COLORADO SUPREME COURT

RULES OF PROFESSIONAL CONDUCT STANDING COMMITTEE

Approved Minutes of Meeting of the Full Committee
On
September 27, 2024
Seventy-Third Meeting of the Full Committee

The seventy-third meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:01 a.m. on Friday, September 27, 2024, by Chair Judge Lino Lipinsky de Orlov. Judge Lipinsky initially took attendance.

Present at the meeting in person were Judge Lipinsky, Justice Maria E. Berkenkotter, Katayoun Donnelly, Judge Bryon M. Large, Marianne Luu-Chen, Jason Lynch, Julia Martinez, Stephen G. Masciocchi, Troy R. Rackham, Marcus L. Squarrell, David Stark, James S. Sudler, Fred Yarger, J.J. Wallace, and Jessica Yates.

Present for the meeting by virtual appearance were Justice William Hood, Nancy Cohen, Thomas Downey, Judge Adam Espinosa, Scott Evans, Marcy Glenn, Erika Holmes, Matthew Kirsch, Lois Lupica, Cecil Morris, Noah Patterson, Henry Reeve, Alexander R. Rothrock, Robert W. Steinmetz, and Judge John Webb.

Committee members excused were Cynthia Covell, Margaret Funk, April Jones, and Eli Wald.

Jordan Bates-Rogers and Michael Kauffmann attended as guests.

1. CALL TO ORDER. Judge Lipinsky called the meeting to order at 9:01 a.m. Judge Lipinsky welcomed the members attending in person and virtually. Judge Lipinsky then welcomed Mr. Bates-Rogers, the Executive Director of the Legal Aid Foundation and the Colorado Lawyer Trust Account Foundation (COLTAF), and Mr. Kauffman, who attended the meeting as guests.

2. APPROVAL OF MINUTES FOR JULY 26, 2024 MEETING. A member moved to approve the minutes, which another member seconded. A vote was taken on motion to approve minutes with the amendment. The motion passed unanimously.

3. OLD BUSINESS.

A. Report on the proposed amendments to Rules 5.4 and 8.4, the proposed new comment 15 to Rule 1.2, and the proposed amendments to the Model Pro Bono Policy [Judge Lipinsky]. Judge Lipinsky reported that the Colorado Supreme Court had adopted the proposed amendments to Rules 5.4(f) and 8.4(g) and to the Model Pro Bono policy. The Supreme Court did not adopt the proposed new comment 15 to Rule 1.2. The Court thanked the Committee for its work and reported that it was not foreclosing consideration of another proposal to amend Rule 1.2.

B. Report from the Rule 1.2 Subcommittee [Erika Holmes]. Ms. Holmes reported on the Subcommittee's work regarding a possible amendment to conform the language of Rule 1.2 to the new language in Rule 5(e) of the Appellate Rules addressing limited legal services. The Subcommittee decided to postpone further work pending the Supreme Court's decision on proposed analogous amendments to Rules 11(b) and 311(b) of the Rules of Civil Procedure.

C. Report from the trust fund Subcommittee [James Sudler]. Mr. Sudler explained that the Subcommittee considered how lawyers should handle situations where a client does not want funds being held for the client in a lawyer's trust account. Mr. Sudler explained the Subcommittee's recommendations for amendments to Rule 1.15B, as described in attachment 2 to the packet of materials distributed in advance of the meeting. The proposed amendments to Rule 1.15B(l) would eliminate the term "or other trust" to address concerns regarding an inconsistency with the Colorado Unclaimed Property Act. Under the proposed amendments, unclaimed funds kept in a non-COLTAF account, but not funds kept in a COLTAF account, would have to be reported to the state. Consistent with this recommendation, the Subcommittee also is recommending an amendment to Rule 1.15B(k) that would eliminate the reference to "or other trust." The Subcommittee concluded that the Rule does not constrain a lawyer's discretion regarding the disposition of nominal amounts of funds kept in a trust account for only a short period of time. The Rule does not define a "short period of time" or a "nominal amount." From a practical standpoint, there currently is no type of account in which a lawyer can retain client funds that the client does not want. Mr. Sudler also reported that OARC does not object to the proposed amendments and has noted that lawyers are not disciplined if they hold a nominal amount of funds for a short period of time in the lawyer's COLTAF account.

Mr. Sudler also reported on the proposed amendments to Comment 1 of Rule 1.15A. Mr. Sudler explained that there have not been problems with the Colorado Unclaimed Property Act and that the modest amendments would not cause problems for lawyers.

A motion was made to approve the amendments proposed by the Subcommittee. Judge Large abstained from the motion. The motion was seconded. The motion carried unanimously.

Mr. Bates-Rogers discussed issues that COLTAF has seen involving funds held in a non-COLTAF account. There is no limitation on when a client can request a disbursement from a COLTAF account but there is a limitation on when a party can request a disbursement from a non-COLTAF account consistent with the Unclaimed Property Act. Mr. Bates-Rogers suggested that, to avoid the risks associated with holding funds in a non-COLTAF trust account, the Supreme Court adopt a rule requiring lawyers to have COLTAF accounts.

A member explained that a lawyer may decide to use a non-COLTAF trust account so the client can earn interest on the funds in the account. The member suggested that the Committee should not recommend that lawyers be denied the ability to use an interest-bearing trust account. COLTAF is not suggesting that the Court eliminate the ability of lawyers to use non-COLTAF trust accounts but, rather, that only unclaimed funds in a COLTAF account would need to be remitted to COLTAF; unclaimed funds in a non-COLTAF trust account would not be remitted to COLTAF.

D. Update on ABA Model Rule 1.16 [Steve Masciocchi]. Mr. Masciocchi reported on the status of states' consideration of the ABA's 2023 amendments to Model Rule 1.16. Wyoming revised its version of Rule 1.16 based on the amendments to the Model Rule. Maryland and Oregon are considering proposals to adopt the language of the amendments, with revisions. California, Utah, and other states rejected the language of the amendments. Indiana, Massachusetts, Texas, and Wisconsin are considering adopting the language of the amendments. Mr. Masciocchi noted that the proposed amendments were controversial within the ABA. The new Model Rule and comments impose a new duty on lawyers to repeatedly inquire into whether a client is using the lawyer's services to perpetrate a fraud or a crime. Some commentators disagree with the ABA's position that the amendments to the Rule do not impose new obligations on lawyers, because, in their view, the amendments impose the duty to inquire throughout the representation. Mr. Masciocchi questioned why the amendments were necessary if they did not impose new obligations and noted other concerns with the amendments. The Standing Committee will revisit issue at its January 24, 2025, meeting.

E. Report from the AI Subcommittee [Julia Martinez]. Ms. Martinez continued the presentation of the AI Subcommittee, which began at the Standing Committee's July 26 meeting. She began by discussing the Subcommittee's proposed amendments to Rule 5.3. The Subcommittee was somewhat evenly divided on the issue. The Subcommittee focused on what AI technology can do and what it is reasonably likely to do in the future. Some members of the Subcommittee gave an example of why Rule 5.3 to address lawyers' supervision of artificial intelligence-based assistants — chatbots that a lawyer or a firm could use to interact with clients and potential clients. Chatbots have the capability of making phone calls and talking to prospective or current clients. Rule 5.3 currently provides that a lawyer must ensure that the lawyer's human assistants act in conformance with the lawyer's obligations under the Rules. The Subcommittee has been wrestling with whether, in light of recent advances in AI technology, Rule 5.3 should also address a lawyer duty to ensure that the lawyer's use of non-human assistants is consistent with the lawyer's obligations under the Rules.

Mr. Kauffmann asked whether the proposed amendments would address a situation where a lawyer's AI technology gave the client the wrong hearing date. Ms. Martinez explained that the proposed amendment, but not the current version of Rule 5.3, would address such an error caused by an AI tool rather than human error. The concern is that Rule 5.3 does not cover this type of situation issue. The Committee discussed who would be responsible for this type of error. For example, would the vendor that supplied the technology be responsible? If so, Rule 5.3 already obligates the lawyer to properly supervise vendors.

A member suggested that we should not treat algorithms like humans. The Rules govern the conduct of human lawyers. They do not govern technology, experts, or other similar matter that the lawyer has to address in the lawyer's practice. For example, the Rules do not apply to an expert witness who makes a mistake or breaches confidentiality. It is up to the lawyer to ensure that the expert witness understands the rules and what the expert can and cannot say with respect to the expert's review or report. The member said the Rules ensure that the obligation is on the lawyer.

Rule 1.1 requires a lawyer to be competent, including with technology. Rule 1.1 would apply if a lawyer or the lawyer's staff did not competently use technology or made a mistake with technology in a way that was unreasonable. Lawyers already are governed by obligations that the use of technology implicates. The member suggested that the entire Rule 5 series is about human beings and unintended consequences could result if it required lawyers to supervise technology because concepts such as knowledge of conduct, ratification of conduct, and the like do not apply to supervising or implementing technology, as opposed to supervising humans. The member suggested that Rule 1.1 is the better place to address lawyer's obligations with respect to technology.

Judge Lipinsky placed the proposed amendments to Rule 5.3 on the screen so the Committee could review them and discuss them in detail. The proposed amendment to comment 1 would say "'nonlawyer' includes technologies that rely on artificial intelligence or other innovations that act on behalf of the lawyer." A member suggested that the comment may be fine, but the proposed amendments to the Rule do not inform the lawyer on the lawyer's responsibility. How does the lawyer supervise the technology? If a human gave the client the wrong date for a court appearance because it was miscalculated or not noted, the lawyer's obligation is clear. The lawyer should talk to the human and correct the mistake through communication and training. The member wondered what a lawyer is supposed to do with respect to "supervising" technology.

A member suggested that including technology in Rule 5.3 adds a layer of insulation for the lawyer because, as long as the lawyer investigated the technology before implementing it, the lawyer may have satisfied the lawyer's obligation even if there was a mistake. That would not occur if the lawyer's mistake was communicated by the lawyer rather than by the technology.

Courts are concerned that lawyers will use technology without understanding what the technology does and the risks it creates. Additionally, there is a concern about clients and client protection because the risks of using the technology could significantly adversely impact clients. AI technology is not like email or the internet.

A member who uses AI at the member's firm explained that it is very difficult to conceptualize how a lawyer could supervise AI. The member explained that, when a question came up, the member searched Google AI and it gave a wrong answer. The member explained that the member used a different AI tool and obtained the correct answer with purported supporting authority. The authority did not satisfactorily explain the answer, however. In that situation, how does a lawyer supervise the AI technology? If a human gave the answer, the lawyer could talk to the human and educate the human about the research and whether it supported the answer. The lawyer cannot do that with technology.

A member noted that AI technology allows a bot to talk to a client. What are the lawyer's responsibilities in this context when the AI technology — and not a lawyer or human assistant — is engaged in the communication with a client? The member suggested that Rule 5.3 is a good fit for addressing this situation because it addresses the responsibility of the lawyer in supervising others and ensuring that others with whom the lawyer works conform their conduct to the RPC.

Judge Lipinsky explained that he attended a conference where a judge from Louisiana spoke about AI technology and how judges and courts could use it. An AI generative tool can take information in the court's file, such as deadlines and requirements for a probationer, and advise the probationer about those deadlines and requirements without human intervention. Judge Lipinsky said that judge's website included a video showing an AI-generated human image speaking about a probationer's deadlines and requirements. A human being would have provided this information before the development of AI technology.

A member wondered whether the video was reviewed before it went out to make sure it was correct. It is an essential obligation of a lawyer to ensure that information provided on the lawyer's behalf is accurate. A member explained that AI technology takes the task of reviewing information for accuracy off the lawyer's shoulders and transfers it to the technology. The lawyer uses the AI for efficiency, and it would not be efficient to review every video that the AI technology creates.

A member emphasized that part of the features of AI is that it is not reviewable in advance. Once the video goes out, there is interaction between the recipient and the AI bot that happens organically in the moment and is not reviewable in advance.

A member asked whether the Subcommittee had run its report through AI for an "internal" review. A Subcommittee member said that the Subcommittee did ask an AI tool about certain of the issues discussed in the report and, as a test, asked AI to identify rules that may need amendment. The Subcommittee did not rely upon the information obtained from the AI tool but just experimented with it.

A member said that the examples discussed illustrate the problem. If a lawyer knows that the AI tool is engaged in legal reasoning and offering legal advice, then isn't the responsibility with the lawyer that knows that information. The lawyer may be aiding and abetting the unauthorized practice of law or violations of the RPCs. In terms of the responsibility of using technology, the Rules already cover the lawyer's responsibilities. But if the lawyer is using AI to serve as an associate or paralegal, then there is a vast difference that may need to be addressed through the Rules.

A member explained that this whole issue is intriguing because the member has not studied use of AI. The member said that this issue does not belong in Rule 5.3 because it should not address a lawyer's duty to supervise nonhumans. The member suggested that perhaps there should be amendments to Rule 8.4(a) to make it clear that a lawyer cannot aid or abet violations of the Rule through humans ***and technology***. The risks that flow from violating the Rules is professional discipline, but there are other risks that would flow from a lawyer's negligent use of technology, such as malpractice or other tort claims. The member urged the Committee not to ignore those other ways that lawyers are governed.

A member advocated in favor of the proposed amendments to Rule 5.3 because they are helpful even outside of the technology area. The member's concern is that technology is changing quickly and that putting technology-related obligations in the Rules creates greater risks of discipline. Lawyers already can be disciplined (and have been) for negligent or inappropriate use

of technology. The member suggested that these topics may be better addressed in an ethics opinion rather than amendments to the RPCs. Judge Lipinsky reminded the Committee members that the Supreme Court asked this Committee to consider amendments to the RPCs relating to AI.

Judge Lipinsky suggested straw polls to provide guidance to the Subcommittee. The first straw poll was on the proposed amendments to Rule 5.3's blackletter text, and not the comments to the Rule. Six members voted in favor of adopting the proposed amendments to Rule 5.3's blackletter text. One member abstained. All remaining members voted against adopting the proposed amendments to Rule 5.3's blackletter text. The straw vote results were against adopting the proposed amendments to Rule 5.3's blackletter text.

The second straw poll was whether to adopt: (1) the proposed amendment to Rule 5.3 comment 1, which would say "'nonlawyer' includes technologies that rely on artificial intelligence or other innovations that act on behalf of the lawyer"; (2) the proposed amendments to Rule 5.3 comment 2; and (3) the proposed amendment to Rule 5.3 comment 3. One member abstained and the other members voted against proposing the amendments to the comments.

A third straw poll was taken regarding whether the Committee should adopt the two new proposed comments to Rule 5.3. One member abstained. Seven members voted in favor of adopting the two new proposed comments to Rule 5.3. The other members voted against it. The majority voted to reject the two new proposed comments to Rule 5.3.

The Committee transitioned to considering the new proposed standalone rule on technology — proposed Rule 1.19. The proposed rule is quite short but has several comments designed to provide guidance to lawyers. The Subcommittee members explained the process of creating the proposed new Rule and comments. The Subcommittee thought it was important to have a new Rule on technology rather than trying to fit in proposed amendments to other Rules that are not specific to a lawyer's duties relating to technology. A member suggested that the proposed Rule 1.19 is needed precisely because of the discussion that the Committee had today and at its last meeting. A new rule is needed because the current rules do not focus on technology or the unique concepts relating to technology.

A member spoke against the proposed Rule 1.19. The member suggested that Colorado does not need a new Rule because the comments to other rules, such as Rule 1.1, address most of the issues. The member also noted that no state has adopted an analogous rule. Some states have provided guidance on lawyer use of technology, but Colorado does not have a mechanism for issuing guidance documents other than the Rules and CBA Ethics Committee opinions. States such as New York, California, and Pennsylvania have an intermediary process for providing guidance on the Rules. Members discussed whether Colorado should adopt a similar intermediary process. A member suggested that the Committee should get more information about whether lawyers are being disciplined in other states or are otherwise facing sanctions for misusing technology.

A member suggested that the Committee should wait to see how other states technology. A member also noted, because the technology is advancing so quickly, even if Colorado adopted proposed Rule 1.19, it may need to be revised within a short amount of time and frequently.

A member noted that the RPCs provide a basis for discipline. Because of that, it is important to be precise. The member suggested that the proposed Rule 1.19 does not cover any new obligations for a lawyer and therefore is unnecessary. Lawyers already are being disciplined for improper use of AI technology. A member commented that the language of the new proposed Rule 1.19 and the proposed accompanying comments is fine but may be a better fit for a *Colorado Lawyer* article or a CBA Ethics Opinion.

A member commented that perhaps the Committee needs a Rule like Rule 1.19 but suggested that the eleven paragraphs of proposed comments to the proposed Rule 1.19 were too much. If the goal is to provide guidance to members of the Bar, the goal is achieved with the adoption of Rule 1.19 and only the first three comments. Another member explained that the member likes the proposed Rule 1.19, but believed that it would be better to put the proposed language in Rule 1.1 instead of adopting a new Rule.

A member advocated in favor of the Rule and believed that it needed to be a stand-alone Rule instead of comments to other Rules because it makes it easier to find and understand.

A straw poll was taken as to whether the Committee supported the concept of a stand-alone Rule on technology, but not on the text or comments of the proposed Rule 1.19. A member abstained. A majority of the members voted in support of considering a stand-alone rule. The vote was 17 to 7 with one abstention.

A straw poll was taken on the current language of proposed Rule 1.19, without the comments. The language is: "A lawyer shall make reasonable efforts to ensure that the lawyer's use of technology, including artificial intelligence (AI) technology, in the lawyer's practice conforms to the Rules of Professional Conduct." A majority of the members voted in support of adopting the proposed language to Rule 1.19. The vote was 18 to 6 with one abstention.

Members discussed whether the clause "including artificial intelligence (AI) technology" was necessary. A member advocated in favor of the clause because many lawyers may not understand that AI is part of technology. Another member suggested that this issue could be addressed in the comments to the proposed rule rather than in the Rule. Another member advocated in favor of the clause because the rapid development of AI technology makes it important to highlight AI to lawyers. Further, the proposed new Rule is a better fit than addressing technology in the scope and preamble of the RPCs.

A straw poll was taken on whether to remove the clause "including artificial intelligence (AI) technology" from the blackletter language of the proposed Rule. Six voted in favor of removing the clause. Nineteen members voted in favor of retaining the clause, with four voting to remove the clause and one abstention.

A member suggested that perhaps the proposed new Rule could just focus on AI rather than all technology. Members of the Subcommittee explained the need to make the rule more general. At the moment, however, the proposed comments nearly entirely focus on AI.

A member moved to provide guidance to the Subcommittee that it should come back with fewer and more general comments. A vote was taken, with one member abstaining. Eleven members voted in favor of the motion. One voted against. The motion carried.

A member suggested that it would be useful to provide some guidance to the Subcommittee. The first three comments, with some amendments, generally are good. A member suggested that listing a number of rules in the comments is unnecessary. Another member suggested that including reference to certain rules and not others may create an inference that only the referenced rules need to be considered, when in reality the lawyer needs to consider all RPCs that could be implicated.

A member suggested the proposed Comment 3 could be inconsistent with what the Committee previously discussed because sometimes AI generated content cannot be reviewed. Comment 3 would nonetheless impose a duty to review such content. Another member noted that the ABA and those states that have promulgated AI guidance documents have referenced Rule 5.3. A member explained that this reference applies when a lawyer's human assistant uses AI technology. Another member suggested that, if Rule 5.3 is omitted from the changes, lawyers may be left with the impression that Colorado adopts Rules differently from other jurisdictions.

The Subcommittee will reconvene on the proposed comments. At the Committee's January 24, 2025, meeting, it can consider the Subcommittee's revised proposed comments to Rule 1.19. After doing that, the Committee can formally vote on the proposed amendments.

4. NEW BUSINESS.

A. Possible Subcommittee to consider amendments to Rule 6.5 [Jessica Yates]. Ms. Yates presented on the possibility of forming a new Subcommittee to consider amendments to Rule 6.5. The reason for creating a new Subcommittee is that a question came up at the last meeting when the Committee was discussing limited scope representation. Rule 6.5 applies to clinics. But at a clinic, a volunteer lawyer may be unable to perform a conflict check or obtain informed consent from a client. Rule 6.5 provides:

> (a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter: (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

Rule 6.5 references a "client," which could create ambiguous expectations on the part of the person appearing at the clinic and the lawyer participating in the clinic in terms of when the "representation" began, when it would end, and the terms of the representation. Clinics are trying to manage expectations of the participants. Ms. Yates suggested that there would be value in

revising the Rule to make it clear to clinics that the participants in the clinic can give legal advice and provide legal services, but it would be on a short-term basis just during the clinic. A member reported on the form that some clinics, such as Metro Volunteer Lawyers' clinics, use. The comments to Rule 6.5 require a lawyer to provide in writing the information necessary for informed consent. That is why these clinics use a written form to obtain informed consent from the clients. There is a particular challenge for lawyers who participate in virtual clinics because everything is online, and it is difficult to provide a form for informed consent to participants who appear virtually.

A member explained that Rule 1.5(b)(2) requires lawyer to communicate with the client, in writing, regarding the scope of the representation. It is difficult to comply with this rule when the lawyer and the participant in a virtual clinic have not met each other in person and have not communicated in writing. Participants in that clinic have a difficult time communicating in writing with the client because it is virtual and the meeting with the individual is brief. Rule 1.15(b) is intended to protect the client/consumer so that the client/consumer better understands what he or she is obtaining from the lawyer.

Another member commented that the Committee's discussion illustrates why a Subcommittee would be advisable. A Subcommittee could evaluate more directly and carefully the issues discussed and consider whether amendments to Rule 6.5 are needed. A Subcommittee was formed. Ms. Yates agreed to serve as Chair. Judge Espinosa, Mr. Stark, Mr. Patterson, Ms. Holmes, Ms. Lupica, and Mr. Downey agreed to serve on the newly formed Subcommittee.

6. ADJOURNMENT. A motion to adjourn was made at 11:50 p.m. and was duly seconded. The motion carried. The next meeting of the Committee will be on January 24, 2025.

Respectfully submitted,

Troy R. Rackham, Secretary