

COLORADO SUPREME COURT

RULES OF PROFESSIONAL CONDUCT STANDING COMMITTEE

Approved Minutes of Meeting of the Full Committee

On

January 24, 2025

Seventy-Fourth Meeting of the Full Committee

The seventy-fourth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:03 a.m. on Friday, January 24, 2025, by Chair Judge Lino Lipinsky de Orlov. Judge Lipinsky initially took attendance.

Present at the meeting in person were Judge Lipinsky (Chair), Justice Maria E. Berkenkotter, Justice William Hood, Katayoun Donnelly, Judge Adam Espinosa, Marcy G. Glenn, April D. Jones, Judge Bryon M. Large, Jason Lynch, Julia Martinez, Stephen G. Masciocchi, Troy R. Rackham, Marcus L. Squarrell, David W. Stark, James S. Sudler, J.J. Wallace, and Jessica Yates.

Present for the meeting by virtual appearance were Nancy L. Cohen, Cynthia F. Covell, Thomas E. Downey, Jr., Scott L. Evans, Margaret B. Funk, Erika L. Holmes, Jason Lynch, Cecil E. Morris, Jr., Noah Patterson, Henry R. Reeve, Alexander R. Rothrock, Robert Steinmetz, and Eli Wald.

Matthew Kirsch, Lois Lupica, Marianne Luu-Chen, Jason Lynch, Judge John Webb, and Fred Yarger were excused. Michael Kaufmann from the Public Defender's Office attended as a guest.

1. CALL TO ORDER. Judge Lipinsky called the meeting to order at 9:03 a.m. Judge Lipinsky welcomed the members in attendance and virtually.

2. APPROVAL OF MINUTES FOR SEPTEMBER 27, 2024 MEETING. A member moved to approve the minutes, which another member seconded. A vote was taken on the motion, which passed unanimously.

3. OLD BUSINESS.

a. Report on the proposed amendments to Rules 1.15A and 1.15B [Judge Lipinsky]. Judge Lipinsky reported that the Colorado Supreme Court had adopted the proposed amendments on October 2, 2024. He thanked the members of the subcommittee that drafted the proposed amendments: James S. Sudler, Chair; Katayoun Donnelly; Scott L. Evans; Margaret B. Funk; Erika Holmes; Marianne Luu-Chen; Alexander R. Rothrock; Marcus L. Squarrell; and Fred Yarger.

b. Report from the Rule 6.5 subcommittee [Jessica Yates]. Ms. Yates reported that the subcommittee was considering possible amendments to Rule 6.5, which addresses limited

scope representation, in light of the recent amendments to C.A.R. 5(e), C.R.C.P. 11(b), and C.R.C.P. 311(b), and to clarify when a lawyer volunteering at a legal clinic must disclose in writing to the individuals whom the lawyer assists at the clinic the scope of the lawyer's limited representation. The subcommittee members generally seek to give guidance to clinics and participants in the clinics about what disclosures are necessary to satisfy the informed consent requirement in Rule 1.2(c) and the documentation necessary to confirm that the lawyer provided the required informed consent.

c. Interim report from the AI subcommittee and Technology Committee proposal [Julia Martinez]. Ms. Martinez presented on the status of the work of the AI subcommittee. The last time the Committee met, in September 2024, the subcommittee provided a lengthy report and a minority report. The subcommittee obtained helpful feedback from members of the Committee at that time. The subcommittee has subsequently met several times and discussed incorporating some of the Committee members' suggestions into the subcommittee's proposals. The subcommittee is not in a position to submit a final report because it decided to add definitions of terms such as "AI tool" to its proposed new Rule 1.19. A member of the subcommittee explained that this issue came up a month or so ago and wondered whether existing, generally accepted definitions could be used. The subcommittee anticipates that it will provide final majority and minority reports in advance of the Committee's April meeting.

In addition, the subcommittee is recommending that the Committee propose that the Supreme Court form a new advisory committee on technology that could provide the Bar, LLPs, the judiciary, and members of the public with guidance regarding ethical use of AI. No entities in Colorado are currently authorized, or possess the legal and technological expertise, to draft such guidance documents. Moreover, because technology develops so quickly, current committees, including the CBA Ethics Committee, would not have the resources, time, and expertise to provide timely guidance as technology evolves.

A member explained that roughly two thirds of U.S. jurisdictions have mandatory bar associations, committees of which are authorized to provide court-approved guidance documents or advisory opinions for lawyers and nonlawyers. There would be value in forming a committee to provide similar guidance in Colorado.

Another member spoke in support of the idea of having a technology committee staffed with members who have the expertise and time to provide guidance on the use of technology and evolving changes in technology. A member also noted that no state has adopted changes to its Rules of Professional Conduct to address AI, although there are ethics opinions from the ABA and other states about the use of AI. The absence of authoritative guidance in Colorado makes it all the more important for the formation of a technology committee that could provide useful and authoritative guidance to lawyers and others in Colorado.

Another member voiced support for proposing a technology committee, but wondered under what auspices the committee would proceed. For example, would it be a subcommittee of a current committee? Another member noted that other states, such as New Jersey and New York, have committees that promulgate guidance documents. There is no analog in Colorado.

Judge Lipinsky noted that the proposed committee would not promulgate advisory opinions or guidance documents without the Supreme Court's approval. But the benefit of such a technology committee would include flexibility and nimbleness. A member liked the idea of having specific subject matter expertise on such a committee and noted that a few subject matter experts are members of the AI subcommittee of the Standing Committee. A subcommittee of the CBA Ethics Committee is considering an AI opinion, but has placed the issue on hold while the Standing Committee considers Rule changes relating to AI. The goal is to ensure that all court and CBA committees speak with a unified voice on AI so there is consistency in the guidance provided. Should the Court elect not to adopt AI-related Rule changes, the Ethics Committee would likely issue an AI opinion.

A member commented that it is important to consider proposing to the Supreme Court AI-related revisions to the current Rules even if the Committee does not propose a standalone Rule on technology. Other members of the Committee agreed. A subcommittee member explained that the subcommittee's next report would likely include proposals for AI-related revisions to the current rules, in addition to a proposed new Rule 1.19 on technology. Judge Lipinsky emphasized that a vote to approve a proposed technology committee would not impact the work of the AI subcommittee.

A member voiced support for proposing a technology committee to the Court, but said the proposal should include a job description or a mission statement. Judge Lipinsky suggested that a few members of the Committee work together to prepare that mission statement for the Committee's approval.

Judge Lipinsky suggested putting the proposal to create a technology committee up for a vote. Judge Large abstained. Mr. Wald abstained. The remainder of the members present voted unanimously in favor of proposing a technology committee to the Supreme Court. A working group was formed to draft a mission statement for the proposed technology committee. The working group members include Jessica Yates, Julia Martinez, Dave Stark, and Judge Lipinsky. Mr. Kaufmann suggested language for the proposed mission statement for the technology committee. The working group will review that language and draft a proposed mission statement for the Committee's review and approval.

A member suggested determining what the CBA and other local bar associations are doing relating to technology and guidance to lawyers on the use of technology. Judge Lipinsky commented that this was a good suggestion. There are other local AI subject matter experts, such as Michael Siebecker (a professor at the University of Denver), who has spoken on the topic. A member discussed an AI tool that the member recently reviewed and noted that a number of generative AI tools are now available for the legal market. Members discussed such tools and how lawyers are using them in their practices.

Justice Berkenkotter thanked the work of the Committee and the AI subcommittee. She explained that, when the Court reached out to Judge Lipinsky to ask the Committee to take on this project in mid-2023, the Court understood that Colorado lawyers and litigants were already confronting problems with their use of AI technology. The evolution of the technology and the correlating issues has been swift. Justice Berkenkotter expressed her and the Court's thanks to

everybody on the subcommittee, particularly Julia Martinez (who graciously volunteered to chair the subcommittee) for the time and significant efforts they have spent on evaluating and addressing issues relating to lawyers’ use of AI. Justice Berkenkotter explained that many lawyers simply do not understand the technology or its risks and are using it improperly or in a way that violates the Rules of Professional Conduct and expectations of lawyers. The work that the subcommittee is doing is very important. Judge Lipinsky referenced two recent cases highlighting the dangers of AI and the risk of lawyer sanctions as a result of improper use of the technology. He encouraged members to review the cases: (1) *United States v. Hayes*, 24-cr-0280, 2025 WL 235531 (E.D. Cal. Jan. 17, 2025); and (2) *Kohls v. Ellison*, No. 24-cv-3754, 2025 WL 66514 (D. Minn. Jan. 10, 2025).

d. Update on ABA Model Rule 1.16 [Steve Masciocchi]. Mr. Masciocchi presented on the states that have adopted, rejected, or are considering the amendments to ABA Model Rule 1.16 that the ABA House of Delegates approved in August 2023. So far, only two states — Oregon and Wyoming — have adopted the revised Rule. Wyoming also adopted the comments to the revised Rule. Oregon did not do so; it created its own comments. Eight jurisdictions are at some level of consideration: Alaska, the District of Columbia, Massachusetts, Ohio, New York, Texas, Washington, and Wisconsin. Some states have declined to adopt the revised Rule, including California, Florida, Indiana, and Utah. Mr. Masciocchi will continue to monitor various jurisdictions’ consideration of Model Rule 1.16 and inform the Committee of further developments, as necessary.

e. Report from the Rule 1.2 subcommittee [Erika Holmes] Ms. Holmes reported that the subcommittee is considering whether the term “limited legal services” should be substituted for “limited representation” in Rule 1.2(c). The subcommittee had waited to see whether the Court would adopt the proposed changes to C.R.C.P. 11(b) and C.R.C.P. 311(b), which tracked the recent amendments to C.A.R. 5(e). When the court approved those changes, the subcommittee began considering revisions to Rule 1.2(c) to track the language of the amendments to the three rules. The subcommittee plans to submit a proposed revision to the Committee in advance of its April 2025 meeting.

f. Report from the subcommittee reviewing references to “nonlawyer” in the Rules [Lois Lupica]. Judge Lipinsky presented because Professor Lupica was unavailable. Some commentators believe that the use of “non-lawyer” in the Rules is derogatory to persons who do not have a J.D. and are not members of the bar. The subcommittee anticipates it will submit a report with recommendations for consideration at the Committee’s April 2025 meeting.

4. NEW BUSINESS.

a. Outdated cross-references in the Rules [Steve Masciocchi]. Mr. Masciocchi reported that he had identified a number of outdated cross-references in the Rules, which appear to be artifacts of prior amendments to the Rules that did not update the corresponding cross-references found in other Rules. Mr. Masciocchi recommended the following amendments to the Rules:

- Rule 1.7, comment [17]: change 1.0(m) to 1.0(n)
- Rule 1.7, comment [20]: change 1.0(n) to 1.0(o)

- Rule 1.10, comment [4]: change 1.0(k) to 1.0(l)
- Rule 1.11, comment [6]: change 1.0(k) to 1.0(l)
- Rule 1.12, comment [4]: change 1.0(k) to 1.0(l)
- Rule 1.18, comment [7]: change 1.0(k) to 1.0(l)
- Rule 2.4, comment [5]: change 1.0(m) to 1.0(n)
- Rule 3.3, comment [1]: change 1.0(m) to 1.0(n)
- Rule 3.5, comment [5]: change 1.0(m) to 1.0(n)

A member moved to approve the recommended revisions. Judge Large abstained. The proposal otherwise carried unanimously. A member commented that it is important to keep in mind in the future that, when the Committee proposes changes to the Rules, it should also propose the necessary changes to any cross-references to those Rules.

b. Coordination with LLP committee [Jessica Yates]. Ms. Yates explained that the advisory committee on LLPs recommended and approved amendments to the LLP Rules of Professional Conduct to conform to the recent amendments to Rules 1.15B, 5.4, and 5.4. The advisory committee will keep abreast of further proposed changes to the Rules to determine whether analogous changes to the LLP Rules of Professional Conduct are needed. At this point, the LLP Rules of Professional Conduct, with only a couple of exceptions, do not have their own comments and instead direct readers to the comments to the analogous Rules. There is currently no need to amend or revise the LLP Rules, which the advisory committee has conformed to the Rules.

5. ADJOURNMENT. A motion to adjourn was made at 10:01 am. The motion carried. The next meeting of the Committee will be on April 25, 2025, with meetings on July 25, 2025, and on September 26, 2025.

Respectfully submitted,

Troy R. Rackham, Secretary