IOWA’S LEGAL ETHICS RULES—
IT’S TIME TO JOIN THE CROWD

Gregory C. Sisk *

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* Professor of Law, Drake University Law School (greg.sisk@drake.edu). For background information, I thank Justices Mark Cady, David Harris, and Marsha Ternus of the Iowa Supreme Court, none of whom should be necessarily understood to have endorsed the proposal made in this Article, to agree with my diagnosis, or to have suggested there even is a problem needing attention. Justice Cady, Justice Harris, my colleague Professor Laurie Doré, Professor Robert Cochran, and Vermont bar leader Clarke Gravel generously reviewed and critiqued an earlier draft of this Article. Any errors of judgment or substance that remain are mine. My writing of this Article was generously supported by a research stipend from the John and Leslie Fletcher Endowed Faculty Fund at the Drake University Law School.
I. INTRODUCTION: THE GROWING "MODEL RULES" CROWD AND THE SHRINKING "CODE" FRATERNITY

During the past fifteen years, state supreme courts and bar associations have had to choose between two competing models for regulating the conduct of attorneys—the Model Rules of Professional Conduct originally proposed in 1983 (Model Rules)¹ and the Model Code of Professional Responsibility originally proposed in 1969 (Model Code or Code)²—both of which had been drafted and ratified by the American Bar Association (ABA) for adoption by the states. When the Model Rules were initially promulgated by the ABA in 1983 to replace the earlier Model Code, a tide of states quickly shifted to the new regime.³ But the pace of adoption soon slowed, as the supposedly superseded Model Code proved surprisingly resilient with a strong core of states continuing to adhere to it.⁴ Recently, however, the trend toward the Model Rules among these remaining states has again accelerated, indicating that the Model Code may be on its last legs as a viable ethical regime.

As of January 1, 1998, the State of Massachusetts,⁵ one of the remaining holdouts, joined the substantial majority of states in adopting the basic framework of the Model Rules⁶ to govern the behavior of lawyers. The States of Tennessee,⁷ Vermont,⁸ and Virginia⁹ appear to be on the verge of taking this step

3. See generally infra Part II (describing the history of the Model Rules and Model Code).
4. See generally id.
5. MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT AND COMMENTS (West 1998). The Massachusetts rules were adopted on June 9, 1997, and became effective on January 1, 1998. Id.
7. A Tennessee Bar Association committee proposal to adopt the Model Rules of Professional Conduct, with certain modifications, has been published for notice and comment by members of the bar. Tennessee Bar Association, Preliminary Draft of the Report of the TBA Committee for the Study of Standards of Professional Conduct, (visited July 17, 1998) <http://www.tba.org/committees/Conduct/>. The deadline for public comments was September 1, 1998. Tennessee Bar Association, Comment Deadline Extended on Proposed New Tennessee Lawyer Ethics Rules (visited July 17, 1998) <http://www.tba.org/committees/Conduct/press.html>. Given that the comments to date have been overwhelmingly positive, the Tennessee Bar Association is expected to endorse the proposal and petition the Tennessee Supreme Court to adopt the rules. Telephone Interview with Carl A. Pierce, Professor, University of Tennessee College of Law and Reporter, Committee on Standards of Professional Conduct, Tennessee Bar Association (July 16, 1998). In the absence of meaningful opposition within the bar, approval by the Tennessee Supreme Court would appear likely.
as well. The State of Georgia is also making purposeful movements in this direction. Assuming these four states follow their current path toward the Model Rules, the number of states continuing to adhere to the Code will shrink to six or fewer. Is it time for Iowa, like these four transitional jurisdictions and

8. The Vermont Bar Association has diligently worked on a set of disciplinary rules, based upon the Model Rules with some local variation, for the past couple of years. Vermont Bar Association, Final Report of the Study Committee on the ABA Model Rules of Professional Conduct (1996) (on file with author). That proposal is pending before the Vermont Supreme Court, which reportedly is actively reviewing the proposal and appears likely to approve it, perhaps with some revision, by the end of 1998. Telephone Interview with Clarke Gravel, Chair, Committee on Professional Responsibility, Vermont Bar Association (July 20, 1998); Electronic Mail Messages from Robert M. Paolini, Executive Director, Vermont Bar Association to Gregory C. Sisk (July 17 & 18, 1998).

9. The Virginia State Bar Special Committee to Study the Code of Professional Responsibility, established in 1993, has proposed adoption of the Model Rules as the structural model for the Virginia lawyer disciplinary rules. This recommendation was approved by the Virginia State Bar Council in 1996. In a series of meetings from 1997-1998, the Council has approved the substance of 48 rules based upon the Model Rules, with some variation. The full proposal will shortly be submitted to the Virginia Supreme Court for active review and ultimately final approval. If ultimately approved by the Virginia Supreme Court as expected, the bar has suggested a delayed effective date of January 1, 2000, to allow further education and transition for Virginia lawyers. Virginia State Bar Association, Special Committee to Study the Code of Professional Responsibility (visited July 17, 1998) <http://www.vsb.org/>; Telephone Interview with Dennis W. Dohnal, Chair, Special Committee to Study the Code of Professional Responsibility, Virginia State Bar Association (July 20, 1998).

10. The Disciplinary Rules and Procedure Committee of the State Bar of Georgia is drafting new professional responsibility standards based on the Model Rules, which are expected to be presented to the Board of Governors in early 1999. If approved, the new rules would be recommended to the Supreme Court of Georgia for final approval. Electronic Mail Message from William E. Cannon, Jr., President, State Bar of Georgia to Gregory C. Sisk (Aug. 3, 1998); Electronic Mail Message from Cliff Brasheer, Executive Director, State Bar of Georgia to Gregory C. Sisk (Aug. 3, 1998). As the Georgia bar’s board of governors voted against the Model Rules 10 years ago, approval of the committee’s forthcoming proposal is not certain. Electronic Mail Message from Paula Frederick, Deputy General Counsel, State Bar of Georgia to Gregory C. Sisk (Aug. 3, 1998).

11. In addition to Georgia, Tennessee, Vermont, and Virginia (at least for the moment), the states of Iowa, Nebraska, New York, Ohio, and Oregon continue to follow the Code. See ATTORNEYS’ LIABILITY ASSURANCE SOCIETY, INC., ETHICS RULES ON CLIENT CONFIDENCES (1997), reprinted in THOMAS D. MORGAN & RONALD D. ROTUNDA, 1998 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 133-42 (1998) (listing ethics code or rules adopted in each state). The status of two of these states deserves some additional explanation. The Nebraska State Bar Association petitioned the Nebraska Supreme Court to adopt the Model Rules in 1984. Letter from Ted E. Dillow, Executive Director, Nebraska State Bar Association to Chief Justice Norman Krivosha, Nebraska State Supreme Court (Nov. 26, 1984) (attaching Report of the Committee on Ethics of the Nebraska State Bar Association on the Proposed New Model Rules of Professional Conduct). Despite the passage of time, the petition remains before the Nebraska Supreme Court and has yet to be acted upon. Letter from D.C. Bradford, President, Nebraska State Bar Association to Professor Gregory C. Sisk, Drake University Law School (Aug. 27, 1998). Thus, the Nebraska State Bar Association remains officially on record as endorsing the Model Rules, and
thirty-nine other states before them, to join the crowd and switch to the Model Rules? Is there sufficient reason to abandon the Code,\textsuperscript{12} which generally has well served Iowa for seventeen years?\textsuperscript{13}

I confess to my personal preference for the general framework of the Code, with its structure of foundational Canons, mandatory Disciplinary Rules, and aspirational Ethical Considerations.\textsuperscript{14} In appropriately picturesque terms, Professor John M.A. DiPippa describes the Code:

The Canons were the foundation of the lawyer’s professional life and the Ethical Considerations were the moral architecture. All professional conduct rested on the bedrock of the Canons. At the same time, the Ethical Considerations buttressed the lawyer’s professional life in the same way that architectural buttresses did. They made explicit the internal moral structure.\textsuperscript{15}

For these reasons, I retain a romantic attachment to the Code. Nonetheless, I have reluctantly concluded that it is becoming, indeed has already become, a relic of the past. I believe that Iowa must come on board with the Model Rules—and soon—if it is to avoid being left behind, with meaningful and detrimental consequences for the profession in our state.

At the moment, the Iowa legal profession is healthy and its disciplinary rules and process appear adequate to the task. But, despite the valiant efforts of the Iowa bench and bar, that stability is precarious and endangered. If Iowa stubbornly clings to a Code that has been superseded in the nation at large, Iowa lawyers will lose the opportunity to fully share in the experiences and ethical advancements of the profession at large and to benefit from the constant reevaluation and evolution of ethical standards. Indeed, if Iowa does not join the rest of the country, its lawyers may find themselves held to contradictory professional standards if they practice in both federal and state court or, as lawyers increas-

\begin{itemize}
  \item the Nebraska Supreme Court could still act upon that recommendation. Maine labels its ethics rules as the “Code of Professional Responsibility” and the language of several of its rules is drawn from the Code; however, the Maine rules do not follow the Code format of nine Canons and Disciplinary Rules; do not include Ethical Considerations; do not use the same order of provisions as the Code; and at many points depart significantly in substance and language from the Code. \textit{See MAINE CODE OF PROFESSIONAL RESPONSIBILITY} (West 1997). Thus, although I have denominated it as a Code jurisdiction for purposes of convenience, it has little in common with the company of other Code states.


ingly do, are involved in a multistate practice. Moreover, the decline in attention to the Code in law schools (particularly outside of Iowa) and on the bar examination presage a generation of new admittees to the bar who will be unfamiliar with the Code, other than as history.

For all of their faults, the Model Rules have the compelling advantage of being up-to-date. The Model Rules are constantly being revised, refined, and adjusted in light of emerging challenges for attorneys and new understandings of what it means to be an ethical lawyer and a true professional. Iowa has much to gain from—and much to contribute to—this process of revision and reform and cannot afford to be left in solitude.

II. A BRIEF HISTORY OF LEGAL ETHICS CODES AND A CURRENT CENSUS OF MODEL RULES VERSUS CODE STATES

Law was one of the last professions to adopt a written code of ethics; the American medical profession committed its ethical standards to a written code a half century before lawyers did.\textsuperscript{16} Although customary and common law expectations of legal practice and behavior existed previously, it was not until this century that a common ethics model was proposed for lawyers in the United States.\textsuperscript{17} The very first formal code for attorneys was adopted in Alabama in 1887, a list of canons for lawyers that was built upon a famous essay on ethics published by Pennsylvana judge George Sharswood in 1854.\textsuperscript{18} At the urging of establishment figures within the American Bar Association early in this century, that organization proposed the first national model—the Canons of Ethics—in 1908.\textsuperscript{19} Ultimately, the Canons were adopted by all but thirteen states and the District of Columbia.\textsuperscript{20}

In 1969, the ABA updated this approach, while preserving most of the substance of the canons, through a more detailed set of rules known as the Model Code of Professional Responsibility.\textsuperscript{21} With the exception of California, every

\begin{enumerate}
\item \textsuperscript{16} Charles W. Wolfram, Modern Legal Ethics § 2.6.1, at 48 (1986).
\item \textsuperscript{17} Id. § 2.6.2, at 53-54.
\item \textsuperscript{19} Monroe H. Freedman, Understanding Lawyers' Ethics 3-4 (1990); Wolfram, supra note 16, § 2.6.2, at 54-56.
\item \textsuperscript{20} Hazard & Rhode, supra note 18, at 117.
\item \textsuperscript{21} Model Code of Professional Responsibility (1969). See generally Wolfram, supra note 16, § 2.6.3, at 56-60. Although first adopted in 1969, the Code was amended by House of Delegates of the American Bar Association in 1970 and then every year from 1974 through 1980, after which it was superseded by the then-pending Model Rules proposal. See Model Code of Professional Responsibility (amended 1980) (listing dates of amendment).
\end{enumerate}
state adopted the Code, at least in modified form.22 The Code is distinctive in its
structure. It is organized around nine Canons, each of which are divided into
mandatory Disciplinary Rules and aspirational Ethical Considerations.23 "The
Canons are statements of axiomatic norms, expressing in general terms the stan-
dards of professional conduct expected of lawyers in their relationships with the
public, with the legal system, and with the legal profession."24 The Disciplinary
Rules are directly prescriptive and "state the minimum level of conduct below
which no lawyer can fall without being subject to disciplinary action."25 The
Ethical Considerations "are aspirational in character and represent the objectives
toward which every member of the profession should strive."26

In 1983, the ABA significantly altered both the format and the substance
of ethical rules, devising an entirely new framework for regulation of lawyers in
the Model Rules of Professional Conduct.27 In structure, the Model Rules are
prepared in the format of a "Restatement" of the law.28 Thus, the Model Rules
consist of fifty-four black-letter and mandatory Rules,29 each of which is fol-
lowed by explanatory Comments that "provide guidance for practicing in
compliance with the Rules."30 There is nothing similar to the advisory Ethical
Considerations found in the Code. Professor Geoffrey C. Hazard, Jr., the dean
of legal ethics in America and the key draftsman of the Model Rules, insists that
they should be understood "as a code of legal standards, not ethics."31 Accord-
ingly, the Model Rules prescribe the minimum prohibitions for lawyers and
make no effort to be aspirational. The Model Rules also differ substantively

22. HAZARD & RHODE, supra note 18, at 118; WOLFRAM, supra note 16, § 2.6.3, at 56-
57.
23. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY (amended 1980). Although
several states adopted only the Disciplinary Rules, WOLFRAM, supra note 16, § 2.6.3, at 58, Iowa
adopted the full format of the Code, including both the Disciplinary Rules and the Ethical Consid-
erations. IOWA CODE OF PROFESSIONAL RESPONSIBILITY (West 1998).
24. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (amended
1980).
25. Id.
26. Id.
27. MODEL RULES OF PROFESSIONAL CONDUCT (1983). See generally WOLFRAM, supra
note 16, § 2.6.4, at 60-63 (discussing the background of the adoption of the Model Rules). The
Model Rules have been amended by the House of Delegates of the American Bar Association in
1987 and every year from 1989 through 1997 with the exception of 1996. See MODEL RULES OF
PROFESSIONAL CONDUCT (amended 1997) (listing dates of amendment).
28. ARONSON & WECKSTEIN, supra note 18, at 23.
29. See MODEL RULES OF PROFESSIONAL CONDUCT (amended 1997).
30. Id. Scope.
31. HAZARD & RHODE, supra note 18, at 109 ("Defenders of the regulatory approach see
its primary virtue as clarifying credible, enforceable requirements, unconfused by cant and exhorta-
tion; accordingly, the proposed Model Rules are defended as a code of legal standards, not of
ethics.") (citing Geoffrey C. Hazard, Jr., Rules of Ethics: The Drafting Task, 36 THE RECORD 77
(1981)).
from the Code, even in terms of the mandatory rules. For example, the Model Rules define confidentiality somewhat more broadly and generally place stricter restrictions on permissible disclosure of confidential information.\textsuperscript{32} In addition, the Model Rules include more detailed regulation of conflicts of interest and the behavior of lawyers in organizational settings.\textsuperscript{33}

However, while they were intended to replace the Code, the reception to the Model Rules among the states was uneven and slow to reach a critical mass\textsuperscript{34}—although they now plainly "constitute the governing ethical standards in a majority of American jurisdictions."\textsuperscript{35} Accordingly, over the past fifteen years, there have been two competing models, with the Model Rules slowly, but surely, moving ahead. In this competition, the Code has fallen further and further behind and its remaining adherents, including Iowa, are increasingly alone.\textsuperscript{36}

III. THE ADVANTAGES OF COMMUNITY

While popularity should not be the touchstone of a decision on what ethical rules to adopt, the widespread adoption of the Model Rules, even with

\textsuperscript{32} Compare Model Rules of Professional Conduct Rule 1.6(a) (amended 1997) (broadly protecting information "relating to representation of a client"), with Model Code of Professional Responsibility DR 4-101(A) (amended 1980) (defining protected "secret" as "information gained in the professional relationship" if revelation would be embarrassing or would be likely to be detrimental to the client or the client "has requested" that the information be held inviolate). Compare Model Rules of Professional Conduct Rule 1.6(b) (amended 1997) (narrowly authorizing, inter alia, revelation of confidential "information to the extent the lawyer believes necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm"), with Model Code of Professional Responsibility DR 4-101(C) (amended 1980) (authorizing more broadly a lawyer to "reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime"). See also infra notes 121-27 and accompanying text (discussing controversial nature of Model Rules on confidentiality). But compare Model Rules of Professional Conduct Rule 3.3 (amended 1997) (requiring a lawyer to "take reasonable remedial measures" if evidence is offered to a tribunal that the lawyer learns was false, notwithstanding that this "compliance requires disclosure of information" otherwise protected as confidential), with Model Code of Professional Responsibility DR 7-102(B)(1) (amended 1980) (precluding a lawyer from revealing his client's perpetration of "a fraud upon a person or tribunal . . . when the information is protected as privileged communication"). See also infra notes 86-94, 125-46 and accompanying text (discussing contrast between Code and Model Rules in response to the problem of client perjury).

\textsuperscript{33} See Model Rules of Professional Conduct Rules 1.7 to 1.12 (amended 1997) (governing conflicts of interests); id. Rule 1.13 (governing the organization as client).

\textsuperscript{34} See Hazard & Rhode, supra note 18, at 118; Aronsen & Weckstein, supra note 18, at 23.

\textsuperscript{35} Aronsen & Weckstein, supra note 18, at 24.

\textsuperscript{36} As discussed earlier, 39 states and the District of Columbia have adopted the Model Rules as the framework for regulation of lawyers in those jurisdictions, with four more states: Georgia, Tennessee, Vermont, and Virginia likely to join them in the near future. Assuming that these four states adopt the Model Rules, the number of states adhering to the Code will fall to six. See supra notes 5-11 and accompanying text.
variations, does reflect a broad consensus in the legal profession as to the appropriate norms of behavior and rules governing misconduct and the general effectiveness of the Model Rules in capturing this consensus.37

A. Staying Current on Professional Developments

The ABA’s Model Code of Professional Responsibility was last amended in 1980,38 after which it has been superseded by the ABA’s Model Rules of Professional Conduct.39 Consequently, those states adhering to the Code have often been bypassed with changes in the reality and understanding of legal practice over the past two decades.40 Even when Code states have diligently attempted to remain abreast of emerging developments nationally, they have been forced either to translate new proposals from the text of the Model Rules to the dialect of the Code or to transplant Model Rules language into the foreign soil of the Code. In either event, Code states are increasingly at risk of becoming passive bystanders in national debates regarding and reforms of legal ethics.

Indeed, when first promulgated by the ABA in 1983, the Model Rules already had the value of addressing professional situations or problems that had either not been adequately addressed or had not been anticipated by the Code drafters a decade-and-a-half earlier. For example, the Model Rules contain six rules governing the multifarious scenarios under which conflicts of interest could arise, including conflicts arising from transactions between lawyers and clients, conflicts between existing clients, successive conflicts involving former clients, conflicts created by successive government and private employment, and conflicts involving former judges or arbitrators.41 The parallel Code provisions touch on many, but not all, of these issues42 and thus fail to provide complete guidance to practitioners on what is perhaps the most common ethical problem to arise in everyday legal practice.

In particular, with respect to “successive conflicts”—when the interests of an existing client conflict with those of a former client—the Model Rules have the considerable virtue of providing specific textual direction. Under Model Rule 1.9, “[a] lawyer who has formerly represented a client in a matter shall not

40. See Pierce & Pera, supra note 37, at 29 ("[B]ecause the ABA no longer ‘maintains’ or updates the Model Code, Model Code states ... have been left largely to their own devices when they have attempted to update particular portions of the Disciplinary Rules to accommodate critical needs ... ").
42. See Model Code of Professional Responsibility Canon 5, DR 5-101 to 5-107 (amended 1980).
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.\footnote{43}

By contrast, the Code fails to directly address this situation. How then should a practitioner in a Code state regulate his or her behavior when representation of a current client comes into conflict with the interests of a past client? Should the lawyer assume that something like the “substantially related” test of the Model Rules will be inferred into the silence of the Code? Should he or she treat a former client like a current client (given that the Code’s conflict rules make no express distinction between a former and current client) and thus refuse ever to accept representation adverse to a former client, no matter how distant the prior representation falls into the past or how much the present representation differs from the prior representation?

Recognizing that no practical or principled purpose is served in forbidding a lawyer from ever acting adversely to a former client, when the representation is long past and the current matter bears no resemblance to the prior work, courts in the pre-Model Rules era settled upon a “substantial relationship” test by extrapolation from or common-law gloss upon the Code.\footnote{44} This general pattern of common-law supplementation has continued in the remaining Code states.\footnote{45} But is it entirely safe to rely upon these decisions in the absence of textual support in the written ethical rules? And will Code state courts be informed by Model Rules precedent and scholarship on difficult or close questions of successive conflicts of interests and the relationship between current and prior matters? Will the explanatory comments accompanying Model Rule 1.9 be recognized as persuasive authority by Code state courts? While the diligent lawyer might find “answers” to these questions in ethics opinions, caselaw, or treatise commentaries, the “values of education and guidance of practicing lawyers and judges suggest that [the] ‘answers’ [to such questions] might properly be incorporated in the ethics rules themselves.”\footnote{46}

\footnote {43} Model Rules of Professional Conduct Rule 1.9(a) (amended 1997).

\footnote {44} 1 Hazard & Hodes, supra note 6, § 202, at Intro-12 n.2 (stating that, for successive conflicts arising under the Code, “a common law loosely based on Canons 5 and 9 was cobbled together”); Stephen Gillers, What We Talked About When We Talked About Ethics: A Critical View of the Model Rules, 46 Ohio St. L.J. 243, 244 & n.12 (1985).


\footnote {46} See Pierce & Pera, supra note 37, at 27.
Similarly, the Code was frequently criticized as "directed primarily to attorneys as litigators." In recent years, the profession has come to appreciate the diverse roles that lawyers play—as negotiators, mediators, and counselors—and the likewise diverse ethical problems that arise in these areas. The Model Rules at least acknowledge different functions and introduce some minimal direction for lawyers acting in counseling, transactional, and other non-litigation capacities. In the near future, the ABA is likely to consider whether the Model Rules should be revised to address recent shifts in the legal profession, such as the growing number of lawyers acting as in-house counsel for corporations.

Turning then to the future, the national debate about formal legal ethics will tend to revolve around the structure of the Model Rules and reform efforts will build upon the substance of those rules. The preeminent forum at present for reform of ethics rules is the American Bar Association's "Ethics 2000 Commission." This Commission has been charged "to undertake an in-depth review and assessment of ethics rules during the final years of the second millennium." At the Commission's first public hearing held in May, 1998 at a national conference on professional responsibility, participants suggested revising, replacing, or creating rules concerning revelation of confidential information to prevent future injury or harm, the confidentiality issues raised by electronic transmission of information, whether fee contracts should be in writing, settlements of litigation that include secrecy clauses forbidding release of information affecting public health or safety, and a host of other subjects. Of course, this sustained debate and deliberation on legal ethics is occurring—and will be given concrete resolution—within the framework of the Model Rules.

49. ABA Panel Meets for Comprehensive Review of Its Model Rules of Professional Conduct, 97-10 Law Office Mgmt. & Admin. Rep. 6 (1997) (describing the charge of the ABA's Ethics 2000 Commission to consider whether revisions to ethics rules "are needed to address recent shifts in the legal profession, such as . . . the proliferation of in-house counsel").
52. See id. (describing proposed revisions of particular rules in the Model Rules). Although there is debate within the Ethics 2000 Commission between "minimalists" and "maximalists" on the extent of revision of ethical rules that is necessary or appropriate, the changes are likely to be proposed as amendments to the Model Rules and are unlikely to upset the settled structure of the Model Rules. ABA Center for Professional Responsibility, Ethics 2000—Commission on the Evaluation of the Rules of Professional Conduct (visited July 27, 1998) <http://www.abanet.org/cpr/ethics2k.htm> ("While it has been 20 years since the ABA convened a commission to examine the ethical precepts of the profession, there is no effort to abandon the
Lawyers practicing in the small cadre of states that continue to follow the Code may be left largely on the sidelines of this vital ethics initiative and its comprehensive evaluation of disciplinary rules. There is little incentive for these lawyers to pay close attention to the debate, much less to become actively involved in efforts to amend or revise a model ethics regime in which their home state does not participate. As a consequence, lawyers in Code states are not fully engaged in the national dialogue about emerging ethics issues, losing the opportunity both to learn from that engagement and to contribute their insights and experiences.

B. Benefiting from Common Experience

Adoption of the ethics rules that govern the vast majority of our fellow members of the profession would allow Iowa lawyers to more directly benefit from, build upon, and share in the common experiences of our colleagues across the country. If Iowa joins the community of jurisdictions that have adopted the Model Rules, then Iowa lawyers facing emerging problems of professional responsibility or encountering ethical issues of first impression in our state will have a ready source of persuasive authority to which to turn. The ever-growing library of ethics committee opinions and court decisions in other states interpreting the Model Rules will be available for comparison, guidance, and critique.

The ABA’s Committee on Ethics and Professional Responsibility regularly provides guidance on the meaning and application of the Model Rules through formal and informal opinions that are collected in several volumes. Although the Committee’s opinions have been criticized as uneven in quality, its body of work is nonetheless an important resource, outlining emerging issues and trends in the profession and suggesting at least one possible analytical resolution to the questions that have arisen. Moreover, when it provokes controversy through its opinions, the Committee’s efforts generate increased professional and scholarly debate about the issue and proposals for revision of the rules. The ABA Ethics Committee’s work, however, is plainly conducted within the framework of the Model Rules and thus as time passes will have less and less significance for the dwindling band of Code jurisdictions.

Model Rules. The Model Rules have proven to reflect, in the main, an effective approach to the resolution of many ethical issues that could serve the profession well into the next century.”; Telephone Interview with Carl A. Fierce, Professor, University of Tennessee College of Law and Reporter, Ethics 2000 Commission, ABA (July 16, 1998); see also Geoffrey C. Hazard, Patterns in Disciplinary Violations Mark Change, NAT’L L.J., Apr. 13, 1998, at A19 (concluding, in the context of grievance procedures, that “[i]t would appear that major reforms, much less a change in the basic concepts underlying the present Rules, are unnecessary”).

53. WOLFRAM, supra note 16, § 2.6.6, at 65-66.
54. Id.
Even work on professional responsibility that does not proceed under the auspices of the ABA and its Model Rules nonetheless is often strongly influenced by the prevailing ethics regime in the nation. For example, the American Law Institute (ALI), after ten years of work, gave final approval in May 1998 to the Restatement of the Law Governing Lawyers.\textsuperscript{55} The Restatement undertakes to provide a comprehensive description—and, in part, prescription—of the "legal constraints" upon lawyers "in discharging their several responsibilities as representatives of clients, officers of the legal system, and public citizens having special responsibilities for the quality of justice."\textsuperscript{56} The primary purpose of the Restatement is to guide lawyers and judges on the law regulating their behavior in the civil context, such as actions for legal malpractice, motions to disqualify counsel, and disputes concerning attorney's fees.\textsuperscript{57} Accordingly, the Restatement was influenced by the various lawyer codes but was not designed to track any particular set of ethics rules.\textsuperscript{58} Nonetheless, it should not be surprising that the ALI's effort to reflect the informed and deliberate consensus of the profession on professional conduct would naturally bear a strong resemblance in many respects to the ethics rules regime that governs in nearly eighty percent of American jurisdictions.

Indeed, the reader of the Restatement will find that the influence of the Model Rules upon this project is heavy and readily apparent.\textsuperscript{59} Even when the ALI has departed in substance from the ABA's approach, the pertinent Restatement provision generally has been framed by and is responsive to the parallel Model Rules provision.\textsuperscript{60} The American Law Institute's incomparable treatise

\textsuperscript{55} \textit{ALI Completes Restatement on Lawyers, Gives Final Approval to All Sections}, 14 Laws. Man. on Prof. Conduct (ABA/BNA) No. 8, at 211 (May 13, 1998) [hereinafter ALI Completes Restatement].


\textsuperscript{57} \textit{Restatement of the Law Governing Lawyers} Reporter's Memorandum, at xxiv (Proposed Final Draft No. 2, 1998); \textit{ALI Completes Restatement, supra} note 55, at 211.

\textsuperscript{58} See \textit{Restatement of the Law Governing Lawyers} Foreword, at xxii (Proposed Final Draft No. 1, 1996) (stating that the "rules of law set forth in this Restatement are generally drawn, and at all events are influenced, by the rules set forth in 'the lawyer codes'" including the Model Rules, the Code, locally formulated rules, and counterpart rules in the federal courts).

\textsuperscript{59} See, e.g., \textit{Restatement of the Law Governing Lawyers} § 155 (Tentative Draft No. 8, 1997) (drawing heavily upon Model Rule 1.13 on lawyer's responsibilities in representing the organization as a client); \textit{id.} § 157 (following Model Rule 4.1 on communications on behalf of a client with a non-client); \textit{Restatement of the Law Governing Lawyers} § 213 (Proposed Final Draft No. 1, 1996) (tracking Model Rule 1.9 on conflicts of interest with a former client); see also \textit{ALI Completes Restatement, supra} note 55, at 211 (reporting that Restatement Section 215 on compensation or direction of lawyer by a third person was amended on the floor to incorporate the standard of Model Rule 1.8(f)). These examples scratch only the surface of the Model Rules' influence upon the substance of the Restatement.

\textsuperscript{60} See, e.g., \textit{Restatement of the Law Governing Lawyers} §§ 117A, 117B (Proposed Final Draft No. 2, 1998) (as stated in both the Comments and the Reporter's Notes following
on the law governing lawyers will be of diminished educational, research, persuasive, and catalytic value in those states that fall outside of the Model Rules mainstream.

With respect to the ALI’s work, the influence runs both ways, as the ABA’s Ethics 2000 Commission is reviewing the Restatement of the Law Governing Lawyers to determine whether that project “can offer constructive enhancements to the Model Rules.”61 However, this dynamic relationship between the Model Rules and the Restatement is definitely a bilateral one; the Code is not a participating third party. Once again, formal ethics discourse at the national level is being heard primarily within the forum of the Model Rules. Accordingly, full admission to that conversation requires intimate familiarity with the Model Rules.

In response, some might argue that the small remnant of Code states are not wholly isolated, as many of the Code provisions find a counterpart in the Model Rules. But these parallels between the competing ethics regimes fade over time and may be misleading even when they persist.

As a practical example, consider the lawyer advocate who finds him or herself in a situation where he or she has knowledge that could be presented on the client’s behalf as a witness in litigation.62 Or place yourself in the position of a judge who must decide whether to disqualify an attorney who has information that conceivably could be used at trial. When must the lawyer abandon the role of the advocate and testify on behalf of the client? When should the judge grant the motion to disqualify?

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61. ABA Panel Meets for Comprehensive Review of Its Model Rules of Professional Conduct, 97-10 LAW OFFICE MGMT. & ADMIN. REP. 6 (1997) (saying that the Ethics 2000 Commission will review the ALI’s Restatement project to determine whether it “can offer constructive enhancements to the Model Rules”); see also Memorandum from Chief Justice E. Norman Veasey, Chair of Ethics 2000 Commission, ABA, (Feb. 1998) (listing the Restatement of the Law Governing Lawyers as one of the matters the Commission will be reviewing); Ritchenya A. Shepherd, Law of Lawyering, A.B.A. J., July 1998, at 30 (quoting Chief Justice E. Norman Veasey, the chair of Ethics 2000, as saying the commission is “being informed by the ALI Restatement of the Law Governing Lawyers in practically every aspect that we look at”).

On this basic question, the Code and the Model Rules are apparently—perhaps beguilingly—parallel. Under Disciplinary Rule 5-102(A) of the Code, a lawyer generally should withdraw as counsel if the lawyer "learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client." In an apparently similar statement of the general rule, Model Rule 3.7 provides that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness." Although the choice of words varies—"ought to be called as a witness" under the Code versus "necessary witness" under the Rule—they could be read as articulating the same standard in different language.

But do these Code and Model Rules provisions truly mean the same thing or are the apparent synonyms ("ought" versus "necessary") misleading? The Model Rules drafters obviously opted for the phrase "necessary witness" over the existing Code standard of "ought to be called as a witness." Was this word choice in the Model Rules made to achieve greater clarity in expression of a continuing standard or to change the meaning from prior practice under the Code? Moreover, the policy underlying the "advocate-witness" prescription of


64. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102(A) (amended 1980) (emphasis added). The Iowa Code provision is identical. IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102(A) (West 1998) ("If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a member of the firm ought to be called as a witness on behalf of the client, the lawyer shall withdraw from the conduct of the trial [subject to certain defined exceptions].").

65. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 (amended 1997) (emphasis added).

66. With respect to the scope of disqualification in the "advocate-witness" situation, the Model Rules plainly depart from the Code. Under the Code, the lawyer is disqualified from continuing to represent the client as an advocate, whenever he or another lawyer in his firm becomes a witness. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B), 5-102 (amended 1980); IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(D), 5-102 (West 1998). By contrast, Model Rule 3.7 allows a lawyer to continue to "act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness," unless that testimony will create a conflict of interest. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 (amended 1997). In addition, the exceptions to the advocate-witness disqualification rule—which allow an attorney to continue representation even when he or she would otherwise be a necessary witness or even will actually offer testimony—are less restrictive under the Model Rules than under the Code. See 1 HAZARD & HODES, supra note 6, § 3.7:202, at 684-686.1; Wydick, supra note 63, at 678-79.

67. While little is known of the intentions of the Model Rules drafters, the sparse evidence could be construed as pointing in different directions. Drafting notes indicate that the "ought to be called" language of the Code was objectionable to the Model Rules drafters "because it did not sufficiently confine itself to instances in which the lawyer's testimony was 'necessary.'" WOLFRAM, supra note 16, § 7.5.2, at 381 n.63. Professor Hazard, the key drafter of the Model Rules, states in his co-authored treatise that the Code's language was "problematic" and "vague"
the Code is subtly different from that of the Model Rules provision. The Code
"treated the advocate-witness problem primarily as one of conflicts of interest,"
while the Model Rules "treat the advocate-witness issue more generally as a
problem of managing advocacy." 68 Thus, our interpretation of these provisions
might begin from different premises or emphases.

What then is the standard for determining when the attorney's testimony is
so valuable to the client that he or she should appear as a witness (thus mandating
withdrawal), rather than being merely helpful or cumulative such that the
lawyer properly may avoid the witness stand (and continue as an advocate)?
Or must the attorney surrender the representation and appear as a witness whenever
his or her evidence might conceivably be useful? Is this a purely objective test
to be applied by outside evaluators (such as the judge) or should deference be
granted to the attorney's judgment (in consultation with the client) as to whether
to withdraw and testify on behalf of the client? Does the different phrasing of
the Model Rules shift the balance in close cases away from disqualification and
in a manner contrary to that which would pertain under the Code?

It is not my purpose to definitively answer these questions here, 69 but
rather to emphasize that such questions must be asked and answered whenever

and was read by some courts "to require disqualification if the lawyer's testimony could conceivably
be used at trial." 1 HAZARD & HODGES, supra note 6, § 3.7:201, at 682. He explains that Model
Rule 3.7 is "more carefully tailored" and applies only when the advocate is "likely" to be a "necessary"
witness; "a lawyer does not become 'necessary' merely because an opposing party asserts that
the lawyer has knowledge that might be relevant." Id. at 682-83. Thus, the Model Rules' "necessary
witness" standard could be viewed as narrower than the Code's "ought to be called as a
witness" provision. On the other hand, the Model Rules' use of "necessary" could be understood
as clarifying the manner in which the Code's "ought to be called" provision was most appropriately
interpreted, thus essentially preserving the existing standard with "more carefully tailored" language.

68. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 168, Reporter's Note (Tentative

69. My tentative and general answer is that the "ought to be called as a witness" test of
the Code (properly understood and applied) and the "necessary witness" standard of the Model
Rules are substantially the same. Difficult questions of application remain, but the outcomes
should not vary between the Code and the Model Rules (although the Model Rules are clearer in
pointing the way to proper resolution). However, my conclusion was reached only by studying the
text and commentary on both the Code and the Model Rules; reading ethics treatises describing the
drafting, purpose, and meaning of the Model Rules provision; discovering that the "necessary wit-
ness" test of the Model Rules was drawn from court decisions interpreting and applying the Code's
"ought to be called as a witness" provision; and reasoning that the somewhat different policy
underlying the Model Rules "advocate-witness" rule likely is more reflected in the Model Rules' refusal
to impeach disqualification to other lawyers in the law firm. See Erik G. Luna, AVOIDING A
"Carnival Atmosphere": Trial Court Discretion and the Advocate-Witness Rules, 18 WHITTNER L.
REV. 447, 459 (1997) (stating that "tribunals and practitioners have found little difference between
the advocate-witness provisions in the Model Code and the Model Rules" and that "the discrepancy
in language ["ought to be called as a witness" versus "likely to be a necessary witness"] has been
viewed as rhetorical rather than purposeful"); Wydick, supra note 63, at 666 (1982) ("Most courts
we try to compare a Code provision with its Model Rules counterpart. When a lawyer in a Code state is looking for persuasive precedent in the majority of other jurisdictions adhering to the Model Rules, he or she cannot casually assume that an apparently parallel Model Rules provision—and constructions of it by courts in other states or by scholars—offers clear guidance. In close and difficult cases, subtle differences between the Code and the Model Rules, in purpose and language, may take on magnified importance. And, of course, in many circumstances, the differences are not subtle or there simply are no parallels between the two; thus leaving the Code state practitioner isolated from the experiences of his or her peers in other states. Even when we ultimately conclude that the meaning of parallel Code and Model Rules provisions are the same, we will have reached that point only after additional preliminary translation work that would be unnecessary if we were all speaking the same language.

In sum, because nearly everyone else is talking in the language of the Model Rules, Iowa lawyers must learn the grammar and vocabulary of the rules in order to fully join in the conversation. As the leaders of the movement to the Model Rules in Tennessee have argued, “membership in a diminishing minority of Model Code jurisdictions means that the working lawyer or judge who wants and needs an answer to an ethical question not easily answered by the plain language of the Code has less and less analogous authority from other jurisdictions on which to draw for help.”

IV. THE DISADVANTAGES OF SOLITUDE

A. Isolation from the Growing Interstate Legal Practice

It is so frequently stated, and perhaps overstated, as to have become a truism—the practice of law today is increasingly an interstate practice. Likewise, interpret ‘ought to be called as a witness’ to mean that the lawyer is a ‘necessary’ or ‘indispensable’ witness—the lawyer is the only person available to testify about a crucial fact.”); see also supra note 67. This conclusion, however, is certainly subject to dispute and depends upon what one views as the proper interpretation of the Code provision. See generally Jeffrey A. Stonerock, The Advocate-Witness Rule: Anachronism or Necessary Restraint, 94 Dick. L. Rev. 821, 828-29, 846-47 (1990) (observing that some courts interpret the Code’s “ought to be called” narrowly to apply only when the lawyer possesses crucial information while other courts interpret the phrase broadly to include a lawyer who is only a potential witness, and further contending that the general opinion of courts and commentators is “that the Rule 3.7 language setting a threshold of ‘likely to be a necessary witness’ before courts engage in the balancing test places a higher burden on the opposing party seeking disqualification than did the Model Code standard”). In any event, I had to travel quite a long distance just to get to the starting line and conclude that Model Rules precedent on the “advocate-witness” rule is relevant by analogy to the Code.

70. Pierce & Pera, supra note 37, at 27.
71. On the growth of interstate law practice, see Samuel J. Brakel & Wallace D. Loh, Regulating the Multistate Practice of Law, 50 Wash. L. Rev. 699, 699-700 (1975); Mary C. Daly,
the variation of disciplinary codes from state to state is frequently identified as a troublesome obstacle to conscientious, efficient, and ethical practice by attorneys representing interstate concerns. One commentator recently summarized the arguments of those deprecating the “balkanization” of ethical regulation of lawyers in America today:

According to the rhetoric of the organized bar, the increasing diversity in conduct rules and the growth of multijurisdictional practice have created an “increasingly serious problem” that poses “grave difficulties” for multistate practitioners. Lawyers’ inability to determine in advance which of several inconsistent rules might later be applied to their conduct “undermines compliance with legal ethics codes.” Commentators, lamenting the “critical level of interstate disparity in professional ethics,” complain that lawyers’ “ability to find guidance in a single state’s code of conduct has virtually disappeared,” explain that law firms are “bedeviled” by conflicting standards that might apply to a team of multiply-admitted practitioners working on a single transaction, and predict that inconsistency in state ethics rules will harm the attorney-client relationship.\(^{72}\)

However, this same commentator concludes that these “calls to alarm” are exaggerated, that few state ethical rules are in direct and irreconcilable conflict, and that inconsistencies in applicable disciplinary standards are unlikely to create irresolvable problems when applied to real-world situations rather than cleverly crafted hypotheticals. Moreover, he reminds us that, even today, “the work of many (or even most) lawyers is confined to one state.”\(^{73}\)

Nonetheless, the problem of ethical code disparity among the states (even short of sharp inconsistency) and the impact on the growing multistate nature of legal practice cannot be dismissed, even if it should not take center stage in an evaluation of a state’s ethics code. State-by-state variation in ethical regimes is inevitable and, when thoughtful and principled, even commendable. Such differences, however, should reflect a deliberate and considered choice grounded in policy and the principled consensus of the state bench and bar. (As discussed below, I propose that Iowa maintain its individual identity in the crowd by insisting upon certain discrete and principled variations when adopting the

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\(^{72}\) \textit{Moulton, supra} note 71, at 99-100 (citations omitted).

\(^{73}\) \textit{Id.} at 83.
Model Rules). By contrast, only confusion is produced if a state adopts unnecessary or inadvertent variations from the Model Rules, whether because of the state’s isolation from national developments or from stubborn adherence to an outmoded ethics code.

There is a difference between diversity, which is to be valued, and chaos, which is to be avoided. The difference lies in deliberation and principle. Surely as much uniformity as is possible without sacrificing the considered principles of local legal culture is a worthwhile goal. Adoption of the Model Rules—even with appropriate modifications and relatively minor departures—would, in a single stroke, bring Iowa ethics rules into conformity with the body of disciplinary rules in force in eighty percent of American jurisdictions.

To be sure, we should approach the question of reducing barriers to interstate practice in a balanced manner and without undue apprehension or alarm. For the foreseeable future, most Iowa lawyers will likely continue to practice solely or primarily within this state. At the same time, a growing number of Iowa attorneys are admitted to practice in more than one state. Moreover, thriving Iowa businesses must compete and engage in transactions across state lines. Barriers to interstate practice, such as those occasioned by unnecessarily divergent ethics rules, not only impair effective representation by Iowa lawyers, but also add unjustified costs to their clients. In sum, we cannot ignore the consequences of ethical solitude upon the ability of Iowa lawyers and the clients they represent to participate fully in the national economy.

B. The Prospect of Inconsistency with Federal Legal Practice

In contrast to interstate legal practice, which at present may not reflect the day-to-day realities of most Iowa lawyers, a substantial percentage of the Iowa bar does practice, at least occasionally, in the federal courts located within our state. In that area too, Iowa’s growing isolation in ethical rules may create problems for Iowa lawyers. Continued adherence to the Code raises the prospect of confusion and inconsistency in ethical guidance within the very borders of our state.

In the past decade, scholars, practitioners, and increasingly the judges themselves have deplored the growing disunity and fragmentation in procedural rules governing the federal courts. In a study on federal procedure, I described the situation as follows:

A little more than half a century after federal procedure was unified in 1938 with the adoption of the Federal Rules of Civil Procedure, the federal judicial system is de-evolving into a collection of largely autonomous court units with separate procedural regimes. Instead of a unitary federal judicial

74. See infra Part V.A.
system, joined together in a common procedural enterprise, each district and each circuit has become its own field with its own independent rules governing the progress and disposition of litigation. As Professor Charles Alan Wright laments, "[p]rocedural anarchy is now the order of the day."75

In response to this procedural drift, the Committee on Rules of Practice and Procedure (the Rules Committee) of the United States Judicial Conference has conducted careful studies and has begun considering means to arrest the disintegration of federal civil and appellate procedures through the proliferation of inconsistent local rules.76

As one piece of this general problem, commentators have also decried the disarray among the federal district courts on rules governing attorney conduct or ethics.77 Indeed, the Reporter for the Rules Committee, Professor Daniel Coquillette, has concluded that "[n]o area of local [federal district court] rulemaking has been more fragmented than local rules governing attorney conduct."78 Studies have found more than half a dozen different designs for attorney standards among the federal district courts, ranging from the absence of any express rule to adoption of federal attorney conduct rules that conflict with those of the state in which the federal court sits.79 In response, some scholars have urged the federal judiciary to adopt its own set of ethical rules through its procedural rulemaking process, either by incorporating the Model Rules wholesale or


76. See Daniel R. Coquillette et al., The Role of Local Rules, A.B.A. J., Jan. 1989, at 64-65 (discussing the proliferation of local rules in the federal district courts and the Judicial Conference's "Local Rules Project").


79. See id. at *335-51, *375-405; Mullenix, supra note 77, at 132-56. As a particularly notorious example of the disarray in the federal courts, the judges of the Eastern and Southern Districts of New York independently adopted the Model Rules as the standards of ethical conduct in those districts, notwithstanding that the State of New York has never adopted the Model Rules and still applies the Code to practitioners in that state. See Mullenix, supra note 77, at 118-20.
with modifications,\textsuperscript{80} or by developing an independent set of standards comprehensively addressing federal practice.\textsuperscript{81} Others have suggested a minimalist approach under which each federal district court would be obliged to follow the ethical rules in the state in which it sits.\textsuperscript{82}

At present, the Rules Committee is tentatively exploring a middle course toward greater harmony among the federal courts on rules of professional responsibility. The Committee directed its Reporter to draft (1) a set of national federal rules on certain key subjects of professional ethics that would apply uniformly in every federal court, and (2) a general rule under which relevant state standards would be adopted for each federal court on all remaining matters of professional conduct.\textsuperscript{83} In sum, this approach combines a "narrow core of uniform federal rules" for frequently litigated issues [of attorney conduct] with dynamic conformity, that is, deference to state standards in all other areas."\textsuperscript{84} The draft package of rules is currently being reviewed by five advisory committees that report to the Rules Committee.\textsuperscript{85}

This draft includes nine federal rules on specific subjects of attorney conduct that frequently arise in federal court, namely confidentiality, conflicts of interest, candor toward the tribunal, the advocate-witness rule,\textsuperscript{86} truthfulness in statements to others, and lawyers' communications with persons represented by counsel (commonly known as the "no-contact rule").\textsuperscript{87} Significantly for the pre-

\textsuperscript{80} See Coquillette Memorandum, \textit{supra} note 78, at *370 (listing as possible options for action by the federal judiciary either (1) the addition of "a short rule to the uniform federal rules that simply incorporated the ABA Model Rules "as amended from time to time by the American Bar Association, except as otherwise provided by specific federal rules" or (2) adopting a ""federal" version of the ABA Model Rules," adapted as appropriate, as an appendix to the rules of procedure).

\textsuperscript{81} Green, \textit{supra} note 77, at 514 (advocating independent development of detailed federal rules of attorney conduct); see also Mullenix, \textit{supra} note 77, at 126 (generally urging "Promulgation of a uniform code of professional responsibility for federal practitioners," without discussing the source or content of such rules).


\textsuperscript{84} Note, \textit{Federal Rules of Attorney Conduct, supra} note 82, at 2071-72 (quoting Memorandum from Daniel R. Coquillette, Reporter, Committee on Rules of Practice and Procedure, to the Committee on Rules of Practice and Procedure I, I-2 (Dec. 1, 1997)).

\textsuperscript{85} \textit{Proposal for Uniform Ethics Rules, supra} note 83, at 78.

\textsuperscript{86} See \textit{generally supra} notes 62-69 and accompanying text (discussing the advocate-witness rule).

\textsuperscript{87} \textit{Draft Federal Rules of Attorney Conduct, 14 LAWS. MAN. on Prof. Conduct (ABA/BNA) No. 3}, at 82-86 (Mar. 4, 1998) [hereinafter \textit{Draft Federal Rules of Attorney Conduct}].
sent discussion, "the draft federal rules closely follow the substance of the corresponding ABA Model Rules, with only small stylistic changes."

Accordingly, lawyers in a Code state—such as Iowa—face the prospect of being held to one set of ethical standards when practicing in state courts and yet another when entering into the federal courthouse. Even in the limited areas addressed by the Draft Federal Rules, the Model Rules vary from and, in at least one area, are inconsistent with the Code. On some points, the variance may provoke little consternation. For example, Rule 5 of the Draft Federal Rules adopts verbatim the successive conflict of interest standard of Model Rule 1.9. As discussed above, while the Code failed to expressly address conflicts involving former clients, Iowa and other Code states, through common-law extrapolations from the Code, have settled upon a standard similar to that of the Model Rules. Thus, while the federal rule would have the virtue of greater clarity, the expectations of counsel presumably would be consistent.

However, of greater concern, draft federal Rule 7 incorporates Model Rule 3.3 which in turn reflects a deliberate departure from the Code policy. Under Disciplinary Rule 7-102(B)(1) of the ABA Model Code, a lawyer who learns that his or her client has perpetrated "a fraud upon a person or tribunal"—such as by committing perjury upon the witness stand—is precluded from revealing that information to the court "when the information is protected as a privileged communication." In other words, while a lawyer of course must not knowingly offer perjured testimony at trial, the client's admission to perjury after-the-fact is protected by the attorney-client privilege, in the same manner as a client's confession of other past wrongdoing. The Model Rules reverse that outcome. Under Model Rule 3.3, a lawyer is required to "take reasonable remedial measures" if he or she learns that evidence offered to a tribunal was false, notwithstanding that this "compliance requires disclosure of information" other-

88. Proposal for Uniform Ethics Rules, supra note 83, at 78; see also Draft Federal Rules of Attorney Conduct, supra note 87, at 82-86 (notes accompanying rules state that changes are mostly stylistic).
89. Proposal for Uniform Ethics Rules, supra note 83, at 78.
91. See supra notes 43-46 and accompanying text.
93. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (amended 1997).

Disciplinary Rule 7-102(B)(1) provides in pertinent part:
A lawyer who receives information clearly establishing that . . . [his client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected client or tribunal, except when the information is protected as a privileged communication.

Id.
wise protected as confidential. In a formal ethics opinion, the ABA’s Committee on Ethics and Professional Responsibility confirmed that Model Rule 3.3 “represent[s] a major policy change” from the Code because the duty to disclose a client’s perjury would no longer be excused by client confidentiality. The Committee concluded that the attorney’s duty under Rule 3.3, to take “reasonable remedial measures” to correct the fraud, mandates revealing his or her client’s perjury directly to the court.

The Iowa version of Disciplinary Rule 7-102(B) resembles that of the ABA Model Code and also prohibits the attorney from disclosing the client’s fraud upon the tribunal when the information is protected under Iowa Code section 622.10, which is the statutory attorney-client privilege. Although the Iowa rule’s incorporation by reference of the statutory privilege has created some ambiguity in its meaning and scope, the Iowa Board of Professional Ethics and Conduct has resolutely construed the rule as, not only excusing the attorney from a duty to disclose, but affirmatively prohibiting an attorney from revealing a client’s confidential admission of fraud. Accordingly, a federal ethics rule based

95. **Model Rules of Professional Conduct** Rule 3.3 (amended 1997). Rule 3.3 provides:

(a) A lawyer shall not knowingly:

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6 [the confidentiality rule].

Id.


97. Id.

98. Iowa Code of Professional Responsibility Disciplinary Rule 7-102(B)(1) states:

A lawyer who receives information clearly establishing that . . . [a] client has . . . perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses . . . the lawyer shall reveal the fraud . . . except when barred from doing so by Iowa Code section 622.10. If barred from doing so by section 622.10, the lawyer shall immediately withdraw from representation of the client unless the client fully discloses the fraud to the person or tribunal.

IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (West 1998). Section 622.10 of the Iowa Code supplements the common-law attorney-client privilege with a statutory privilege for information received by the attorney from the client during representation. See **Iowa Code § 622.10** (1997).

99. The ambiguity arises from the language in section 622.10 stating that “[a] practicing attorney . . . shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person’s professional capacity.” **Iowa Code § 622.10(1)** (1997) (emphasis added). The Iowa Supreme Court has, from time to time, offered the reminder that this statutory attorney-client privilege is an evidentiary provision and applies only to preclude the testimonial use of privileged information. See, e.g., McMaster v. Iowa Bd. of Psychology
on the Model Rules would be inconsistent with current Iowa practice. In sum, if

Exam’rs, 509 N.W.2d 754, 757 (Iowa 1993) ("The privilege in section 622.10 is limited to disclosure of confidential communications by the giving of testimony."); State v. Munro, 295 N.W.2d 437, 443 (Iowa 1980). Accordingly, based upon a superficial and literal reading, one could argue that the exception language in Disciplinary Rule 7-102(B), by referring to Iowa Code section 622.10, is likewise so limited. Thus, the rule could be read as obliging an attorney to disclose a client’s confession of fraud to the tribunal by any means short of actually taking the stand and testifying—that is, “giving testimony”—against his or her client.

Of course, such a reading would virtually nullify the disciplinary rule’s purpose of protecting client confidentiality. As long as lawyers resisted taking the witness stand, they could regularly be obliged to reveal past client fraud to courts and other persons. If this interpretation prevailed, the language in Disciplinary Rule 7-102(B)—excepting the attorney from a duty of disclosure when the information is confidential—would almost never be implicated. The exception would become meaningless. But Disciplinary Rule 7-102(B)(1) itself anticipates that attorneys will find themselves unable to reveal a client’s perjury by reason of client confidentiality and thus alternatively directs the attorney to withdraw if the client fails to rectify the fraud with the tribunal or person affected. Iowa Code of Professional Responsibility DR 7-102(B)(1) (West 1998). Read in context, and in appreciation that the ethic’s rule drafters presumably sought to implement the parallel provision in the ABA’s Model Code with Iowa-specific statutory language, the Iowa version of Disciplinary Rule 7-102(B)(1) should be read as substantially identical in effect with that of the Model Code. While a duty to disclose client perjury notwithstanding client confidentiality may (or may not) be a preferable policy, see infra notes 137-53 and accompanying text, the current language of the Disciplinary Rule would be a strange, indirect, and misleading way to accomplish that purpose.

Moreover, the Iowa Supreme Court has also said, with respect to section 622.10, that when direct revelations by a professional are prohibited under the section, the information may not be exacted by indirect means. Newman v. Blom, 249 Iowa 836, 843, 89 N.W.2d 349, 354-55 (1958). If the attorney is precluded from revealing the client’s confidences in testimony at the witness stand, then other means of disclosure are arguably prohibited as well, both as indirect evasions of section 622.10 and because those disclosures could well become the subject of testimony if controverted by the client. Moreover, the Iowa Supreme Court has recognized a broad attorney-client privilege under the common-law, which supplements the testimonial privilege of section 622.10. Squealer Feeds v. Pickering, 530 N.W.2d 678, 683-84 (Iowa 1995).

The Iowa Supreme Court’s Board of Professional Ethics and Conduct has confirmed the understanding of Disciplinary Rule 7-102(B) as broadly precluding attorney revelation of client confidences. In Iowa Ethics Opinion 93-18, the Board concluded that the client’s confession of fraud was a confidential communication entrusted to the lawyer in his or her professional capacity and thus “not only do[es] the attorney] not have a duty to disclose under the Iowa Code of Professional Responsibility for Lawyers, but under section 622.10, the Code, [the attorney] may not disclose it.” Iowa Sup. Ct. Bd. of Prof’l Ethics & Conduct, Op. 93-18 (1993). When asked to reconsider this opinion in light of the Iowa Supreme Court’s decisions limiting the privilege in section 622.10 to disclosure of confidential communications by the giving of testimony, the Board reaffirmed its prior opinion as correct. Iowa Sup. Ct. Bd. of Prof’l Ethics & Conduct, Op. 93-37 (1993). The Board explained that the Supreme Court’s rulings arose in the different context of evidence, that is, where a party or counsel was being asked to waive a privilege at trial. Id. By contrast, Disciplinary Rule 7-102(B) speaks to the question of voluntary disclosure of a secret or confidence when a client has committed fraud. Id.

In any event, any uncertainty or ambiguity about the meaning and scope of Disciplinary Rule 7-102(B) is yet another reason to reexamine the Iowa ethical rules and to either adopt the greater clarity of the Model Rules or clarify the substance of a different Iowa rule.
the correct answers to the questions were the same under both the Code and the Model Rules, and the MPRE thus did not test the distinctions between the two.\textsuperscript{109} The MPRE has been criticized on this ground: "Because only a discrete number of propositions are true under both standards, preparation for the MPRE typically was narrowly-focused."\textsuperscript{110} In any event, the neutral stance of the MPRE to date has certainly not ensured that bar applicants have any substantial familiarity with the Code.

More significantly, as of 1999, the drafters of the MPRE have dropped any pretense of neutrality between the Model Rules and the Code. In response to criticism, the National Conference of Bar Examiners has revised the test to address a broader range of legal and ethical issues facing lawyers.\textsuperscript{111} But while the specifications of the MPRE may have broadened in these respects, it has been narrowed to exclude the Code. Henceforth, the questions on the MPRE will "reflect[] an acknowledgement that the modern law governing the conduct of lawyers is based in large part on the disciplinary rules articulated in the Model Rules and the Model Code of Judicial Conduct."\textsuperscript{112} The National Conference of Bar Examiners explained that "the law of professional responsibility has changed so significantly in the past decade since the ABA abandoned the Model Code that the law cannot be properly tested under the limitations imposed by the current test specifications."\textsuperscript{113} Accordingly, the MPRE no longer gives the slightest nod to the Code perspective and "the correct answers to questions relating to attorney discipline will be governed exclusively by the Model Rules."\textsuperscript{114}

It is difficult to overstate the significance of this development and what it means for the survival of the Code as a meaningful and universal standard for professional responsibility in Iowa: Beginning in 1999, applicants to the Iowa bar will be expected to demonstrate detailed knowledge of a set of ethical rules that do not apply in this state, while the governing Code will be wholly neglected. How can the Code remain a living ethical framework in Iowa when it has become irrelevant to the examination of bar applicants? What statement is

\textsuperscript{109} MPRE 1998 Information Booklet, supra note 107, at 26; Letter from Erica Moeser, President, National Conference of Bar Examiners, to Law Schools Deans 1 (Feb. 28, 1997) [hereinafter Erica Moeser Letter].


\textsuperscript{111} Id.

\textsuperscript{112} Erica Moeser Letter, supra note 109, at 2; see also MPRE 1998 Information Booklet, supra note 107, at 27 (announcing the adoption of "new test specifications for the MPRE beginning with the March 1999 administration," including testing based upon the disciplinary rules "currently articulated in the ABA Model Rules of Professional Conduct").

\textsuperscript{113} Erica Moeser Letter, supra note 109, at 2.

\textsuperscript{114} See Levin, supra note 107, at 396 n.4.
the Iowa bench and bar making about our confidence in the viability of the Code when familiarity with it has become dispensable for admission to the bar?

In sum, at present, a new member of the Iowa bar—particularly one who graduated from a law school outside of the state—likely will not have studied the Code in any depth in law school and will not have been specifically examined on it. Beginning in March 1999, new admittees to the Iowa bar will actually be expected to demonstrate their understanding of the Model Rules as a condition of admission to the bar, notwithstanding that the state formally adheres to the Code. While new Iowa lawyers presumably will give the Iowa Code of Professional Responsibility at least a cursory read upon assuming their new responsibilities, the Code will not have been instilled into them as an integral part of their professional identity or as a meaningful guidepost for conduct.

Nor is it realistically possible to turn back the clock. As the Tennessee ethics rules revisers have concluded, "[a]t best, the Model Code is currently on the side of the stage and headed offstage, almost certainly never to return."\(^{115}\) Swimming nearly alone in a Model Rules sea, Iowa cannot withstand the tidal wave of ethical attention and instruction directed toward the Model Rules. By virtue of the dominance of the Model Rules in law school education, the next generation of lawyers will find its thinking and approach to formal legal ethics framed by the Model Rules. It is also unlikely that Iowa will abandon the MPRE, which is currently used by forty-seven states,\(^{116}\) and thereby become further isolated from the national professional community. Yet, the MPRE unsurprisingly will now track the Model Rules as the consensus of the profession around the country. Thus, it is time for Iowa as well to acknowledge the wave of the future.

V. JOINING THE CROWD BUT MAINTAINING INDIVIDUAL IDENTITY

A. Adopting the Model Rules with Principled Modifications

The project of adopting the Model Rules of Professional Conduct in Iowa will demand a committed and patient drafting committee representative of all elements of the Iowa bench and bar. Moreover, an extended period of time would probably be necessary for drafting and evaluating each portion of the Model Rules, to allow full opportunity for lawyer comment on proposals, for bar recommendation of the final package, for Iowa Supreme Court approval of the final rules, and finally for transition and education of Iowa lawyers. The magnitude of the task ahead is all the more reason to initiate the enterprise in the near future, rather than waiting until fast-moving developments or a crisis of

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116. See supra note 107 and accompanying text.
confidence in the Code force matters along more hastily and without time for full deliberation.\textsuperscript{117}

Fortunately, the path for transition from the Code to the Model Rules has been well-worn by some thirty-nine states before us, as well as four other states that are currently walking along it.\textsuperscript{118} A substantial body of literature has accumulated concerning the Model Rules as proposed and adopted in a multitude of states, much of which has been published and is thus readily accessible.\textsuperscript{119} For those states currently in the adoption process—Georgia, Tennessee, Vermont, and Virginia—detailed materials are also available, including information on the structure, approach, and work method of the drafting committee; detailed explanations of each part of the proposed rules; committee notes outlining the new rules and comparisons with the prior code; and identification of difficult or controversial provisions with suggested resolutions.\textsuperscript{120} Thus, it would not be necessary to reinvent the wheel, and the road ahead—including potholes to be avoided and potential detours—is well-marked.

In general, of course, uniformity with the Model Rules as promulgated by the ABA and adopted by most other states would be the guidepost in drafting the Iowa Rules of Professional Conduct. However, Iowa would undoubtedly wish at discrete points to depart from the ABA’s version of the Model Rules to preserve certain principled practices of local professional culture. When the Model Rules were first promulgated in 1983, one leader of the ABA extended the invitation to

\textsuperscript{117} See infra Part VI.

\textsuperscript{118} See supra notes 5-11 and accompanying text.


"shape these rules to your own states when you get home." Thus, as has been true in Tennessee where the transition to the Model Rules is underway, when the legislature or the Iowa Supreme Court "had firmly or recently decided a question of law or written another rule directly relevant to an ethics rule"—and there is no good reason to revisit that decision—adherence to that existing state law would take precedence over uniform adoption of the Model Rules.

For example, Iowa very recently adopted an amendment to Disciplinary Rule 5-101 providing: "A lawyer shall not engage in sexual relations with a client, or a representative of a client, unless the person is the spouse of the lawyer or the sexual relationship predates the initiation of the attorney-client relationship." Iowa's deliberate and principled decision to firmly address the harm caused by an attorney's initiation of a sexual relationship with an often-vulnerable client should be preserved in any transition to the Model Rules. Indeed, on this singular point, Iowa is ahead of the game. At present, the Model Rules contain no comparable provision. The ABA's Ethics 2000 Commission is actively considering a revision to the Model Rules prohibiting attorneys from having sexual relations with clients. If Iowa were to join the Model Rules community, it would be in a better position to share this experience and promote such a rule change nationally.

Exceptions from or supplements to the Model Rules in the Iowa version would likely be few and limited. In fact, very few aspects of the Model Rules have proven controversial or prompted states to adopt varying language. As Professor H. Geoffrey Moulton, Jr. outlines:

Though the Model Rules and their amendments have not been uniformly adopted, and some state amendments have been significant, those amendments typically involve a small number of rules and take a limited number of forms. In other words, those states adopting some version of the Model Rules have adopted the vast bulk of the text without change. The great majority of state amendments concern either confidentiality or information about legal services (advertising and solicitation).

This observation serves also as a prediction of the narrow areas in which Iowa would most likely find good reason to deviate from the uniformity of the

122. See Pierce & Pera, supra note 37, at 30.
123. IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B) (West 1998) (new rule effective Jan. 2, 1995); see also id. EC 5-25 (aspirational and clarification language on sexual relations with clients).
125. Moulton, supra note 71, at 91.
Model Rules—confidentiality and advertising/solicitation. The latter is discussed below.126 With respect to confidentiality, one example of particular controversy has been the appropriate circumstances justifying disclosure of client confidences to prevent criminal harm. At present, Disciplinary Rule 4-101(C)(3) of the Iowa Code authorizes (but does not compel) a lawyer to reveal "[t]he intention of the client to commit a crime and the information necessary to prevent the crime."127 The permissible scope of revelation of confidential information under the ABA’s Model Rule 1.6(b)(1) is significantly narrower: "A lawyer may reveal [confidential] information to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm. . . ."128 Not surprisingly, Rule 1.6 has proven to be the most controversial, and thus the most often amended, of the Model Rules.129

If Iowa chose to preserve its present doctrine permitting an attorney to disclose confidential information whenever necessary to prevent any crime, whether or not imminent death or substantial bodily harm is likely to result, it would be in very good company among those states that have adopted the Model Rules in other respects.130 Indeed, the ABA’s Model Rules themselves are likely to be reformed in light of the majority rejection of its position; proposed amendments to Rule 1.6 top the work plan list of the Ethics 2000 Commission.131

Moreover, the rule revision process attending transition to the Model Rules would give Iowa the opportunity to evaluate whether even our present position adequately reflects the values of the Iowa profession. Iowa should consider the more enlightened approach of actually mandating disclosure when necessary to prevent death or serious bodily harm, whether by criminal means or otherwise. As Professor Robert H. Aronson says, "[a]lthough the reasons for vigilant protection of client confidences are strong, these policy bases disappear

126. See infra Part V.B.
129. I Hazard & Hodes, supra note 6, § 1.6:101, at 127; Moulton, supra note 71, at 91-94; Aronson, supra note 47, at 83; see also infra notes 130-33 (describing state variations from Model Rule 1.6).
130. Two commentators on the subject recently observed the following:
As of 1994, twenty-nine states had retained Model Code-type language permitting lawyers to reveal the intent of a client to commit any crime[,] two states (Florida and Virginia) require lawyers to reveal the intent of a client to commit a crime; nineteen jurisdictions have Model Rule-type provisions permitting lawyers to reveal only the intent of a client to commit a crime likely to cause death or serious bodily injury; and one jurisdiction (California) prohibits lawyers from revealing the intent of a client to commit any crime.
131. ABA Center for Professional Responsibility, supra note 124.
when the client seeks, not representation with respect to past acts (whether criminal or not), but rather to harm others in the future.” 132 Confidentiality cannot be justified when the life or substantial health of another is at serious and imminent risk. 133

B. Forthrightly Addressing Difficult Issues but Avoiding Unnecessary Controversy During the Transition

Although the emergence of differences of opinion on crucial points in a transition from one ethics regime to another is inevitable, contentious issues should be avoided to the maximum extent possible so that the general and overriding enterprise of joining the Model Rules community does not founder upon collateral disputes. 134 As noted above, the Model Rules have generated little controversy on the vast bulk of provisions as incorporated into state ethics codes. 135 Thus, the basis for common ground is large and the points of agreement should prevail over the minor sources of contention. The exceptions to

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132. Aronson, supra note 47, at 832; see also Freedman, supra note 19, at 102-03.

The most compelling reason for a lawyer to divulge a client's confidence is to save a human life. There are two reasons to require divulgence in such a case. First, the value at stake, human life, is of unique importance. Second, the occasions on which a lawyer's divulgence of a client's confidence is the only thing that stands between human life and death are so rare that a requirement of divulgence would pose no threat to the systemic value of lawyer-client trust.

Freedman, supra note 19, at 102-03.

133. Only two states, Florida and Illinois, appear to have a rule that allows disclosure to save a human life when the threat of death is not related to criminal conduct. The Florida rule provides:

A lawyer shall reveal . . . information to the extent the lawyer reasonably believes necessary:

(1) to prevent a client from committing a crime; or
(2) to prevent a death or substantial bodily harm to another.

FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-1.6(b) (West 1998); see also Maura Strassberg, Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics, 80 IOWA L. REV. 901, 902 n.12 (1995) (discussing the Florida rule). The Illinois rule provides:

(b) A lawyer shall reveal information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily harm.

ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 1.6 (West 1993). And the Florida and Illinois rules are mandatory—actually requiring disclosure of information in that higher cause. But these two states stand alone. Iowa should stand with them.

134. See Wilkins, supra note 119, at 261 (explaining that “[i]t is an historical accident that Massachusetts came so late, compared to other states,” in adopting the Model Rules, because the original attempt to adopt the Model Rules ten years earlier “founndered on a dispute over a seemingly innocuous provision” regarding division of attorney’s fees among lawyers, “a dispute that dominated the analysis”).

135. See supra note 125 and accompanying text.
consensus have revolved around issues of confidentiality and advertising/solicitation.

In addition to the question of attorney disclosure of client confidences to prevent future harm, discussed above, at least one additional and difficult issue of confidentiality will have to be faced and resolved—the lawyer’s proper response to client perjury. The problem of client perjury has been an intractable one for the profession and has led people of wisdom and good faith to reach startlingly contrary conclusions. The client perjury dilemma displays the ever-present tension in the legal profession between the ideal of the attorney as an officer of the court and the role of the attorney as a zealous advocate of the client.

As common ground, nearly all agree that a lawyer may not knowingly elicit false testimony, that a client should be dissuaded from committing perjury, and that a client who has falsely testified should be urged to rectify the perjury. There is no consensus, however, on how to respond when the lawyer is surprised by the client’s false testimony or the client confesses afterward that he or she lied. On the “officer of the court” side of the debate, advocates of mandatory disclosure by the attorney to the tribunal “have argued that non-disclosure of perjury is a taint on a lawyer’s character and an affront to the court’s dignity.” Arguing that “the truth-seeking elements of a trial must remain paramount in order to preserve the integrity of our adversary system of justice,” proponents compare the duty to reveal client perjury to the lawyer’s responsibil-

136. See supra notes 127-33 and accompanying text.


138. See WOLFRAM, supra note 16, § 12.5, at 653 (“A lawyer faced with perjurious testimony by a client or friendly witness confronts the choice between client interest and social interest in a most poignant form.”); Brent R. Apel, The Limited Impact of Nix v. Whiteside on Attorney-Client Relations, 136 U. PA. L. REV. 1913, 1916-17 (1988) (describing the client perjury problem as implicating the contrasting models of the attorney as “officer of the court” and as the client’s “alter ego”).

139. Lidge, supra note 137, at 6-7 (describing “general, although not unanimous, agreement on a few points”). In addition, the Iowa rule requires the attorney to withdraw from the representation if the client will not disclose the fraud to the tribunal. IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (West 1998).

140. Lidge, supra note 137, at 9 (describing position of advocates of mandatory disclosure).
ity to prevent threats or bribes to witnesses or jurors. The failure to disclose, it is suggested, means that the lawyer essentially “cooperate[s] in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement.”

On the zealous advocacy side, opponents contend that forcing disclosure of client confidences “transform[s] the attorney from an advocate to a whistleblower.” A mandatory disclosure rule discourages clients from entrusting their lawyers with full confidential information; it also encourages the lawyer to avoid the problem by remaining deliberately ignorant and avoiding investigation so that he or she will never actually “know” that a client has given false testimony, thereby impairing effective representation with full knowledge of the client’s story. At least one commentator suggests that the issue has become unduly inflated in importance, as few criminal defendants who go to trial are acquitted, whether they lie on the stand or not, and thus a disclosure rule “would affect the outcome in an insignificant number of cases.”

Unfortunately, the client perjury dilemma cannot be side-stepped in the process of adopting the Model Rules, both because it is a point of divergence between the Model Rules and the Code and because the federal judiciary may stake out a position on this issue. As discussed previously, Iowa Disciplinary Rule 7-102(B)(1) prohibits the lawyer from disclosing his or her client’s confessed perjury to the court. Although the lawyer, of course, may not knowingly use perjured testimony or false evidence, the lawyer who learns of the client’s perjury after-the-fact or is surprised by it at trial is bound to protect the client’s confidence, in the same manner as privileged knowledge of any other past wrongdoing by a client. Model Rule 3.3 takes the opposite stance and mandates that the attorney disclose the client’s perjury to the court, notwith-

141. See Dunetz, supra note 137, at 426-27; see also Nix v. Whiteside, 475 U.S. 157, 174-75 (1986) (comparing, in dicta, the duty to prevent or reveal client perjury to the duty to rectify bribes or threats to witnesses or jurors).
142. Model Rules of Professional Conduct Rule 3.3 cmt. 6 (amended 1997).
143. Lidge, supra note 137, at 3.
144. See Freedman, supra note 19, at 109-13, 119-20, 139-41; Wayne D. Brazil, Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law, 44 Mo. L. Rev. 601, 641-42 (1979); Lidge, supra note 137, at 9-11.
146. See supra notes 93-101 and accompanying text.
147. See id.
149. Id. DR 7-102(A)(4).
150. Id.
standing that he or she may have learned of it through privileged communications.¹⁵¹

In considering adoption of the Model Rules, Iowa will have to confront this sharp difference in outcome and underlying policy and determine whether to adhere to its present confidentiality requirement or incorporate the Model Rules’ disclosure mandate. As outlined immediately above, the answer will not be easy, as the problem of client perjury is one where the cure of revelation may be worse than the disease of falsity. Moreover, rule drafters would have to determine whether a mandatory disclosure rule could be squared with Iowa’s attorney-client privilege and confidentiality expectations.¹⁵² Iowa also would have to consider whether a position contrary to that of the Model Rules would be so firmly grounded in principle as to justify placing Iowa practitioners at the risk of inconsistent ethical guidance should the federal courts adopt the Model Rules approach on this question.¹⁵³

The client perjury/fraud debate provoked by the contrast between Model Rule 3.3 and Disciplinary Rule 7-102(B) is, fortunately, not typical. While the issue cannot be avoided, and the difficulty of resolution cannot be denied, the philosophical dilemma thereby presented is exceptional and not representative of the bulk of the Model Rules.

By contrast, another “hot” topic—the subject of advertising and solicitation—is not only avoidable during this process but should be shunned like the plague. As with the subject of confidentiality, state modifications of the Model Rules provisions on advertising and solicitation have been common.¹⁵⁴ But, in contrast with the confidentiality and client perjury issues, reversion of advertising and solicitation regulation is not necessary to complete the transition to the Model Rules. It is not that the issue is unimportant or that the subject is settled for all time and thus uncontroversial. Iowa probably has the strictest restrictions

¹⁵¹. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (amended 1997); see also supra notes 93-101 and accompanying text.

¹⁵². See supra note 99 (discussing attorney-client privilege in context of client perjury situation). Prior to Iowa's adoption of the confidentiality exception to Disciplinary Rule 7-102(B), indeed in a case arising prior to the adoption of the Code at all, the Iowa Supreme Court had held that an attorney did have a duty to rectify client perjury, stating that “no duty exists to the client when the client perjures himself to the knowledge of the attorney” and “[s]uch conduct by the client fills outside the attorney-client relationship.” Committee on Prof’l Ethics & Conduct v. Crary, 245 N.W.2d 298, 306 (Iowa 1976). Thus, by adopting the revised version of the Disciplinary Rule 7-102(B), Iowa changed its position on the reach of confidentiality and the attorney-client privilege. Having done so once, it presumably may do so again. This decision indicates that the Iowa Supreme Court, through the approval of ethical rules, may modify the scope of confidentiality protection. In many respects, adoption of the Model Rules would simply restore the confidentiality rules that previously governed under the Crary decision.

¹⁵³. See supra notes 93-101 and accompanying text.

¹⁵⁴. Moulton, supra note 71, at 94-95.
on lawyer advertising in the nation,\textsuperscript{155} there is growing concern that those restrictions place Iowa lawyers at a competitive disadvantage with lawyers in border states,\textsuperscript{156} and at least some of the limitations may be vulnerable to constitutional challenge under the First Amendment.\textsuperscript{157} But this is not the place to reopen that “can of worms.”

If lawyer advertising were revisited in the context of progress to the Model Rules, it would likely become the tail that wags the dog. Attention to more important questions might suffer. Indeed, the success of the entire venture could be held hostage to drawn-out debate and reformulation (or ultimate preservation) of each detail of these regulations. Moreover, the Iowa Supreme Court has consistently and recently rejected constitutional challenges to the Iowa advertising rules,\textsuperscript{158} making this an inopportune time for reopening the subject. Massachusetts, the most recent convert to the Model Rules, decided to defer treatment of lawyer advertising until the rest of the rules were in place.\textsuperscript{159} I regard even that as insufficient. Rather than deferring the issue and leaving unfinished business, I would encourage simply clothing the substance of the existing advertising and solicitation rules in the garb of the Model Rules. If the rules on advertising and


\textsuperscript{157} Iowa’s restrictions on television and other electronic media advertising by lawyers “are among the most stringent in the United States.” Rossi & Weighner, \textit{supra} note 155, at 207. Under the Iowa rules, information may be communicated over radio or television “only by a single nondramatic voice, not that of the lawyer, and with no other background sounds,” and a television advertisement may not display anything other than the words in print being read by the “voice.” \textit{Iowa Code of Professional Responsibility DR} 2-101(B)(5) (West 1998). Commentators have argued that Iowa’s approach to electronic media is unnecessarily restrictive and thus unconstitutional under Supreme Court decisions generally allowing accurate information to be communicated in lawyer advertising. Brooks, \textit{supra} note 155, at 20-26; Judith L. Maute, \textit{Scrutinizing Lawyer Advertising and Solicitation Rules Under Commercial Speech and Antitrust Doctrine}, 13 Hastings Const. L.Q. 487, 515-20 (1986); Bernadette Miragliotta, \textit{First Amendment: The Special Treatment of Legal Advertising}, 1990 Ann. Surv. Am. L. 597, 621-27 (1992). The United States Supreme Court has not addressed electronic media advertising by attorneys. However, other courts have upheld the validity of the Iowa regulations. Committee on Prof’l Ethics & Conduct v. Humphrey, 355 N.W.2d 565 (Iowa 1984), \textit{vacated and remanded}, 472 U.S. 1004 (1985), \textit{on remand}, 377 N.W.2d 643 (Iowa 1985), \textit{appeal dismissed}, 475 U.S. 1114 (1986); Bishop v. Committee on Prof’l Ethics & Conduct, 521 F. Supp. 1219, 1228-29 (S.D. Iowa 1981), \textit{vacated on other grounds}, 686 F.2d 1278 (8th Cir. 1982). But see Committee on Prof’l Ethics & Conduct v. Humphrey, 355 N.W.2d at 572-75 (Larson, J., dissenting).


\textsuperscript{159} Wilkins, \textit{supra} note 119, at 266.
solicitation are to be reexamined, let it be accomplished through an independent process held distinctly separate from the question of Iowa’s adoption of the Model Rules.160

C. Ethical Rules, Moral Judgment, and Good Character

Lawyers seem to be forever haunted by a penetrating question, one that is as old as the profession, but ever new: “Can a good lawyer be a good person?”161 Many seem pessimistic about the answer today. Leading scholars have identified a crisis of morals and morale in our profession, describing lawyers as having lost their ideals and their identity.162 We are said to have lost our sense of a higher calling and degenerated from a noble profession into a business concerned only with maximizing profit.163

The answer to this crisis of faith within the legal profession will not be found in any code of disciplinary rules. In the past few years, wise voices have reminded those of us teaching in the area of professional responsibility that a set of rules, however well-constructed, cannot substitute for character and moral reasoning.164 Indeed, ethics scholars have found that excessive attention to

160. Indeed, such a process is already underway through the Advertising Taskforce of the Iowa State Bar Association, which is considering the wisdom of revisions to the advertising rules to allow Iowa lawyers to more readily provide information about legal services through the Internet, to permit rural law firms to better communicate their capabilities, and to place Iowa lawyers at less disadvantage in competing with lawyers subject to less restrictive advertising rules in such border states as Minnesota and Illinois. Beckman, supra note 156, at 5-6.

161. For an examination of this question by several leading members of the profession drawing upon one moral tradition, see generally CAN A GOOD CHRISTIAN BE A GOOD LAWYER? (Thomas E. Baker & Timothy W. Floyd eds., 1998).


163. See GLENDON, supra note 162, at 29-33; KRONMAN, supra note 162, at 271-314.

164. See, e.g., COCHRAN & COLLETT, supra note 130, at v (“One of the many subjects that merit discussion in a legal profession class is the relationship between morality and the practice of law. Professional rules outline what a lawyer must do... morals determine what a lawyer should do.”); DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVERSIVE METHOD 4 (2d ed. 1998) (“In a narrow sense, [legal ethics] refers to the law of lawyering—the formal rules governing attorneys’ conduct. In a broader sense, legal ethics involves application of ethical theory and implicates deeper questions about the moral dimensions of our professional lives.”); Mark S. Cady, Advocating Personal Values in Advocacy, Ia. L. Rev., May, 1992, at 8, 8. (stating that “the conduct of a lawyer is not simply guided by rules of law and professional ethics” but “that personal values acquired as human beings remain an instructional force in the practice of law”); Geoffrey C. Hazard, Jr., Personal Values and Professional Ethics, 40 CLEVE. ST. L. REV. 133, 133 (1992) (urging “reexamination of personal values as a fundamental resource of professional ethics” because “rules of ethics, such as those embodied in the profession’s ethical codes, are insufficient guides to making the choices of action that a professional must make in practice”); Patrick J. Schiltz, Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral For-
black-letter rules may stunt ethical growth and inhibit development of moral character. The risk of a narrow focus on rules is that "the Code [will become] the boundaries of [the lawyer's] moral universe." As Professor Robert Cochran has suggested: "It may be that the problem in the legal profession is not too little attention to rules, but too little attention to character."

Accordingly, I do not pretend that adoption of the Model Rules would suddenly revitalize the profession or inspire a renewal of moral practice. We ask too much of a formal ethics code and too little of ourselves to expect to find within mandatory rules the roadmap to a happy and moral life and practice. Nonetheless, while good ethics rules may not be sufficient for a healthy profession and moral practitioners, they are surely necessary. Good ethics rules alone cannot make good lawyers, but bad ethics rules will undermine professionalism and moral aspiration. If a code of ethics is ambiguous, has become obsolete,
fails to address emerging problems, or fails to resonate with the actual experiences and changing practices of lawyers, that code will lose the respect of the governed and breed cynicism within the profession. By contrast, a well-drafted and contemporary “corpus of rules can at least establish a common core of shared values and have an educative and uplifting effect.”

The need remains for moral inspiration—for something that “calls lawyers to ethical performance, instead of ethical distance.”169 One of the distinctive virtues of the Code of Professional Responsibility was its aspirational reach in the form of the Ethical Considerations. To be sure, like the body of the Code, the Ethical Considerations had become antiquated and failed to encompass the diversity and emerging experiences of professional life. Moreover, they were flawed and ambiguous, sometimes aspirational, sometimes using mandatory rather than permissive language; sometimes inspiring; and sometimes merely offering further clarification of a disciplinary rule.170 Nonetheless, they served as a meaningful symbol of a higher calling, reminding lawyers that a satisfying and moral practice meant more than avoiding disciplinary sanction.

As one commentator observes, “[I]ronically, but perhaps not coincidentally, the ABA’s move toward enforceable, mandatory rules [in the Model Rules] and away from aspirational statements [in the Code] has coincided with the popularity of state and local bar adopted creeds [of professionalism].”171 The loss of the aspirational aspects of the Code with the ascension of the Model Rules has left the profession yearning for a moral compass. Indeed, Iowa, even while retaining the aspirational Ethical Considerations, has also promulgated a professionalism creed, in the form of the Standards for Professional Conduct adopted in 1996.172

The Model Rules themselves may witness a resurrection of aspirational ideals in the foreseeable future. As part of its reform charge, the ABA’s Ethics

168. See 1 HAZARD & HODES, supra note 6, § 203, at Intro-13; see also Cochran, supra note 167, at 725 (“[R]ules have a place; rules provide minimum standards, and they can teach and reinforce moral behavior.”); Schiltz, supra note 164, at 713-15 (stating that, while ethical legal practice requires more than mere compliance with the rules, “[t]he rules are important, for they affect the conduct of lawyers (in both anticipated and unanticipated ways) and they influence the values of the profession”).

169. See DiPippa, supra note 15, at 364 (describing the vision of the Code).

170. See RHODE, supra note 164, at 46 (describing interpretation problems with the Ethical Considerations because not all of them “appeared only ‘aspirational in character;’ some provided important clarification of the Rules and used mandatory rather than permissive phrasing”); Aronson, supra note 47, at 826 (although the Ethical Considerations were intended to be aspirational, they were treated variously as having no weight, as helpful in interpreting the rules, as legislative history for the rules, and as actually binding).


2000 Commission is considering the addition of "Principles of Ethics in Practice" to the Model Rules, which would be aspirational in nature and not serve as minimum disciplinary standards. If a comprehensive set of ethical practice considerations were to be developed, the project would be tremendously ambitious, provoke controversy at every step, encounter difficulty in achieving consensus on moral ambitions within a diverse profession, and certainly be exhausting. But it could also be an exciting and transforming moment for the profession, serving as a national ethics seminar. Because of the resilient health and professionalism of the Iowa bar, Iowa lawyers would have much to contribute to this discussion and process. If Iowa joins the national Model Rules community, we will have a greater opportunity to share from our experience.

VI. CONCLUSION: THE INEVITABILITY OF THE MODEL RULES

As a self-confessed Code romantic, I say with regret but also with reluctant conviction: It is inevitable that Iowa will, sooner or later, one way or another, adopt the essence and framework of the Model Rules of Professional Conduct and thus leave the Code of Professional Responsibility in the past. The manner in which this will occur is, however, by no means inevitable or foreordained. As members of the Iowa bench and bar, we control the means and circumstances under which Iowa may join the national ethics dialogue as we enter the next century.

There are three ways in which events may unfold. First, Iowa may be forced to hastily shift from the Code to the Model Rules in the wake of a future crisis of confidence within the legal profession in our state. As the Code becomes increasingly anachronistic and therefore ill-suited to address the real and changing experiences of Iowa lawyers, cynicism toward the Code as an effective and genuine ethical regime may grow. As the younger generation of lawyers enters the bar with little or no knowledge of the Code, respect for it as a viable practice guide will diminish. In sum, if the Code is perceived as a tired holdover from the past, that perception could undermine disciplinary regulation and discourage ethical learning and growth among Iowa lawyers. Fortunately, that point has not been reached in Iowa and the profession here remains healthy and ethically responsible. But we should not be blind to the storm clouds on the horizon.

Second, Iowa may slowly and by happenstance evolve into a Model Rules state, much as a computer program can "morph" a photograph of one person into that of another. As new questions of legal practice and new concepts of ethical

behavior are addressed at the national level in the context of the Model Rules, Iowa may borrow these provisions and engraft them upon the Iowa Code of Professional Responsibility. Over time, the content of the Iowa Code would increasingly resemble that of the Model Rules. Unfortunately, the likely result would be a mishmash of Code and Model Rules provisions, with no unifying structure or common drafting language. Moreover, rather than involving a constant and regular review of a set of Model Rules in the light of periodic amendments by the ABA, this process of evolution would be uneven and episodic.

Third, during the current period of strength and health in the state’s legal profession, Iowa could proceed in a cool and deliberate process to develop a new and comprehensive ethical regime. As described above, Iowa would then be able to adopt the essential framework of the Model Rules, while preserving its distinctive identity on those matters of peculiar or principled concern to the Iowa bench and bar. Obviously, this path of deliberation and resolve is much to be preferred. I hope that this Article may serve a catalytic role in bringing Iowa toward that destiny.