaves the firm, the lawyer shall not represent a client whose interests are materially adverse to the former client in the same or a substantially related matter in which the firm with which the lawyer formerly was associated had previously represented the former client, unless the former client consents after consultation.[10]

At this point, Nebraska lawyers were ready to engage in the national discussion. There was a common definition of "substantially related matter." There was a uniform method of objective analysis. Nebraska may have resolved the policy issues differently than did the ABA, but since the objective analysis was similar and the expression had the same meaning, Nebraskans could debate the ethics issues without confusion. Nebraskans could argue that its objective test properly assured the former client that its protected information would not be misused. The former client's interest always trumped the lawyer's interest in mobility and the new client's prerogative to choose a lawyer.

---

9. Proposed DR 5-108(B) provided:

> (B) When a former client is represented by a lawyer's firm but not personally by the lawyer and the lawyer leaves the firm, the following rule shall apply: The lawyer shall not knowingly represent a current client in the same or a substantially related matter in which the firm with which the lawyer formerly was associated had previously represented the former client
>
> (1) whose interests are materially adverse to the current client, and
>
> (2) about whom the lawyer had acquired confidential information that is material to the matter, unless the former client consents after consultation. The lawyer shall be considered to have acquired confidential information that is material to the matter unless the lawyer demonstrates otherwise.

Brief for Petitioner at 1, app. A at 1-4, *In re* Neb. State Bar Ass'n, Petition for Adoption of Additional Disciplinary Rules to Code of Professional Responsibility, No. S-36-950001 (Neb. 1996), *quoted in* Faltin, *supra* note 4, at 322 n.355.

10. NEB. CODE OF PROF'L RESPONSIBILITY DR 5-108(B) (1997).

In 1997, in *State ex rel. Wal-Mart Stores, Inc. v. Kortum*,[11] the court had what should have been an easy case to analyze.[12] Lawyer Smith, while at the former firm, had represented Wal-Mart in the Pottorff matter, a case involving a slip-and-fall on a slick floor. Later, after Wal-Mart had dismissed his law firm, one of Smith's colleague's sought to represent a new client, Kortum, against Wal-Mart in a case involving a slip-and-fall in a parking lot. Were the two matters substantially related?[13]

If there ever were a case in which only an objective analysis of this issue was appropriate, this was it. Smith had worked on the former client's matter. If the two matters were such that there was a genuine risk that a normal lawyer representing Wal-Mart might have learned protected information, then the two matters would be substantially related, and Smith would be disqualified. In situations where the departing lawyer worked on the former client's matter, rather than merely being affiliated with the former firm, it is difficult to imagine how a former client would ever feel confident that its protected information would not be misused. This would be true regardless of the evidence the lawyer presented to establish that she had learned no relevant information. Model Rule 1.9(a), and apparently Disciplinary Rule 5-108(A), adopt this irrebutable presumption. If the two matters are substantially related, there is no second step. The departing lawyer may not establish that she knew nothing of the former client's matter.

With that said, how did the Nebraska Supreme Court define "substantially related"? It began by articulating the objective analysis.

---

11. 251 Neb. 805, 559 N.W.2d 496 (1997).
12. Faltin, *supra* note 4, was particularly suggestive of the analysis provided here.
13. *Kortum* is different in two ways from the situation we are discussing here. First, Smith had not left his former firm, and it was Smith's colleague who sought to represent the new client. This raises the imputed disqualification issue, but, since Nebraska has taken the inflexible position that if a lawyer is subject to disqualification, then all her current colleagues are also subject to disqualification, the case can be considered as if Smith were representing the new client. Second, Smith actually represented the former client. In such a case, Nebraska Code DR 5-108(A) is relevant, and, as Model Rule 1.9(a) does in these situations, it provides for a one-step test. NEB. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-108(A) (1997), provides:

> A lawyer who has personally represented a former client in a matter shall not thereafter represent a current client in the same or a substantially related matter in which the current client's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

MODEL RULE OF PROFESSIONAL CONDUCT R. 1.9(a) (2002) provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

The subject matters of two causes are substantially related "*if the similarity of the factual and legal issues creates a genuine threat* that the affected attorney *may have received confidential information* in the first cause that could be used against the former client in the present cause."[14] Moreover, consistent with this objective approach, it noted the "appearance of impropriety" and screening procedures, such as "Chinese Walls," were irrelevant. These factors might impact the final result, but they were not relevant to the definition of substantially related matters.

At this point, the court veered off track. It noted, "[i]n fashioning a 'substantially related subject matter' test, a court must balance several competing considerations."[15] This, of course, is exactly what the second step of Model Rule 1.9(b) would have required in an appropriate case. In *Kortum*, the Nebraska Supreme Court seemed to reject its two-step, objective approach. Instead, it conflated the two steps into one under the rubric of determining the meaning of substantially related matters. The court narrowly focused on whether Smith himself had actually acquired protected information. Furthermore, the court noted that lawyers and judges should consider, *inter alia*, the following factors that focus on whether the actual departing lawyer, not a any lawyer in those circumstances, had acquired protected information: (1) whether the lawyer had interviewed a witness who was a key witness in both causes; (2) the lawyer's knowledge of the former client's trial strategies, negotiation strategies, legal theories, business practices, and trade secrets; (3) the duration and intimacy of the lawyer's relationship with the clients; and (4) the functions being performed by the lawyer.[16]

---

14. *Kortum*, 251 Neb. at 811, 559 N.W.2d at 501 (emphasis added).

15. *Id.*

16. The court stated:

> In fashioning a 'substantially related subject matter' test, a court must balance several competing considerations, including the privacy of the attorney-client relationship, the prerogative of a party to choose counsel, and the hardships that disqualification imposes on parties and the entire judicial process. . . .
>
> Mindful of these competing interests, we determine that the subject matters of two causes are 'substantially related' if the similarity of the factual and legal issues creates a genuine threat that the affected attorney may have received confidential information in the first cause that could be used against the former client in the present cause. Simply stated, if the court determines that the unique factual and legal issues presented in both cases are so similar that there exists a genuine threat that confidential information may have been revealed in the previous case that could be used against the former client in the instant case, then disqualification must ensue.
>
> A nonexhaustive list of the factors a court may consider in making this determination includes: whether the liability issues presented are similar; whether any scientific issues presented are similar; whether the nature of the evidence is similar; whether the lawyer had interviewed a

The court concluded that Smith had established he had not acquired protected information; therefore, the two matters were not substantially related. And therefore, Smith's colleague, and Smith too if he had been representing the new client, would not be disqualified. Without admitting it, the court had grafted Model Rule 1.9(b)'s second step into its own one-step rule.[17] The Nebraska interpretation of substantially related matters now included a focus on what information the lawyer had actually acquired.

IV. CONCLUSION

In this Paper, I am not evaluating the substantive policy behind a one-step DR 5-108(B) or the two-step Model Rule 1.9(b). Instead, I am critical of the Nebraska Supreme Court's uncommon analysis and interpretation of the *Model Rules'* common vocabulary. In most jurisdictions that have adopted the *Model Rules*, two matters are substantially related if there is a substantial risk that any lawyer representing the former client might have acquired protected informa-

---

witness who was a key in both causes; the lawyer's knowledge of the former client's trial strategies, negotiation strategies, legal theories, business practices, and trade secrets; the lapse of time between causes; the duration and intimacy of the lawyer's relationship with the clients; the functions being performed by the lawyer; the likelihood that actual conflict will arise; and the likely prejudice to the client if conflict does arise.

Id. at 811-12, 559 N.W.2d at 501 (citations omitted).

17. The court stated:

> The differences in the factual and legal issues, where a plaintiff falls into a hole in a parking lot as opposed to where a plaintiff falls on a wet floor inside a store, are crucial and are not outweighed by the similarities.
>
> We agree with the special master's findings that during the time Wal-Mart was represented by Smith, the policies, procedures, and practices Smith was told about did not include any trade secrets or anything that was not discoverable. Courts have recognized that defense strategies are confidential information that may be factored into the disqualification decision. However, the defense strategies utilized in these types of relatively uncomplicated slip-and-fall actions are generally commonplace and routine. Wal-Mart did not assert that Van Steenberg became privy to any defense strategies that are unique, unexpected, unusual, or novel. Thus, we determine that an outside firm, with no prior association with Wal-Mart, would have the same or similar practical knowledge of how Wal-Mart would defend against this action and would have the same discovery opportunities.
>
> Because Van Steenberg did not acquire any specialized knowledge of defense strategies or any other discovery advantages, we conclude that the similarity of the factual and legal issues does not create a genuine threat that Van Steenberg may have received confidential information from Wal-Mart that could be used against Wal-Mart in the instant case.
>
> Because Wal-Mart failed to meet its burden of clearly showing that it has a legal right to the relief sought, we determine that the district court had no alternative but to deny Wal-Mart's motion to disqualify Van Steenberg.

Id. at 813-14, 559 N.W.2d at 502-03 (citations omitted).

tion. The question of whether a lawyer who did not personally represent the former client acquired such information is left to the second step. In Nebraska, both issues are conflated under one rubric. In deciding if two matters are substantially related in one breath, a person must decide if there is a genuine threat that a lawyer whose firm had represented the former client might have acquired protected information *and* if the lawyer representing the second client had, in fact, acquired such protected information.

By developing its own approach to the *Model Rules'* conceptual and linguistic vocabulary, the Nebraska Supreme Court has impaired the ability of Nebraska students, lawyers, and judges to engage in the national ethics dialogue and education. They will always have to explain the Nebraska interpretation of what should be a common vocabulary, in this case the meaning of substantially related matters, before they join the discussion. This will be confusing and, often, misleading. If the Nebraska Supreme Court had simply adopted the *Model Rules*, or, at the least, if it had simply used the common vocabulary without providing, *sub silentio*, its own interpretation, then, despite any policy disagreements, Nebraska students and lawyers would have the vocabulary for ethics dialogue and education.