COLORADO SUPREME COURT STANDING COMMITTEE ON THE COLORADO RULES OF PROFESSIONAL CONDUCT

AGENDA

July 26, 2024, 9:00 a.m.
The Supreme Court Conference Room and via Webex

Webex link:
https://judicial.webex.com/judicial/j.php?MTID=m0eb2bfb63e071961c9eb0f1dc120db37

---

1. Call to Order [Judge Lipinsky].

2. Introduction of new Committee members and reappointed members.

3. Approval of minutes for April 26, 2024, meeting [attachment 1].

4. Old business:

    a. Report on the proposed amendments to Rules 1.5 and 1.8 regarding gifts [Judge Lipinsky].

    b. Report from the Rule 1.2 subcommittee [Erika Holmes] [attachment 2].

    c. Report on outdated cross-references in the Rules [Steve Masciocchi] [attachment 3].

    d. Report from the Rule 8.4 subcommittee [Matt Kirsch] [attachment 4].

    e. Report from the trust fund subcommittee [Jamie Sudler] [attachment 5].

    f. Report from the reproductive health subcommittee [Nancy Cohen] [attachment 6].

g. Report from the AI subcommittee [Julia Martinez] [attachment 7] [the appendix will be sent separately given the size of the file].

5. New business.

a. Policy on referring to specific members of the Standing Committee in minutes.

b. Possible subcommittee to review references to "nonlawyer" in the Rules.

6. Adjournment.

Upcoming meeting dates: September 27, 2024; January 24, 2025; and April 25, 2025.

Judge Lino Lipinsky, Chair
Colorado Court of Appeals
lino.lipinsky@judicial.state.co.us

Attachment 1

COLORADO SUPREME COURT

RULES OF PROFESSIONAL CONDUCT STANDING COMMITTEE

Approved Minutes of Meeting of the Full Committee
On
April 26, 2024
Seventieth Meeting of the Full Committee

The seventy-first meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:02 am on Friday, Apil 26, 2024, by Chair Judge Lino Lipinsky de Orlov. Judge Lipinsky initially took attendance.

Present at the meeting were Judge Lino S. Lipinsky de Orlov (Chair), Katayoun Donnelly, Margaret B. Funk, April D. Jones, Judge Bryan M. Large, Marianne Luu-Chen, Stephen G. Masciocchi, Troy R. Rackham, Marcus L. Squarrell, Robert W. Steinmetz, David Stark, James S. Sudler, Eli Wald, Fred Yarger and Jessica Yates.

Present for the meeting by virtual appearance were Cynthia F. Covell, Thomas E. Downey, Jr., Scott L. Evans, Marcy Glenn, Erika Holmes, Julia Martinez, Henry Reeve, Alexander R. Rothrock, and Judge John R. Webb.

Committee members excused were Nancy L. Cohen, Judge Adam Espinosa, Matthew Kirsch, Cecil E. Morris, Jr., Noah Patterson and liaisons Associate Justice William Hood and Maria Berkenkotter. Michael Kaufmann, a member of Colorado's bar, attended as a guest.

1. CALL TO ORDER. Judge Lipinsky called the meeting to order at 9:04 a.m. Judge Lipinsky welcomed the members in attendance and virtually, as well as guest Mr. Kaufmann.

2. APPROVAL OF MINUTES FOR JANUARY 2024 MEETING. A member moved to approve the minutes, which another member seconded. A member requested an amendment to the minutes to remove the word "strategic" on page 5. A vote was taken on motion to approve minutes with the amendment. The motion passed unanimously.

3. OLD BUSINESS.

A. REPORT ON PROPOSED AMENDMENTS TO RPCS 1.5 AND 1.8 [Judge Lipinsky]. Judge Lipinsky presented on the proposed amendments. The agenda and materials have the notice of public hearing regarding the proposed amendments. The Court set a hearing for May 7, 2024 at 3:30 p.m. The deadline to request to speak at the public hearing is April 29, 2024 at 4:00 p.m. The comment period on the proposed amendments already has expired. Mr. Rothrock, the chair of the relevant subcommittee that proposed the amendments, will present on the proposed amendments but would have to appear virtually. Judge Lipinsky explained that there will be technology improvements that should allow a virtual appearance. If any other person on the committee is interested in speaking, please submit a request to speak or let Judge Lipinsky know.

The PALS II Project's proposed revisions to the limited licensed paraprofessional rules and the Rules of Professional Conduct (RPCs) became official because it was approved by the Court on November 16, 2023, effective immediately. Chair Lipinsky thanked all of those who were involved.

B. REPORT ON PROPOSED REVISIONS TO RPCS 1.8, 1.13, 1.14, 4.2, 4.5, 5.5, AND 6.1 [Judge Lipinsky]. Judge Lipinsky reported that the Court adopted the committee's proposed the revisions to RPCs 1.8, 1.13, 1.14, 4.2, 4.5, 5.5, and 6.1 (which eliminated gendered pronouns from the Rules) effective February 8, 2024. Rule Change 2024(06) is on the Court's website and can be located in the minutes for this meeting.

C. REPORT ON PROPOSED REVISIONS TO RPC 1.2 [Judge Lipinsky]. Judge Lipinsky reported on the proposed revisions to Colo. RPC 1.2. Judge Lipinsky explained that the Court has elected to Court defer consideration of the proposed amendments to Rule 1.2.

D. REPORT FROM THE AI SUBCOMMITTEE [Julia Martinez]. Julia Martinez provided an update of what the AI Subcommittee has been doing. The subcommittee meets regularly. The subcommittee has have very robust discussions on potential amendments to a variety of rules. The subcommittee anticipates a full report from the subcommittee with proposed revisions to the rules at the next meeting scheduled for July 26, 2024.

E. REPORT FROM THE REPRODUCTIVE HEALTH SUBCOMMITTEE [Nancy Cohen]. Ms. Cohen was unavailable for and excused from attending the meeting, so Judge Webb presented on the work of the subcommittee in her stead. The work of the subcommittee is ongoing and there have been robust discussions. The subcommittee expects to have a proposed draft amendments and a report at the July 26, 2024 meeting. The primary focus of the committee us whether to allow a lawyer to provide legal assistance and advice to clients in jurisdictions where the conduct would be unlawful.

F. REPORT FROM THE ATTORNEY REFERENCE/RPC 6.1 SUBCOMMITTEE [Steve Masciocchi]. Mr. Masciocchi explained that the subcommittee met in February. Before meeting, members of the committee searched the various applicable RPCs to determine if they used the term "attorney" instead of lawyer. There are 106 references to the term "attorney" in the RPCs. Most of the references to "attorney" in RPC 6.1, the model pro bono policy. There are several others where the use of the term attorney is a term of art, such as "power of attorney," "attorney general," or "attorney-client privilege." The other references are fairly innocuous, such as attorney discipline. The overall view of the subcommittee was to not recommend revisions because there are no ambiguities and because the references to "attorney" are terms of art or are innocuous. The issue was put to a vote before the entire Committee. The Committee unanimously voted to not act further or request additional changes to the proposed Rules.

After the vote, a member raised a question about to whether to revise the comments and cross-references to the model pro bono policy appended to RPC 6.1. The Colo. Rules of Civil Procedure and statutory references in the model pro bono policy are outdated and need to be revised. There are two options. One is to simply check the cross-references in the pro bono policy and ensure that the cross-references are accurate. Another is to take a fresh look at the entire RPC

6.1 and model pro bono policy. The RPC 6.1 subcommittee will review the C.R.C.P. and statutory references in the rule and recommend revisions to them to ensure that the cross-references are accurate. S. Masciocchi agreed to have the subcommittee review the C.R.C.P. and statutory references in the rule and recommend revisions. That work should be completed with recommendations by the July 2024 meeting.

The Chair asked the Committee whether there is a need to take a fresh look at RPC 6.1 or the model pro bono policy. A discussion ensued. No member of the Committee moved to take a fresh look at RPC 6.1 or the model pro bono policy appended to the Rule.

G. Report on the Letter Regarding the Amendments to Rule 1.16 of the Model Rules [Steve Masciocchi]. Mr. Masciocchi reported on the letter regarding the amendments to RPC 1.16 of the Model Rules. (S. Masciocchi). Mr. Masciocchi explained the history of the issue. The ABA House of Delegates passed Resolution No. 100, which authorized revisions to Model RPC 1.16 that impose obligations on lawyers to report clients who may be involved in money laundering, human trafficking or other terrible conduct. The revisions to Model Rule 1.16 were an effort to get in front of the potential that Congress may take certain action. The revisions to Model Rule 1.16 go beyond the limited situations described above, but would also apply to client fraud or generalized misconduct.

In April 2024, the Committee discussed the issue. The Committee elected to authorize Mr. Masciocchi to draft a proposed letter to the Court describing the revisions to Model Rule 1.16 and explaining the Standing Committee's current view and determining whether the Court wants the committee to evaluate and consider whether to adopt the amended language of Model Rule 1.16 or some alternative language. Another member proposed revisions to the proposed letter Mr. Masciocchi drafted. A member also had a question of whether other jurisdictions have adopted the revisions to Model Rule 1.16. There is insufficient information on this issue. Mr. Masciocchi has researched it and has not found any jurisdictions that have adopted the revisions to Model Rule 1.16. Members of the subcommittee were going to perform further research to determine whether other jurisdictions have adopted the revisions to Model Rule 1.16. Another member explained that the ABA Center on Professional Responsibility is a good resource to review to determine whether other jurisdictions have adopted the revisions to Model Rule 1.16. Members of the subcommittee will contact the ABA Center on Professional Responsibility to get further information.

The Chair put the redline version of ABA Resolution No. 100 on the screen so members of the Committee could review it. ABA Resolution No. 100 approved the amendments to Model Rule 1.16. Committee members identified and discussed the revisions to Model Rule 1.16. The Chair explained that he attended the ABA meeting where the proposed revisions were debated. Members of the committee discussed the arguments in favor of and against the revisions to Model Rule 1.16. One lawyer debating the proposed amendments presented an interesting hypothetical involving a patent lawyer who represents many clients in a very limited way. Does the lawyer have to do a thorough investigation of each client even with the limited scope of engagement in order to comply with Model Rule 1.16? That hypothetical created concerns amongst those who were evaluating and debating the proposed revisions to Model Rule 1.16.

Mr. Kaufman, a guest of the Committee, asked for the context of the Model Rule 1.16 revisions? He wondered whether the proposed revisions emanate from the post-2020 election aftermath. A member reported on the background of the revisions to Model Rule 1.16, which come from a treaty about money laundering. The treaty then resulted in the Treasury Department proposing anti-money laundering regulations that would apply to lawyers. The revisions to Model Rule 1.16 were an effort to get in front of the Treasury Department to avoid regulation by the Treasury Department. Another member explained that Sarbanes-Oxley, when it was passed, would have allowed regulation of lawyers in certain contexts. That resulted in the revisions to Model Rule 1.13 addressing obligations of lawyers to run issues up the corporate chain.

A motion was made to approve the revised letter to send to the Court. The motion was seconded. The motion carried unanimously.

H. RULE 8.4 SUBCOMMITTEE. No report.

4. NEW BUSINESS.

a. Proposed New Rule Addressing a Client's Refusal to Accept Funds Belonging to the Client [Joseph Michaels, Chair of the CBA Ethics Committee]. Mr. Michaels was not yet in the meeting because of a conflict, so the Chair presented on the issue. The issue emanates from a request to the CBA Ethics Committee, which was explained in the email (attachment 3) that was part of the packet for the meeting. The Chair initiated the discussion. A member asked about the factual circumstances involved when this issue comes up because logically, one would think the client would want to retain the funds. Another member explained that some clients may be disqualified from public or other benefits if the client receives funds. A member explained that prisoner clients sometimes cannot receive transfer of funds because of the requirements of incarceration. A third member explained that sometimes the clients have diminished capacity that interferes with their understanding about the funds belonging to the clients. A member who also is on the CBA Ethics Committee explained that the CBA Ethics Committee gets a number of inquiries on this topic and generally has to duck the issue because the Rules of Professional Conduct do not provide clear guidance. A decision was made to form a subcommittee. The members of the subcommittee will be J. Sudler (Chair), Ms. Luu-Chen, Ms. Donnelly, Mr. Squarrel, Mr. Rothrock, Mr. Yarger and Ms. Holmes. The Chair of the Committee thanked those who volunteered to serve on this subcommittee.

5. ADJOURNMENT. A motion to adjourn was made at 9:48 a.m. and was duly seconded. The motion carried. The meeting adjourned at 9:49 a.m. The next meeting of the Committee will be on July 26, 2024.

Respectfully submitted,

Troy R. Rackham, Secretary

Attachment 2

Memorandum

To: Standing Committee on the Rules of Professional Conduct

From: Erika Holmes, Chair of the Rule 1.2(c) Subcommittee

Date: July 26, 2024

Re: Proposed Changes to Colorado Rule of Professional Conduct 1.2(c)

In May 2024, the Supreme Court approved amendments to C.A.R. 5(e) regarding lawyers' provision of limited legal services to self-represented parties in civil appeals. Among the amendments was the replacement of the term "limited representation" with "limited legal services."

The intent behind this change in terminology was two-fold. First, "limited legal services" more accurately describes a lawyer's ability to provide a variety of specified legal services, including drafting, advising, reviewing documents, and preparing clients to represent themselves in court. In addition, the term "limited representation" can create the misperception that a lawyer may only limit the services they provide in a litigation context. Second, referring to "limited legal services" in C.A.R. 5(e) is consistent with the use of the term since 2008 in Colo. RPC 6.5: Nonprofit and Court-Annexed Limited Legal Services Programs.

Following the approval of C.A.R. 5(e), the Rule 1.2(c) Subcommittee met on June 11, 2024, and July 12, 2024, to discuss amending Rule 1.2(c) to be consistent with C.A.R. 5(e) and to give guidance to lawyers regarding the types of limited legal services they can provide. The Subcommittee included additional examples of limited legal services in its proposed amendments to comment [6]. The subcommittee also proposes a new comment [6A] to clarify that providing limited legal services constitutes the practice of law.

The Subcommittee requests that the Standing Committee recommend that the Supreme Court adopt the proposed amendments to C.A.R. 5(e) and comment 6, and the new comment [6A].

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

(c) A lawyer may limit the scope or objectives, or both, of the legal services provided to a client if the limitation is reasonable under the circumstances and the client gives informed consent. A lawyer may provide limited legal services to self-represented parties as permitted by C.R.C.P. 11(b), C.R.C.P. 311(b), and C.A.R. 5(e).

COMMENT

Agreements for Limited Legal Services

[6] The scope or objectives of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, when an insurer has retained a lawyer to represent an insured, the legal services the lawyer provides to the insured may exclude assistance with coverage disputes between the insured and the insurer; in a civil case, a lawyer and a client may agree that the scope of the legal services provided to the client will be limited to assistance with a single dispositive motion; and, in a dissolution of marriage case, a lawyer and a client may agree that the scope of the legal services provided to the client will be limited to assistance with temporary orders. Limited legal services may be appropriate because the client has limited objectives for seeking legal services. For example, the limited legal services provided may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[6A] Except as provided otherwise, the Rules of Professional Conduct are applicable to the limited legal services provided by a lawyer.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the scope and objectives of the legal services provided to the client, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to providing advice through a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for limited legal services does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. See Rule 1.1.

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

(c) A lawyer may limit the scope or objectives, or both, of the legal services provided to a client if the limitation is reasonable under the circumstances and the client gives informed consent. A lawyer may provide limited legal services to self-represented parties as permitted by C.R.C.P. 11(b), ~~and~~ C.R.C.P. 311(b)~~.~~, and C.A.R. 5(e).

COMMENT

Agreements ~~Limiting Scope of Representation~~ for Limited Legal Services

[6] The scope or objectives of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. ~~When a lawyer has been retained by an insurer to represent an insured in an auto accident claim, for example, the scope of the legal services provided may be limited to matters related to the insurance coverage and not include may exclude the insured's a counterclaim by the insured against the other driver for property damage to the insured's car.~~ For example, when an insurer has retained a lawyer to represent an insured, the legal services the lawyer provides to the insured may exclude assistance with coverage disputes between the insured and the insurer; in a civil case, a lawyer and a client may agree that the scope of the legal services provided to the client will be limited to assistance with a single dispositive motion; and, in a dissolution of marriage case, a lawyer and a client may agree that the scope of the legal services provided to the client will be limited to assistance with temporary orders. Limited legal services may be appropriate because the client has limited objectives for seeking legal services. For example, the limited legal services provided may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[6A] Except as provided otherwise, the Rules of Professional Conduct are applicable to the limited legal services provided by a lawyer.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the ~~representation~~scope and objectives of the legal services provided to the client, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to providing advice through ~~to~~ a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for ~~a limited representation~~limited legal services does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. See Rule 1.1.

Attachment 3

lipinsky, lino

From: Stephen G. Masciocchi <SMasciocchi@hollandhart.com>
Sent: Thursday, May 9, 2024 11:14 AM
To: lipinsky, lino
Cc: Jessica Yates
Subject: [External] Corrections to C.R.C.P. Cites in the Colo. RPC

Judge Lipinsky,

I'm reporting back from our two-person subcommittee on corrections to C.R.C.P. cites in the rules. I checked each such citation (27 total) and identified three corrections that we need to make. I ran these by Jessica and she concurs. They are as follows:

- In the Model Pro Bono Policy, the two references to C.R.C.P. 260.8, which no longer exists, should be changed to C.R.C.P. 250.9.
- In Rule 5.4(f), the reference to C.R.C.P. 260.6, which no longer exists, should be changed to C.R.C.P. 250.7.

Please let us know if you have questions. Otherwise, you can put these proposed changes on the July 26 meeting agenda.

Best,

Steve

Holland & Hart

Stephen Masciocchi
Partner
HOLLAND & HART LLP
555 17th Street, Suite 3200, Denver, CO 80202
smasciocchi@hollandhart.com | **T:** (303) 295-8451

Attachment 4

Memorandum to Standing Committee on the Rules of Professional Conduct

From: Misgendering Subcommittee (Matt Kirsch (Chair), Thomas Downey, David Stark, John Webb, and Jessica Yates)

Date: July 2, 2024

Re: Proposed Changes to Rule 8.4(g)

Background for Misgendering Subcommittee

This subcommittee was started after an incident in which at attorney attending a CLE reportedly made disrespectful comments related to the gender of or potentially misgendering one or more other people attending the CLE. The subcommittee was asked to consider whether the Colorado Rules of Professional Conduct or their comments should be amended to address this sort of behavior, recognizing that the context and setting of such offensive comments may make a difference as to whether the Rules apply.

The subcommittee initially considered several potentially applicable rules, including 3.4(e), 4.4(a), 8.4(d), and 8.4(i), but it concluded that none of these were good fits for the type of conduct in question.

The subcommittee then focused primarily on Rules 8.4(h) – which prohibits a lawyer from "engag[ing] in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer's fitness to practice law", and 8.4(g) – which prohibits a lawyer from "engag[ing] in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's … gender [or] … sexual orientation…." The subcommittee concluded that 8.4(h) was both too narrow and too broad to effectively address this issue. It's too narrow because it requires proof of both intent and actual harm; it's too broad because it includes conduct unconnected to a lawyer's professional activities and would likely implicate First Amendment issues if used to regulate behavior outside the practice of law.

The subcommittee therefore settled on Rule 8.4(g), which applies only to conduct "in the representation of a client." After reviewing other states' versions of 8.4(g) and similar prohibitions against biased conduct and consulting with a legal expert in gender and sexual orientation issues, the subcommittee made an interim report and had discussion with the full Standing Rules Committee at the January 2024 meeting. At that meeting, the full committee provided the following guidance:

1. The subcommittee should proceed with proposing changes to Rule 8.4(g) that would broaden the prohibited bases for appealing to or engendering bias to more fully reflect current understanding of the concepts of sex, gender identity and expression, and sexual orientation;

2. The subcommittee should also address Rule 8.4(g)'s current omission of ethnicity as a prohibited basis for appealing to or engendering bias;
3. The subcommittee should not propose any changes to the *mens rea* standard of 8.4(g).

Proposal to Amend Rule 8.4(g)

Based on its deliberations and the guidance from the full committee above, the subcommittee proposes that the current version of Rule 8.4(g) be amended as shown in this redline:

> **Rule 8.4. Misconduct**
>
> It is professional misconduct for a lawyer to:
>
> (g) engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, sex, gender identity or expression, sexual orientation, religion, national origin, ethnicity, disability, age, ~~sexual orientation,~~ or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process; or ….

The rationale for each change is described below.

The Addition of "Sex" and "Gender Identity or Expression" Resolves Current Ambiguity in the Rule and is More Inclusive

Sex, gender identity, gender expression, and sexual orientation are all different concepts. Sex refers to a person's biological sex at birth. Gender identity refers to a person's internal psychological identity as female, male, neither, or both. Gender expression refers to a person's outward, visible expression of gender, which might differ from the person's internal gender identity. Sexual orientation refers to the gender(s) of other people, if any, to which a person is sexually attracted. The current version of Rule 8.4(g) does not reflect these nuances.

Other states' treatment of these concepts are mixed. Only about half the states have a prohibition similar to our Rule 8.4(g). Of those, approximately a half again include more concepts than Colorado's current rule, and six states include all four concepts recommended by the subcommittee. The chart below reflects the categories used by the various states that have a similar prohibition:[1]

[1] Information in this chart comes from a list maintained by the ABA at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-8-4.pdf.

States	Protected Categories
California, Connecticut, Illinois, New York, Oregon, Pennsylvania	Sex, sexual orientation, gender identity, and gender expression
ABA Model Rule 8.4(g), Alaska, Maine, Missouri,[2] New Hampshire, New Mexico, Vermont	Sex, sexual orientation, and gender identity
Florida, Indiana, Nebraska, Ohio, Rhode Island	Gender and sexual orientation
Maryland, Massachusetts, Minnesota, New Jersey, North Dakota, Washington, Wisconsin[3]	Sex and sexual orientation

The first shortcoming of the current Rule 8.4(g) is its exclusion of "sex." As noted above, sex is now understood as a biological concept as opposed to the psychological or behavioral aspects of gender. A second issue with the current version of Rule 8.4(g) is that "gender" is not further defined in the rule or its comments. Given the current understanding of concepts related to sex and gender, the scope of the current rule, particularly as it pertains to trans people whose gender identity and/or expression is different from their biological sex, is unclear. For example, would the current rule prohibit engendering bias against a biological male who presented as female on the basis of "gender?" What about a biological female who presented as female but whose gender identity was known to be male? Although the current rule's reference to gender might address such situations, the subcommittee recommends adding to the rule to remove its current ambiguity.

Broadening Rule 8.4(g) is also consistent with a desire that the Rules of Professional Conduct reflect the legal profession's aspirations to be more inclusive. The current version of Rule 8.4(g) appears to provide, or at least to signal a desire to provide, a less robust range of protection from bias than is currently provided in state and federal law. *See, e.g.,* Colo. Rev. Stat. 18-9-121(2) & (5)(b) (2024) (providing enhanced penalties for crimes committed because of a victim's actual or perceived "sexual orientation," which is defined to include both the sex to which a person is attracted and being transgender); Colo. Rev. Stat. 24-34-601 (2024) (making it unlawful to deny public accommodations based on a person's sex, sexual orientation, gender identity, or gender expression); 18 U.S.C. § 249(a)(2)(A) (2024) (criminalizing willfully causing or attempting to cause bodily injury because of the actual or perceived gender, sexual orientation, or gender identity). Changing the rule would better reflect the legal profession's goal of inclusivity and would better align the rule with substantive law related to discrimination and bias.

[2] Missouri also adds "gender" to this list.

[3] Wisconsin uses "sexual preference" rather than sexual orientation.

Finally, the subcommittee proposes moving sexual orientation up from its current place in the list, so it is next to related prohibited bases for appealing to bias. This is not a substantive change but should make it easier for lawyers to understand the full scope of these related prohibitions.

The Addition of "Ethnicity" is Also More Inclusive

According to Merriam-Webster, "race refers to a group sharing some outward physical characteristics and some commonalities of culture and history. Ethnicity refers to markers acquired from the group with which one shares cultural, traditional, and familial bonds." https://www.merriam-webster.com/grammar/difference-between-race-and-ethnicity. The full committee's suggestion to add "ethnicity" to Rule 8.4(g)'s list of prohibited bases for appeals to bias is consistent with a desire to broaden the protections of this Rule to reflect current cultural understanding. The subcommittee has not done additional research or analysis on this suggestion but supports it on this basis.

Attachment 5

Memorandum

To: Standing Committee on the Rules of Professional Conduct
From: Jamie Sudler, Chair of Subcommittee on Rule 1.15
Date: July 26, 2024
Re: Proposed Changes to Rule 1.15(B)

At the April 26, 2024, meeting of the Supreme Court Standing Committee on the Rules of Professional Conduct, a subcommittee was formed to consider a gap in the rules concerning funds a lawyer holds in trust.

The issue was brought to the attention of the Committee by Joe Michaels, Chair of the Colorado Bar Association Ethics Committee. He explained in a memo that a lawyer may hold funds in trust that belong to a client or another person who does not want to accept the funds. Colo. RPC 1.15(B) addresses situations where the lawyer does not know the identity or location of the owner of funds, or the owner is deceased and the personal representative, or heirs cannot be found. However, it does not guide a lawyer when the client or owner of the funds does not want them.

The subcommittee has met and discussed the issue. A draft of a new rule to cover this situation follows. The proposed rule would require COLTAF to accept the funds from the lawyer and to hold them under rules it publishes.

To that end, I have been in touch with Jordan Bates-Rogers who is director of COLTAF. Jordan has informed me by email that the proposed rule looks good from COLTAF's perspective. Unfortunately, he will not be available to attend a meeting of the Committee on July 26.

The Subcommittee is also recommending a change to the first sentence of Rule 1.15(B)(k), which is shown in the attachment. The change would add the following phrase: "or other trust account" to the first sentence of that rule. The addition would make it clear that a lawyer may hold funds in trust but not necessarily in a COLTAF account, as a COLTAF account is not required. We believe it was an oversight not to include that possibility when the rule was written.

The Subcommittee asks that the proposed changes and the new rule be considered by the full Committee.

Current Rule 1.15B

(k) If a lawyer discovers that the lawyer does not know the identity or the location of the owner of funds held in the lawyer's COLTAF account or other trust account, or the lawyer discovers that the owner of the funds is deceased, the lawyer must make reasonable efforts to identify and locate the owner or the owner's heirs or personal representative. If, after making such efforts, the lawyer cannot determine the identity or the location of the owner, or the owner's heirs or personal representative, the lawyer must either (1) continue to hold the unclaimed funds in a COLTAF or other trust account or (2) remit the unclaimed funds to COLTAF in accordance with written procedures published by COLTAF and available through its website or upon request. A lawyer remitting unclaimed funds to COLTAF must keep a record of the remittance pursuant to Rule 1.15D(a)(1)(C). If, after remitting unclaimed funds to COLTAF, the lawyer determines both the identity and the location of the owner or the owner's heirs or personal representative, the lawyer shall request a refund for the benefit of the owner or the owner's estate, in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide upon request.

Rule 1.15B(l)

If a lawyer holds funds in a COLTAF or other trust account but the owner of the funds refuses to accept the funds, or will not communicate with the lawyer about them after the lawyer has made reasonable efforts to contact the owner, then the lawyer must either (1) continue to hold the funds in a COLTAF or other trust account or (2) remit the funds to

COLTAF in accordance with written procedures published by COLTAF and available through its website or upon request. If the lawyer chooses to remit the funds to COLTAF, the lawyer must first provide written notice to the owner informing them of the intent to remit. The lawyer must keep a record of the remittance pursuant to Rule 1.15(D)(a)(1)(C). If, after remitting the funds, the owner of the funds informs the lawyer that they will accept the funds, then the lawyer shall request a refund for the owner, in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide upon request.

Attachment 6

MEMO

To: Standing Committee on the Rules of Professional Conduct
From: Nancy L. Cohen
Re: Proposed Comment to Rule 1.2

Proposed Comment to Rule 1.2.

The subcommittee has met several time over the last several months to decide (1) whether to submit a proposed comment to Rule 1.2 regarding providing legal services to clients in the reproductive health care arena, and (2) if yes, what should the say that addresses lawyers' professional responsibilities when providing advice about reproductive health care to clients who are located in Colorado or come to Colorado from other states. The subcommittee decided the comment should address legal services that are broader than just reproductive health care to avoid having to come back and revise the comment.

The subcommittee spent a significant amount of time discussing whether to submit a proposed comment and if so, what should it say. The overwhelming majority agreed that a comment should be submitted to the Standing Rules Committee. There is some opposition- 2 people expressed opposition to the comment. Although one person on the subcommittee was not in favor of a comment, he provided very helpful suggestions to improve the comment language.

The subcommittee wanted to keep the applicability to jurisdictions other than the federal or tribal jurisdictions. The proposed comment is as follows:

> [15] A lawyer may provide legal services to a client regarding conduct in Colorado that the lawyer reasonably believes is legal in Colorado, even if the conduct or its likely effects may be unlawful in another jurisdiction. Those services can include counseling the client regarding the validity, scope, and meaning of Colorado law relevant to the conduct in Colorado. However, the lawyer shall also advise the client that the conduct or its likely effects may be unlawful in another relevant jurisdiction and encourage the client to seek legal advice from counsel admitted in that jurisdiction.
>
> For purposes of this comment, "another jurisdiction" does not include a federal or tribal jurisdiction.

Colorado Rules of Professional Conduct

- **Rule 1.2.** Scope of Representation and Allocation of Authority Between Client and Lawyer.
    - Comment 14: A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIll, secs. 14 & 16, and the Colorado Natural Medicine Act of 2022, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional

> provisions and statutes, and the statutes, regulations, orders, and other state or local provisions implementing them, as they may be amended from time to time. ln these circumstances, the lawyer shall also advise the client regarding related federal law and policy.

Comment 14 to Colo. RPC 1.2 was initially drafted to address the discrepancy between state and federal regulation regarding marijuana. The comment protects lawyers who advise clients involved in the marijuana industry in Colorado and now the industries under the Colorado Natural Medicine Act of 2022, whether directly or indirectly, under Colorado law, even though federal law prohibits such businesses. A potential new comment to Rule 1.2 described on the first page of this Memo, could be similar to what DORA's professional boards enacted to effectively implement the directives of Executive Order D 2022 032.

The Washington State Bar Association recently proposed an amendment to Comment 18 of the Washington Rule 1.2 – Scope of Representation and Allocation of Authority Between Client and Lawyer, which the Washington Supreme Court approved for publication on an expedited basis. The comment concerns not just advice to client about marijuana but also advice regarding reproductive health care. The redlined version of Comment 18 is as follows:

> Comment 18: Under Paragraph (d), a lawyer may counsel a client regarding ~~Washington's marijuana~~ *Washington* laws and may assist a client in conduct that the lawyer reasonably believes is permitted under those laws *(for example and without limitation, Washington laws related to reproductive health care services, gender-affirming care, or cannabis)*. If Washington law conflicts with federal law~~, or tribal law,~~ *or the law of another jurisdiction*, the lawyer shall also advise the client regarding the ~~related federal or tribal law and policy~~ *conflicting laws or recommend that the client seek the advice of a lawyer with established competence in the field in question. See Comment 1 to Rule 1.1. If a lawyer counsels or assists a client regarding Washington's laws in these circumstances, that conduct, and the predominant effect of the conduct, shall be deemed to occur in Washington for purposes of these Rules.*[1]

Background

On June 24, 2022, the Supreme Court, in a 6-3 decision, voted to overturn *Roe v. Wade* and *Planned Parenthood v. Casey* in *Dobbs v. Jackson Women's Health Organization*.[2] Holding that the Constitution does not confer a right to an abortion, the Court gave individual states the full power to regulate any aspect of abortion not preempted by federal law. Some states have in turn banned the performance of abortion procedures, some of which employed so called "trigger-laws" that went into effect once *Dobbs* was announced. Texas is one of those states, where the

[1] In re Suggested Amendments to RPC 1.2, 2024 Wash. LEXIS 104, *6-7.

[2] 142 S.Ct. 2228 (2022).

performance of an abortion is now a felony, punishable by up to life in prison and a fine of $100,000.[3]

In response, many national companies, including national law firms, have publicly announced policies that would cover the cost of out of state travel and other expenses should their employees require reproductive health care not available in their home state.[4] (In this memo, I use the statutory definition of "reproductive health care" set forth in C.R.S. § 25-6-402(4).)[5] Political groups that oppose access to reproductive health care have responded to these policies with threats of legal action, particularly against law firms whose lawyers may represent certain individuals, groups or companies.[6] This has resulted in the service of litigation hold letters on at least one national law firm that has been involved in the representation of certain clients.

In 2022, the Colorado legislature codified the right to reproductive health care.[7] Also in 2022, Governor Jared Polis issued an executive order in response to the actions of various state legislatures criminalizing aspects of reproductive health care post-*Dobbs* that is meant to protect Colorado licensed professionals who work in health care.[8]

Since that time, at least 14 states have passed legislation that essentially bans all abortions. Some states have criminalized conduct related to abortions. On June 27, 2024, in *Moyle v. US*[9], the US Supreme Court dismissed the writ of certiorari before judgment as improvidently granted. The Idaho state law at issue prohibits abortions even where it is necessary to prevent serious health harm to the mother. The Federal District Court entered a preliminary injunction that allowed women to continue getting abortions to prevent serious harm under the federal Emergency Medical Treatment and Labor Act (EMTALA). Idaho filed an emergency application with the Supreme Court to stay the injunction after the 9th Circuit declined to do so. On January 5, 2024, the Supreme Court stayed the injunction and granted Idaho's petition for certiorari before judgment, allowing Idaho to impose its limitation on abortions. As a result, Idaho's largest provider of medical services had to airlift pregnant women out of the state bi-weekly to receive the necessary medical care. The injunction remains in place but because the Supreme Court did not decide whether the Idaho law is preempted by federal law, the case returns to the District Court.

---

[3] Eleanor Klibanoff, *Texans who perform abortions now face up to life in prison, $100,000 fine*, THE TEXAS TRIBUNE, Aug. 25, 2022. https://www.texastribune.org/2022/08/25/texas-trigger-law-abortion/#:~:text=Performing%20an%20abortion%20is%20now,its%20judgment%20in%20Dobbs%20v.

[4] Emma Goldberg, *These Companies Will Cover Travel Expenses for Employee Abortions*, THE NEW YORK TIMES, Aug. 19, 2022. https://www.nytimes.com/article/abortion-companies-travel-expenses.html

[5] The statute defines "Reproductive health care" to mean "health care and other medical services related to the reproductive processes, functions, and systems at all stages of life. It includes, but not limited to, family planning and contraceptive care; abortion care; prenatal, postnatal, and delivery care; fertility care; sterilization services; and treatments for sexually transmitted infections and reproductive cancers."

[6] Justin Wise, *Sidley Targeted as Republicans Warn Firms on Abortion Pledges*, BLOOMBERG LAW, July 8, 2022. https://news.bloomberglaw.com/business-and-practice/sidley-targeted-as-republicans-warn-firms-on-abortion-pledges

[7] *See* Colorado General Assembly, HB22-1279, Reproductive Health Equity Act

[8] *See* Exec. Order D 2022 032.

[9] 603 US ___ (2024).

The ethical implications for Colorado lawyers whose practice includes representing out of state individuals, health care professionals, and entities that offer reproductive health care services are significant. For example, someone may file a complaint against an attorney licensed in Colorado who represents doctors practicing reproductive health care for patients who live in states that have reproductive health care bans. Likewise, lawyers advising clients seeking to travel from out of state to receive reproductive health care in Colorado may run the risk of being accused of potential ethical violations. Another example concerns transactional advice when an attorney representing a reproductive health care provider or other health care provider providing services for services prohibiting in another state regarding a real estate transaction, could face claims of ethical violations because the provider offers services to out of state patients. This could be especially complex if the lawyer is also licensed in a jurisdiction that imposes substantial limitations on access to reproductive health care.

Law firms also face practical concerns regarding this type of client representation. Clients could have a negative reaction to a widely known firm policy that is meant to overcome statutes or regulations of a jurisdiction or jurisdictions where the firm has an office, and which enacted prohibitions on certain types of reproductive health care services. Similarly, in light of the concern that Colorado attorneys may become the targets of ethical complaints, law firms may well prohibit their attorneys from assisting those who seek to obtain, or to provide, health care services that are lawful in Colorado, but restricted or banned elsewhere.

This memo provides background information about the ethical issues facing Colorado lawyers whose representation may include people and companies that are involved in reproductive health care. The subcommittee is asking the Committee to consider a comment to Colo. RPC 1.2,similar to the comment regarding lawyers representing businesses or people engaged in our state-regulated marijuana industry or provide legal services pursuant to the Colorado Natural Act of 2022, for lawyers whose representation relates to reproductive health care.

Ethics Implications of Dobbs for Law Firm Management and Client Counseling

In the wake of the *Dobbs* decision, the Ethics & Professionalism Committee of the American Bar Association[10] published an article addressing the important professional responsibility issues *Dobbs* raises for attorneys and firms whose conduct is now legal in some states, such as Colorado, while arguably criminal in others, such as every state bordering Colorado other than New Mexico. By way of a summary:

The Problem: Law firms are not just another kind of business.

Lawyers are subject to ethical rules where the lawyers are licensed. This can create an avenue for persons opposed to reproductive health care to file complaints with disciplinary agencies to punish lawyers for advising clients who offer, or seek, reproductive health care, or that may have a business interest in the provision of such care.

[10] https://www.americanbar.org/groups/litigation/committees/ethics-professionalism/articles/2022/ethics-implications-dobbs-law-firm-management-client-counseling/

Approximately 61% of the US population lives in jurisdictions where reproductive health care services are legal.[11] Thus, there is a question whether laws criminalizing conduct that facilitates travel to a state where abortion care is legal, create a crime of moral turpitude that implicates Rule 8.4. Nevertheless, Colorado lawyers representing patients seeking reproductive health care or providers offering such care have legitimate concerns about their ethical conduct based on lawful conduct in the state where they are licensed for providing legal advice to persons in another state about Colorado law.

Justice Kavanaugh noted in his concurrence in *Dobbs* that laws barring residents of a state from traveling to another state to obtain an abortion would violate the constitutional right to interstate travel.[12] This position could support arguments that criminal penalties surrounding reproductive health care do not rise to the level of moral turpitude. Although the Court in *FDA v. Alliance for Hippocratic Medicine*[13] unanimously held that the plaintiffs lack Article III standing to challenge the FDA's actions regarding the regulation of mifepristone because the plaintiffs do not prescribe or use mifepristone, lawyers who practice in this area are still concerned about the advice they provide that impact out of state clients or persons.

Multi-jurisdictional concerns

Liability for firm policies and procedures

In most states, the ethical rules apply to individual attorneys, not law firms. Colo RPC 5.1 and 5.7 deal with obligations of attorneys with respect to the conduct of other attorneys and individual non-attorneys within the firm.

It is helpful to consider this factual scenario: A national law firm is based in Texas, and the firm's management committee holds a vote about covering expenses that relate to employees receiving reproductive health care services not available in the state. The Texas based members vote against the policy, but they are outvoted by other members, resulting in reproductive health care expenses will be covered per the firm policy. Have the Colorado members of the management committee engaged in an ethical violation by enacting a policy for services permitted in Colorado, but sanctioned as criminal in Texas?

Advising clients on reproductive health care-related policies

Many non-legal business entities have announced policies that will cover reproductive health care for their employees, and only did so after consulting with their attorneys, including attorneys in states where certain reproductive services have been criminalized. In other instances, individuals may seek advice from Colorado attorneys before receiving reproductive health care, either for themselves or for a person close to them. Similarly, medical professionals and hospitals are likely to seek advice about these issues from legal counsel as well.

---

[11] https://www.politifact.com/factchecks/2022/jun/27/jonathan-turley/complicated-calculation-determine-what-share-popul/#sources

[12] *See Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, concurring).

[13] 602 U.S. ___(2024)

The duty to report professional misconduct

The duty to report the professional misconduct of another attorney encompassed in Model Rule 8.3 affects attorneys in nearly every state.[14] It is hard to imagine a scenario before *Dobbs* where a law firm would be threatened with criminal prosecution because of an internal policy related to the health care policies it adopted for the benefit of its employees. But when law firms and attorneys act in furtherance of reproductive rights, they may, in the wake of *Dobbs*, become targets. Arguments can be made that because conduct is a crime in one jurisdiction but not another, prohibitions on access to reproductive health care do not create the type of crimes that implicate ethical concerns. Still, it is troublesome to lawyers who manage firms with policies that give their employees access to reproductive health care, and to attorneys in firms who advise clients on reproductive health care issues, that their law license might be at risk because they do so.

Colorado State Law Considerations

In 2023, Governor Polis signed three bills relating to and affecting reproductive health care. SB23-188[15] addresses reproductive health care and gender-affirming health care. SB23-188 also addresses contract provisions between insurers or other persons, and health care providers that protect health care providers from certain legal actions based on reproductive health care or gender-affirming health care services.

SB23-188 protects current and potential health-care licensees from punishment for providing a legally protected health care activity in Colorado or another state pursuant to Colorado law or pursuing their own legally protected health care activity. It also prevents individuals who access a legally protected health care activity in Colorado and those involved in performing such an activity from being subpoenaed in relation to a proceeding in another state.

SB23-189[16] requires large employer health benefit plans to cover the entire cost of reproductive health care as well as individual and small group health benefit plans consistent with federal law requirements.

This bill also allows a health-care provider, where they are permitted to do so, to give contraceptive procedures, supplies, or information to a minor without the permission or notification to the minor's parents, legal guardian, or other adult responsible for the child's actions. The state department is now required to add family planning services and family-planning-related services to its reproductive health program.

---

[14] Washington state and Georgia are the only two states who do not impose a mandatory reporting requirement on attorneys in this regard. Those states' rules that are the equivalent to Rule 8.3 use "should" instead of "shall." The Georgia rule expressly provides there are no disciplinary penalties for a violation of Rule 8.3. *See Rule 8.3: Reporting Other Lawyers*, Lundberg, fn. 3 (Jan. 2019) (http://lundberglegalethics.com/wp-content/uploads/2019/03/jan.-2019-westlaw-rule-8.3-reporting-other-lawyers.pdf).

[15] SB23-188, 74th Gen. Assemb., 2d Reg. Sess. (Colo. 2023).

[16] SB23-189, 74th Gen. Assemb., 2d Reg. Sess. (Colo. 2023).

SB23-190[17] adds as a deceptive trade practice the creation or distribution to the public any advertisement that indicates that the person provides certain pregnancy-related services when the person knows or reasonably should have known that is inaccurate. It also addresses the potential repercussions for health care providers who provide medication abortion reversal.

Conclusions

Following the decision in *Dobbs*, the ethical landscape for Colorado lawyers is, at best, unclear. Unfortunately, the recent US Supreme Court cases decided during its 2024 term have not clarified some of the concerns lawyers have when advising client about reproductive health. This uncertainty could have a chilling effect on the Colorado legal profession because a lawyer's law license may now be threatened when engaging in lawful conduct in Colorado that another state has restricted or altogether prohibited.

[17] SB23-190, 74th Gen. Assemb., 2d Reg. Sess. (Colo. 2023).

Attachment 7

Memorandum

To: Supreme Court Standing Committee on the Rules of Professional Conduct

From: Artificial Intelligence Subcommittee

Date: July 18, 2024

Re: Potential Changes to the Colorado Rules of Professional Conduct in Response to Emerging Artificial Intelligence Technologies

Summary

This memorandum sets forth recommendations of the artificial intelligence subcommittee for the Standing Committee on the Colorado Rules of Professional Conduct ("the AI subcommittee") for possible amendments to the Colorado Rules of Professional Conduct ("the Rules"). These recommendations include:

(I) A new Scope [21];
(II) Amendments to Rule 1.1, Comment [8];
(III) Amendments to the text and comments of Rule 5.3;
(IV) A new Rule 1.19.

We ask that the Standing Committee consider each recommendation separately, rather than as a cohesive set of recommendations. The adoption of some recommendations may obviate the need for others.

Background

The AI subcommittee was tasked with considering possible amendments to the Colorado Rules of Professional Conduct in response to recent rapid developments in artificial intelligence ("AI") technologies.

Our initial step as a subcommittee was to educate ourselves as to the capabilities of generative AI technology and the literature discussing implications for the Rules of such technologies.[1] In our early discussions, we reached a consensus on four principles. First, we agreed that, generally speaking, a lawyer's use of generative AI technology does not and should

[1] The AI subcommittee suggests the following two videos, available on YouTube, as useful overviews: Prof. Harry Surden, *GPT-4 and Law: ChatGPT Applies Copyright Law*, YouTube (March 22, 2023), *available at* https://www.youtube.com/watch?v=nqZcrhR8yPU; Prof. Harry Surden, *How GPT/ChatGPT Work – An Understandable Introduction to the Technology*, YouTube (April 22, 2023), *available at* https://www.youtube.com/watch?v=IMAhwv5dn8E. Additional resources are included in the Appendix to this Memorandum.

not diminish the lawyer's obligations under the Rules. Second, we agreed that there is a need to draw lawyers' attention to that first principle. Third, we agreed that any proposed amendments should be crafted so as not to discourage the responsible and beneficial use of AI technologies in ways that benefit clients and increase access to justice. Finally, we agreed that, while recent advances specifically in generative AI technology inspired our review, we should avoid the trap of proposing too-specific amendments which may soon be rendered obsolete by further advances and instead use language which will retain relevance over time. These principles guided our subsequent discussions, and we remain united as to their value, even when we do not agree on their application.

Next, we divided our subcommittee into working groups and methodically reviewed each rule, as well as the Preamble to and Scope section of the Rules, to consider the need for any amendment to the text or comments. Once we narrowed our list, we reconvened. After months of vigorous discussion and revision, we settled on proposing to the Standing Committee the amendments that follow in this memorandum.

We did not reach unanimous consensus as a subcommittee as to each of the following proposals. But we did unanimously agree to bring each of them to the Standing Committee. Where there was disagreement among the subcommittee members, we have included a minority view arguing against the specific amendment.

We recognize that the proposals which follow would interact with one another in various ways. For example, adoption of a new Rule 1.19, as detailed below, may obviate the need for some of the other proposals. We agreed to present these proposals to the Standing Committee as a "menu" of proposals, so to speak, from which the Standing Committee may select in a variety of combinations. We ask that the Standing Committee initially consider each proposal individually and then, after reaching some level of consensus, consider or ask the AI subcommittee to prepare a cohesive package to be presented to the Colorado Supreme Court.

Recommendations

I. New Scope [21]

The AI subcommittee recommends proposing the addition of a new Scope [21] in the Preamble and Scope of the Rules and renumbering, but not changing, the current Scope [21] to Scope [22], as follows:

> [21] Technology, including artificial intelligence and similar innovations, plays an increasing role in the practice of law, but that role does not diminish a lawyer's responsibilities under these Rules. A lawyer who uses, directly or indirectly, technology in performing or delivering legal services may be held accountable for a resulting violation of these Rules.
>
> [~~21~~22] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide

general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

The use of technology is pervasive in the practice of law. Moreover, the ways Colorado lawyers use technology is constantly evolving, implicating lawyers' professional responsibilities in novel ways.[2] Thus, the subcommittee believes that Colorado lawyers would benefit from express notice that the Rules broadly apply to a lawyer's use of technology in the lawyer's legal practice. Because "note[s] on Scope provide general orientation" to lawyers reviewing the Colorado Rules of Professional Conduct,[3] the AI subcommittee recommends adding a new Scope [21].

In making this recommendation, the AI subcommittee notes that at least one sister jurisdiction's bar association recommends including a statement about the importance of competence with technologies, including artificial intelligence, in the preamble to that state's rules of professional conduct.[4]

II. Comment [8] to Rule 1.1

The AI subcommittee recommends proposing an amendment to Colorado Rule of Professional Conduct 1.1, Comment [8] to adopt the language in current Comment [8] to ABA Model Rule 1.1, as follows:

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with ~~and changes in communications and other~~ relevant technology~~ies~~, engage in continuing study and education, and comply with all continuing legal education

---

[2] For instance, trends point to the rapid adoption of generative AI technologies in law firms. LexisNexis reported in January 2024 that ninety percent of surveyed legal executives expect to increase investment in generative AI technologies over the next five years; that fifty-three percent of Am Law 200 firms have purchased generative AI tools and forty-five percent are using those tools for legal work; and that forty-three percent of Am Law 200 leaders reported their firm has a dedicated budget to invest in the growth opportunities presented by generative AI. *See New Survey Data from LexisNexis Points to Seismic Shifts in Law Firm Business Models and Corporate Legal Expectations Due to Generative AI*, LEXISNEXIS (Jan. 31, 2024), *available at* https://www.lexisnexis.com/community/pressroom/b/news/posts/new-survey-data-from-lexisnexis-points-to-seismic-shifts-in-law-firm-business-models-and-corporate-legal-expectations-due-to-generative-ai.

[3] Colo. RPC, Scope [21].

[4] *See* Report and Recommendations of New York State Bar Association Task Force on Artificial Intelligence, at 54 (Mar. 2024), *available at* https://nysba.org/app/uploads/2022/03/2024-April-Report-and-Recommendations-of-the-Task-Force-on-Artificial-Intelligence.pdf.

requirements to which the lawyer is subject. ~~See Comments [18] and [19] to Rule 1.6.~~

The proposed revision has several benefits. First, it would make the Colorado comment identical to the current Comment [8] to ABA Model Rule 1.1. With the revision, lawyers reviewing the Colorado comment would benefit from the guidance and commentary addressing the Model Rule comment and any identical comments adopted in sister jurisdictions.

Second, the proposed revision puts Colorado lawyers on notice that the duty of competence broadly implicates a lawyer's use of any technology in legal practice—including artificial intelligence—rather than the narrower set of "communications" technologies. The latest generation of AI tools for lawyers have applications far beyond communication tools. In addition, subcommittee members felt that the language "changes in communications" in the Colorado rule was no longer necessary, as the use of email and similar communication technology is now ubiquitous in legal practice.

Third, the proposed revision would simplify and clarify Comment [8]. Subcommittee members agreed that Comment [8]'s reference to Rule 1.6 Comments [18] and [19] potentially creates confusion about which Colorado Rules implicate a lawyer's use of technology in legal practice, and that the cross reference should be omitted in the revised Comment [8]. The current Comment [8] could give rise to a false impression that only Comments [18] and [19] to Rule 1.6 discuss a lawyer's use of technology. But the subject of technology currently and potentially arises in other areas within the Rules, for instance, in the proposed amendments to Comment [3] to Rule 5.3, below, and in the proposed new Scope [21], above. The AI subcommittee thus recommends excising the too-narrow reference to Rule 1.6 Comments [18] and [19] from Comment [8]. In doing so, the AI subcommittee acknowledges that an alternate solution is to expand Comment [8]'s references to include all Rules and comments that discuss a lawyer's use of technology. The AI Subcommittee disfavors this approach, however, because Comment [8] would be in need of revision each time a new reference to technology is added to a Rule or Comment.

III. Rule 5.3

A. Proposed Amendments

The majority of the members of the AI subcommittee recommend certain amendments to the text of Colorado Rule of Professional Conduct 5.3, as well as certain comments to Rule 5.3

Rule 5.3 addresses a lawyer's duty to supervise nonlawyer assistants. A lawyer with direct supervisory authority over nonlawyer assistants is responsible for implementing procedures and policies that ensure that the nonlawyers' conduct is "compatible with the professional obligations of the lawyer." As noted, "[t]he reasoning behind Model Rule 5.3 is that clients hire lawyers to

represent them and while they understand that lawyers may delegate aspects of their work to law firm staff, they expect lawyers to appropriately supervise the performance of those services."[5]

Over recent decades, dramatic technological advances that have changed how lawyers and clients communicate (e-mail), how confidential documents are stored (cloud computing), and how discovery is conducted (e-discovery). Recognizing these changes, in 2012 the American Bar Association (ABA) revised Model Rule 5.3 to change the word "assistants" to "assistance" in the Rule title and in the first clause. This modification recognized that lawyers' work is often assisted not only by individuals, such as legal assistants and investigators, but also by entities, and non-corporeal electronic tools such as electronic discovery vendors and "cloud computing" providers. The ABA Ethics 20/20 Commission's thinking in adopting these revisions to Model Rule 5.3 was explained as follows:

> Model Rule 5.3 was adopted in 1983 and was designed to ensure that lawyers employ appropriate supervision of nonlawyers. Although the Rule has been interpreted to apply to lawyers' use of nonlawyers within and outside the firm, the Commission concluded that additional comments would help to clarify the meaning of the Rule with regard to the use of nonlawyers outside the firm.
>
> As an initial matter, nonlawyer services are provided not only by individuals, such as investigators or freelancing paralegals outside the firm, but also by entities, such as electronic discovery vendors and "cloud computing" providers. To make clear that the Rule applies to nonlawyer services of all kinds, even services performed by entities, the Commission decided to recommend a change in the title of Model Rule 5.3 from "Nonlawyer Assistants" to "Nonlawyer Assistance."[6]

With the advent of digital tools employing artificial intelligence, the scope of assistance relied upon by lawyers has broadened even further. Generative AI tools have advanced to the point where many lawyers are currently using AI tools to conduct legal research, to draft pleadings and to prepare legal briefs. The proposed amendments that follow attempt to reflect the conclusion that lawyers who use an AI tool must have the professional responsibility to ensure that the AI tool's "conduct is compatible with the professional obligations of the lawyer," in the same way that an attorney has the professional responsibility to review a document initially prepared by a legal assistant.

We are in the early days of the development of AI tools that will assist lawyers in the practice of law. Currently, to use AI tools in the practice of law, the lawyer has to provide a query, or a prompt, and the tool, relying on AI, produces a response. Lawyers can ask these tools to draft a motion, based upon provided information, or to develop a contract provision that

---

[5] Katherine Medianik, *Artificially Intelligent Lawyers: Updating the Model Rules of Professional Conduct in Accordance with the New Technological Era*, 39 CARDOZO L. REV. 1497, 1520 (2018).

[6] *See Ethics 20/20 Proposal to Amend Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants)* (Feb. 27, 2012), *available at* https://www.legalethicsforum.com/blog/2012/02/ethics-2020-proposal-on-rule-53-responsibilities-regarding-nonlawyer-assistants.html.

includes specific terms. The resulting legal documents could be delivered to clients, opposing counsel, or other parties without the lawyer's review. AI tools today can also be used to conduct conversations with human beings, and the person may not know they are communicating with an AI chatbot. Such tools could be used by lawyers to interact with clients, potential clients, and others. The AI output may reflect a "hallucination" or produce inaccurate, limited or sub-par work product that would not be "compatible with the professional obligations of the lawyer." The proposed amendments to Rule 5.3 are guided by the opinion of the majority of the AI subcommittee that, as with the case of a human assistant's work product, a lawyer ought to be responsible for AI output.

We also considered anticipated future advances in artificial intelligence that may mimic the work of a human assistant. A recent article detailed what are called "AI Agents" currently in development that can "act with independent agency to pursue its goals in the world."[7] As observed, "without any new leaps in technology whatsoever—just some basic tools glued onto a standard language model—you'd have what is called an 'AI agent,'" that could work on the lawyer's behalf answering client questions, delegating assignments or preparing work-products autonomously. The proposed amendments to Rule 5.3 would require lawyer supervision of the use of autonomous, technological agents of this kind, in the same way the lawyer is responsible for the actions of human agents and subordinates.

The proposed amendments to the text of Rule 5.3 principally involve replacing some uses of the word "person" with "nonlawyer" and are intended to make clear that the requirements and responsibilities of a lawyer to supervise those that provide assistance in the practice of law applies to non-human AI agents.

1. Proposed Amendments to the Text of Rule 5.3

The proposed amendments to the text in Rule 5.3 are as follows:

With respect to nonlawyers' assistance employed by, ~~or~~ retained by, ~~or~~ associated with, or used by a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the ~~person's~~ nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the ~~person's~~ nonlawyer's conduct is compatible with the professional obligations of the lawyer; and

[7] Kelsey Piper, *AI "agents" could do real work in the real world. That might not be a good thing.* (Mar. 29, 2024), *available at* https://www.vox.com/future-perfect/24114582/artificial-intelligence-agents-openai-chatgpt-microsoft-google-ai-safety-risk-anthropic-claude.

(c) a lawyer shall be responsible for conduct of such a ~~person~~ nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the ~~person~~ nonlawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

2. Proposed Amendments to Comments to Rule 5.3

In addition to amendments to the text of the Rule, the majority of the AI subcommittee supports amendments to the comments to Rule 5.3. What follows are two options: (i) amendments to existing Comments [1], [2], and [3] to Rule 5.3; and (ii) two new proposed comments to Rule 5.3. Consistent with the "menu" approach the AI subcommittee is taking in its presentation of proposals, the Standing Committee may wish to choose only one of these options, should it determine any amendments to the comments to Rule 5.3 are warranted.

The comments to Rule 5.3 illustrate a number of arrangements whereby lawyers rely on the work of others, including persons who are not lawyers, in delivering legal services. The proposed edits to these comments are intended to make clear that the arrangements covered by Rule 5.3 include the use of AI technologies, in particular autonomous AI agents. The supporters of the proposed changes believe they are necessary because the existing text is written in terms that suggest only human assistance is contemplated by Rule 5.3.

i. Proposed Amendments to Existing Comments

[1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who act ~~work~~ on firm matters do so ~~act~~ in a way compatible with the professional obligations of the lawyer. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer. "Nonlawyer" includes technologies that rely on artificial intelligence or other innovations that act on behalf of the lawyer.

[2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees, ~~or~~ independent contractors, or technological systems act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants

appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. A lawyer's responsibility to supervise nonlawyer assistants includes managing and monitoring the use of technologies that rely on artificial intelligence or other innovations to act on behalf of the lawyer. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, ~~and~~ using an Internet-based service to store client information, and using technologies that rely on artificial intelligence or other innovations that enable such technologies to act on behalf of the lawyer. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience, ~~and~~ reputation, and capabilities of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

ii. Two New Proposed Comments

The duty to supervise nonlawyer assistants under Rule 5.3 includes the duty to ensure that the lawyer's use on firm matters of AI tools that are capable of performing work historically performed by human nonlawyer assistants does not violate any of the Rules.

The scope of this Rule encompasses nonlawyers whether human or not. Under this Rule, lawyers are obligated to supervise the work of technology utilized in the provision of legal services and to understand the technology well enough to ensure compliance with the lawyer's ethical duties.

B. Minority View of AI Subcommittee on the Proposed Revisions to Rule 5.3

A minority of the AI subcommittee opposes the proposed amendments to the text and comments of Rule 5.3.

The minority believes that the supervision rules can only apply to humans. The diligence required to appropriately select and employ/deploy sophisticated technological tools is already

fairly encompassed within Rule 1.1. The concept of supervision—at least as embodied in the Rules—simply does not apply to non-humans.

1. Rule 5.3's "Reasonable Efforts" Standard Assumes the Ability to Interact with a Human in a Supervisory Capacity, Something Not Readily Found (If At All) in Generative AI Tools

Rules 5.1 (supervisory lawyers supervising other lawyers) and 5.3 (lawyers supervising nonlawyers) have many parallels and are also very similar to the ABA model rules. The idea of a requirement to make "reasonable efforts" to ensure others' compliance with a lawyer's ethical obligations also has been explained in the comments. For example, two comments to Rule 5.1 state:

> [2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property *and ensure that inexperienced lawyers are properly supervised*.
>
> [3] *Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary*. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

(emphasis added). Likewise, comment [3] to Rule 5.3 currently states in part:

> *The extent of this obligation will depend upon the circumstances*, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality.

(emphasis added). So, to be somewhat colloquial, the answer to the question of what constitutes "reasonable efforts" to supervise is "it depends."

Notwithstanding that the comments do not provide a bright line to define supervision, human lawyers have readily adapted to that uncertainty. The ease of adaptation arises from our

individual and collective experiences as human beings. Supervision involves two-way communication: training the supervisee, direction by the supervisor, the ability of the subordinate to ask questions of the supervisor, the ability of the supervisor to review the work at issue, the ability of the subordinate to get feedback on the work at issue, and the supervisor's ability to trust (or not trust) that the supervisee has learned from that feedback to incorporate into future work product and work performance. This is why a lawyer may need to supervise a new employee very closely, and then provide relatively little supervision to a long-term employee with no performance issues.

By contrast, generative AI—the technological tool that gave rise to the AI subcommittee—does not readily provide for that two-way communication in a way that would satisfy the lawyer that the tool has "learned the lesson." Generative AI tools, to date, do not have a singular, one-to-one relationship with the user. It is possible that at some point technology will evolve in that way, but currently generative AI tools "learn" in a variety of ways unknown to the end user. A user might decide through repeated usage that the tool is reliable, but that determination in all likelihood does not arise from the two-way communication and feedback mechanism humans use when they discuss "supervision."

Instead, the question of reliability of the tool, and specifically whether a lawyer has vetted the tool and used it appropriately, is best addressed as a diligence question under Rule 1.3.

2. Even If the Basic Concepts of Supervision Can Eventually Be Applied to AI, Doing So Through Rule 5.3 Would Lead to Ill-Advised Consequences

Moreover, the minority drafting this summary has two specific concerns about applying Rule 5.3(c) to non-human nonlawyer assistance.

Concern #1

Current Rule 5.3(c) states:

> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

While this rule (which is modeled after the ABA model rules) does not expressly create a safe harbor for lawyers whose rogue employee engages in misconduct, the implication of (c) is that a lawyer could do all the right things, in terms of training and supervising employees, and an employee still might commit serious misdeeds. For example, a nonlawyer could be angry at a supervising lawyer and decide to retaliate by releasing confidential client information through social media, even though the lawyer carefully trained the nonlawyer to never disclose client

information through any means. It may be days, weeks, or longer before the lawyer or client realizes what has happened, with no practical way to avoid the consequences.

Accordingly, comment [1] currently includes the following: "Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer."

Notably, Rule 5.1(c) contains a materially identical standard for when a supervisory lawyer can be held responsible for a rule violation by another lawyer.

Placing that standard in a national Westlaw search generates 183 case citations. While it appears that most of these cases involve significant failures to supervise either more junior attorneys or nonlawyer assistants, often implicating the entirety of either Rule 5.1 or 5.3, the broad use of the standard across the country points to a real risk of unintended consequences if Colorado were to apply the paragraph (c) standard to non-humans through a new comment to Rule 5.3.

Generative AI platforms may perform many tasks traditionally performed by humans, but to the best of our knowledge, the platforms do not have the capacity to have bad motives that would compel or "persuade" a platform to do something it had been explicitly trained not to do. Accordingly, a "rogue employee" safe harbor seems inappropriate.

Concern #2

The standard set forth in paragraph (c) of Rules 5.1 and 5.3 does not lend itself to generative AI platforms, because there could be times when a lawyer should be responsible for the so-called conduct of such a platform through circumstances other than (c)(1) or (c)(2).

A hypothetical illustrates these concerns. Let's say a lawyer subscribes to a hypothetical AI platform that responds to client phone calls with basic case updates and a schedule of key upcoming dates. The platform does this by reviewing attorney and paralegal notes made in the client's electronic file, and communicates this information to the client through sophisticated voice comprehension and response tools.

But how Rule 5.3 can apply to this lawyer's use of the AI platform is unclear.[8] What does it mean to say that the lawyer has made "reasonable efforts" to supervise this AI platform? Monitor the occasional phone call with the platform and the client? Or have those calls recorded and review a sample? How would a lawyer tell that platform that the lawyer would like it to provide more of an explanation of what is expected at court appearances? If that request exceeds

[8] This issue of supervising an AI product under Rule 5.3 is separate from a lawyer's duties to appropriately vet an AI product under Rule 1.3 before purchase and deployment. One could argue that it is easier to vet and test the product featured in the hypothetical, but much harder to supervise the individual transactions between the tool and a human in a law firm setting.

the ability of the platform, is that technological limitation a defense to the supervision obligation of the lawyer?

Then assume that this platform misinforms a client about the next court appearance, a very important court appearance. The paralegal notes read, "Tuesday, June 12, 2024." The AI platform reading those notes simply told the client the date of the case appearance was June 12, not recognizing that the reference to Tuesday should have flagged a potential error, since June 12 is a Wednesday. The client fails to show up at the court appearance held on Tuesday, June 11, relying on the June 12 date.

It is hard to see how the standard in paragraph (c) could apply in this hypothetical. The lawyer would not know that a client was misinformed of an upcoming deadline or hearing date until the client had missed it. Indeed, the lawyer might not even know that the AI system malfunctioned, because the lawyer might think the client wrote the date down wrong. Only if the call between the AI platform and client had been recorded would the lawyer know the truth, perhaps not until long after the consequences could be mitigated or avoided. Yet, paragraph (c) would suggest the lawyer perhaps is not responsible.

Perhaps the lawyer used a well-known and vetted platform. Perhaps the lawyer used a lesser-known platform and performed little due diligence in selecting it. Perhaps the inability of the platform to flag potentially incorrect information in the file was not previously known to any user. Perhaps the real problem was that the platform provided incomplete information by referring only to the date and not the day of the week, and the lawyer had been put on notice of this limitation through earlier experience. Many outside viewers would suggest that the liability of the lawyer might be different in these various scenarios.

Some members of the AI subcommittee were concerned that without articulating a standard for vicarious responsibility, a lawyer would be strictly liable for the errors of a generative AI platform. Those agreeing with the minority position set forth here do not believe that the Rules of Professional Conduct default to strict liability when there is no standard expressed in a rule or its comments. Instead, it would be appropriate for other rules to caution lawyers about all types of technological tools, and rely on the ABA Standards for Imposing Sanctions to establish—with other factors recognized by the Colorado Supreme Court—what sanction might be appropriate given the lawyer's mindset associated with the violative conduct.[9]

[9] Arguably, the potential for confusion as to whether a lawyer is subject to vicarious liability is a result of conferring agency on an AI tool. By expanding the definition of "nonlawyer" to include "technologies that rely on artificial intelligence," the proposed revision to Comment [1] to Rule 5.3 unnecessarily ascribes autonomy and intentionality to AI platforms. At least for now, every AI platform is deployed (or switched on) by a person. If the AI tool is not treated as autonomous, whether the person deploying the AI platform is a lawyer or a nonlawyer under the supervision of the lawyer, the responsibilities of the lawyer for the lawyer's actions and the responsibilities of the lawyer for the actions of supervised nonlawyers are addressed by the existing Rules. The ambiguities discussed in Concern #2 arise only because the AI tool is treated as an entity and not as a tool. If the AI tool is viewed as a tool, the only meaningful error in the hypothetical is the failure by the lawyer or the human nonlawyer assistant to verify the output of

Accordingly, a minority of the AI subcommittee would not apply Rule 5.3 to nonhumans.

IV. New Rule 1.19

A. Proposed New Rule 1.19

A majority of the members of the AI subcommittee recommend that the Standing Committee approve for the Supreme Court's consideration a new, standalone Rule 1.19 addressing technology. The majority believes that a separate technology rule is necessary and appropriate in light of lawyers' increasing use of AI tools.

The proposed Rule and accompanying Comments are as follows:

Rule 1.19. Use of Technology

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.

COMMENT

[1] Although technological tools, particularly generative AI tools, can provide substantial assistance to lawyers, they also present risks if used improperly. A lawyer's use of technology can implicate a number of Rules, including those governing competence (Rule 1.1), fees (Rule 1.5), preservation of a client's confidential information (Rule 1.6), meritorious claims and defenses (Rule 3.1), candor toward the tribunal (Rule 3.3), responsibilities of a partner or supervisory lawyer (Rule 5.1), responsibilities of a subordinate lawyer (Rule 5.2), responsibilities regarding nonlawyer assistance (Rule 5.3), and bias (Rule 8.4(g)).

[2] Consistent with comment [8] to Rule 1.1, a lawyer should engage in continuing study and education to keep abreast of technology-related changes in the practice of law, including changes related to the use of AI.

[3] Overreliance on technological tools risks reducing the lawyer's exercise of independent judgment. For example, AI-generated outputs should be analyzed for accuracy and bias, supplemented, and improved, if necessary, to ensure that the content accurately furthers the client's interests, consistent with these Rules. A lawyer should review any information or text obtained from a technological tool and should not assume that such information or text is accurate or complete without exercise of the lawyer's independent judgment.

---

the AI platform. The error is no different than failing to check the output of a voice to text transcription of a date.

[4] Consistent with a lawyer's duty under Rule 1.5, a lawyer may use technological tools to create work product efficiently and may charge for actual time spent (e.g., crafting or refining generative AI inputs and prompts, or reviewing and editing generative AI outputs). A lawyer should not charge hourly fees for the time saved by using technological tools. Costs associated with such tools may be charged to the client in compliance with applicable law, to the extent consistent with the fee agreement.

[5] Consistent with comment [18] to Rule 1.6, when providing a technological tool with information relating to the representation of a client, the lawyer should take reasonable precautions to prevent the information from coming into the hands of unintended recipients. The lawyer should periodically monitor the provider of the lawyer's technological tools to learn about any changes in the tools that might affect the confidentiality of information in the lawyer's possession, custody, or control.

[6] A lawyer's duty under Rule 3.1 not to bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, includes the duty to review and verify any citation to a legal or other authority obtained through the use of a technological tool. This duty to verify also implicates a lawyer's duty under Rule 3.3 not to make a false statement of fact or law to a tribunal or fail to correct a false statement that the lawyer previously made to the tribunal.

[7] The duty of a partner or supervisory lawyer under Rule 5.1 includes the duty to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the use of technological tools by all lawyers in the firm conforms to the Rules. Managerial and supervisory lawyers should establish clear policies regarding the permissible uses of generative AI and other technologies and make reasonable efforts to ensure that the firm adopts measures, including training, that give reasonable assurance that the conduct of the firm's lawyers and nonlawyers complies with their professional obligations when using technological tools.

[8] Consistent with the responsibilities of a subordinate lawyer under Rule 5.2, a subordinate lawyer should not use technological tools at the direction of a supervisory lawyer in a manner that violates the subordinate lawyer's duties under the Rules.

[9] The duty of a partner and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm under Rule 5.3 includes the duty to ensure that the firm has in effect measures giving reasonable assurance that the use of technological tools by a nonlawyer employed or retained by or associated with a lawyer is compatible with the professional obligations of the lawyer. Similarly, the duty of a lawyer having direct supervisory authority over a nonlawyer under Rule 5.3 includes making reasonable efforts to ensure that the nonlawyer's use of technological tools is compatible with the professional obligations of the lawyer.

[10] The duty to supervise nonlawyer assistants under Rule 5.3 includes the duty to ensure that the lawyer's use on firm matters of technological tools that are capable of

performing work historically performed by human nonlawyer assistants does not violate any of the Rules.

[11] Consistent with Rule 8.4(g), a lawyer should take reasonable steps to identify and address biases appearing in the outputs of technological tools.

1. The Need for a New, Standalone Technology Rule

A separate Rule of Professional Conduct addressing technology was unnecessary before the advent of generative AI technology. AI technology took a major leap forward on November 30, 2022, when OpenAI launched ChatGPT[10]—a chatbot and virtual assistant premised on the large language model (LLM) of machine learning.[11] The user submits queries to ChatGPT, which provides near-instantaneous, narrative responses. As contrasted with AI tools that include neural networking,[12] the responses are predictions of the appropriate text based on the vast amounts of data the developers used to train the tool. ChatGPT determines what words to provide users by reviewing and analyzing the text it has learned. This process will echo any biases in the learned text.

---

[10] This report refers to ChatGPT for illustrative purposes only, primarily because it was the first generative AI tool in widespread use and because the cases addressing lawyer misuse of generative AI refer to that tool. But ChatGPT does not have a monopoly on the market. For example, Anthropic has released an LLM tool called Claude and Google has released a tool called Gemini. And on May 13, 2024, OpenAI introduced an enhanced version of its product — ChatGPT 4o. *See* Kylie Robison, *OpenAI releases GPT-4o, a faster model that's free for all ChatGPT users* (May 13, 2024), *available at* https://www.theverge.com/2024/5/13/24155493/openai-gpt-4o-launching-free-for-all-chatgpt-users. A comparison of the features and possible risks inherent in the different AI tools is beyond the scope of this report.

[11] In the interest of brevity, this report does not provide an extensive discussion of the theory underlying and technical aspects of AI technology. Numerous articles, reports, and other sources provide background information regarding the development, functioning, benefits, and risks of AI. Notably, the American Association for the Advancement of Science received funding from the National Institute of Standards and Technology to develop resources for judges "as they address an increasing number of cases involving artificial intelligence." Those resources, which are available online, also provide helpful background information for lawyers interested in learning the fundamentals of artificial intelligence. *See Artificial Intelligence and the Courts: Materials for Judges* (Sept. 2022), *available at* https://www.aaas.org/ai2/projects/law/judicialpapers.

[12] Amazon Web Services defines a neural network as "a method in artificial intelligence that teaches computers to process data in a way that is inspired by the human brain. It is a type of machine learning process, called deep learning, that uses interconnected nodes or neurons in a layered structure that resembles the human brain." *What is a Neural Network?*, *available at* https://aws.amazon.com/what-is/neural-network/ (last visited July 9, 2024).

Generative AI materially differs from earlier forms of technology, such as computerized legal research, e-mail, and cloud storage.[13] Unlike these electronic resources, AI performs functions that, until recently, many believed only a human could undertake. For example, AI can draft text addressing legal topics that incorporates legal authorities pulled from Westlaw or LEXIS, review and summarize vast amounts of information nearly instantaneously, and draft questions for depositions or oral arguments. Thus, generative AI represents an exponential leap over, and not merely an incremental improvement on, prior electronic resources.

Thought leaders in law recognized the promise and pitfalls of the powerful new AI tools as early as 2019. At its August 2019 meeting, the House of Delegates of the American Bar Association approved Resolution 112, which urged courts and lawyers "to address the emerging ethical and legal issues relating to the usage of [AI] in the practice of law."[14] The resolution specifically noted the "(1) bias, explainability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AI and the vendors that provide AI."

The report accompanying the resolution does not mention generative AI, although it discusses a then-novel AI tool that "could have text-based conversations with individuals." In addition, the report notes that lawyers are already using AI for, among other tasks, electronic discovery and predictive coding, assessing the likely outcome of litigation through "the method of predictive analytics," contract management, reviewing large numbers of documents as part of due diligence for corporate transactions, searching company records to detect bad behavior preemptively, and legal research.

The report asserts that, "[g]iven the transformative nature of AI, it is important for courts and lawyers to understand how existing and well established ethical rules may apply to the use of AI." In words that are prescient at a time when some lawyers are misusing generative AI to create legal filings including fictitious legal citations, known as "hallucinations," the report observes, "some tasks . . . should not be handled by today's AI technology, and a lawyer must know where to draw the line. At the same time, lawyers should avoid underutilizing AI, which could cause them to serve their clients less efficiently. Ultimately, it's a balancing act." While the report identified several Model Rules that AI implicates, it did not recommend specific AI-related amendments to the Rules. As best the AI subcommittee can determine, so far no state has done so.

Upon OpenAI's release of ChatGPT, lawyers discovered that it could produce facially plausible legal writing containing citations to what appear to be legal authorities. But judges and opposing counsel quickly discovered hallucinations in ChatGPT-generated motions and briefs that the lawyer failed to review. Consequently, the lawyers who submitted unreviewed

---

[13] Lawyers have been using artificial intelligence for more than forty years; for example, since the 1970s, Westlaw and LEXIS have responded to queries with lists of legal authorities presented in order of relevance. AI in the form of proprietary algorithms determinates the relevance of the authorities.

[14] *Available at* https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/112-annual-2019.pdf.

ChatGPT-written filings suffered public humiliation and, in some cases, were ordered to pay sanctions. *See, e.g.*, *Park v. Kim*, 91 F.4th 610, 612 (2d Cir. 2024); *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443, 449 (S.D.N.Y. 2023); *People v. Crabill*, No. 23PDJ067, 2023 WL 8111898, at *1 (Colo. O.P.D.J. Nov. 22, 2023); *Kruse v. Karlen*, No. ED 111172, 2024 WL 559497, at *4 (Mo. Ct. App. Feb. 13, 2024); *Will of Samuel*, 82 Misc. 3d 616, 619, 206 N.Y.S.3d 888, 891 (N.Y. Sur. 2024).

In response to lawyers' misunderstanding and misuse of AI, in 2023, Justice Maria Berkenkotter of the Colorado Supreme Court and Judge Lino Lipinsky de Orlov of the Colorado Court of Appeals wrote an article for *Colorado Lawyer* to educate lawyers and judges regarding the ethical risks associated with use of the technology (*Colorado Lawyer* article). They believed that lawyers needed prompt guidance regarding the ethical implications of AI; such guidance could not wait until the Standing Committee proposed AI-related amendments to the Rules.

By the time the *Colorado Lawyer* article appeared in the January-February issue of the publication,[15] the legal world had experienced another major technological shift. In late 2023, vendors such as Westlaw and LEXIS[16] unveiled their own generative AI products. Those products limit legal citations to verified sources in the vendors' databases, which makes output results containing hallucinations less likely. But the new legal generative AI tools remain imperfect.

These tools couple the drafting capabilities of ChatGPT with computerized legal research functions to allow lawyers to input queries that produce text containing bona fide hyperlinked legal citations. A click on the hyperlink allows the user to access and check the cited authority. Moreover, the Westlaw and LEXIS tools allow lawyers and firms with sufficient resources to develop their own proprietary body of data they can use to educate the tool. For example, a firm can teach the tool through its own motions, briefs, contracts, memorandums, and other documents.

In addition to the AI legal tools noted above, law firms can now employ AI-powered chatbots to interact with potential clients and clients, such as by submitting questions intended to clarify a prospective client's needs. Personal injury firms can employ AI tools to search news articles for information regarding accident victims to whom the AI tool can then send a solicitation.

Judges are also employing generative AI. Earlier this year, a judge on the Eleventh Circuit cited ChatGPT's responses to his queries regarding whether an in-ground trampoline is a part of "landscaping." *See Snell v. United Specialty Ins. Co.*, 102 F.4th 1208, 1225 (11th Cir.

---

[15] Maria Berkenkotter & Lino Lipinsky de Orlov, *Artificial Intelligence and Professional Conduct: Considering the Ethical Implications of Using Electronic Legal Assistants*, Colo. Law. at 20 (Jan./Feb. 2024).

[16] Other legal vendors offer similar tools; this report is not intended to provide a list of, a commentary on, or an endorsement of such products.

2024) (Newsom, J., concurring).[17] Other courts have expressed skepticism regarding ChatGPT-generated factual information. *See M.B. v. New York City Dep't of Educ.*, No. 22 Civ. 6405, 2024 WL 1343596, at *4 (S.D.N.Y. Mar. 30, 2024) (rejecting argument regarding prevailing attorney market rates premised, in part, on information gleaned from ChatGPT); *J.G. v. New York City Dep't of Educ.*, No. 23 CIV. 959, 2024 WL 728626, at *7 (S.D.N.Y. Feb. 22, 2024) ("In claiming here that ChatGPT supports the fee award it urges, the Cuddy Law Firm does not identify the inputs on which ChatGPT relied. It does not reveal whether any of these were similarly imaginary. It does not reveal whether ChatGPT anywhere considered a very real and relevant data point: the uniform bloc of precedent . . . in which courts in this District and Circuit have rejected as excessive the billing rates the Cuddy Law Firm urges for its timekeepers."); *Pegnatori v. Pure Sports Techs. LLC*, No. 23-CV-01424, 2023 WL 6626159, at *5 (D.S.C. Oct. 11, 2023) (rejecting ChatGPT's definition of "foam"); *In re Vital Pharm.*, 652 B.R. 392, 398 (Bankr. S.D. Fla. 2023) ("In preparing the introduction for this Memorandum Opinion, the Court prompted ChatGPT to prepare an essay about the evolution of social media and its impact on creating personas and marketing products. . . . It listed five sources in all. As it turns out, none of the five seem to exist. For some of the sources, the author is a real person; for other sources, the journal is real. But all five of the citations seem made up, which the Court would not have known without having conducted its own research.").[18]

In addition, a recent ethics opinion from the State Bar of Michigan acknowledges that AI tools could benefit lawyers and judges: "there are times when, properly used, AI is an asset for the legal community, such as creating accurate content for pleadings and legal summaries, providing efficiency in docket management and legal research, and supplying answers to questions based on algorithms used by technological programs."[19] And an advisory opinion from the West Virginia Judicial Investigation Commission concludes that, with proper safeguards, "[a] judge may use AI for research purposes" and for "drafting opinions or orders . . . with extreme caution," so long as the judge does not rely on AI "to decide the outcome of a case." The advisory opinion likens a generative AI tool to a law clerk: "the judge must decide which way he/she wants to rule and let the program know in advance to ensure that the product conforms with the decision rendered by the judge." As with "the final draft of the law clerk, the judge must review it to ensure that it is what the judge wishes to convey to the parties in any given case and make changes where needed."[20]

For these reasons, a majority of the AI subcommittee disagrees with the minority's concern that Colorado should not adopt a new rule on technology because the implications of

---

[17] In his concurrence, Judge Newsom discusses at length the primary benefits and risks of tools premised on LLM technology. *See Snell v. United Specialty Ins. Co.*, 102 F.4th 1208, 1226-34 (11th Cir. 2024) (Newsom, J., concurring).

[18] Significantly, the few judges who described their use of generative AI in opinions demonstrated their acknowledgement of the benefits and limitations of the technology, as well as the importance of verifying the results generated.

[19] https://www.michbar.org/opinions/ethics/numbered_opinions/JI-155.

[20] https://www.courtswv.gov/sites/default/pubfilesmnt/2023-11/JIC%20Advisory%20Opinion%202023-22_Redacted.pdf.

lawyer use and misuse of AI are not yet fully understood. To the contrary, the technology is here and lawyers and judges are drafting documents with it. The majority believes that sufficient knowledge of the impact of AI on the Rules exists to proceed with a standalone technology rule.

The subcommittee is divided on whether the Colorado Supreme Court should adopt separate technology-related amendments to each of the affected Rules (and, where appropriate, the comments to those Rules), or whether the court should approve an overarching new rule that addresses lawyer use of technology. The majority recommends the latter rather than sprinkling technology-related amendments across the Rules without an accompanying overarching Rule that places those amendments in context.

The subcommittee voted unanimously to provide the Standing Committee with a menu of options, including recommending the proposed standalone rule and revisions to the specific Rules and comments that AI implicates. These two options are not mutually exclusive. The Supreme Court could adopt both a standalone technology rule and technology-related revisions to targeted Rules and comments.

The majority urges the Standing Committee to recommend the proposed standalone rule to the Supreme Court.

2. The Rules that Technology Implicates

Lawyers' use of technology potentially implicates several of the Rules. The subcommittee reviewed each of the Rules to assess which are affected by lawyer use and misuse of such technology.

The subcommittee agreed unanimously that the revolution in technology implicates the Rules governing competence (Rule 1.1), fees (Rule 1.5), preservation of a client's confidential information (Rule 1.6), meritorious claims and defenses (Rule 3.1), candor toward the tribunal (Rule 3.3), responsibilities of a partner or supervisory lawyer (Rule 5.1), responsibilities of a subordinate lawyer (Rule 5.2), responsibilities regarding nonlawyer assistance (Rule 5.3), and bias (Rule 8.4(g)).

This portion of the report does not provide a detailed analysis of the technological implications of each of these Rules; such analyses appear in other parts of this report. Rather, it provides the language of the proposed standalone technology Rule and explains the comments to that Rule.

The proposed standalone technology Rule consists of a single sentence: "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." While certain of the Rules currently refer to technology, notably, none requires a lawyer to make reasonable efforts to ensure that the lawyer's use of technology conforms to the Rules.

For example, the current version of comment [8] to Rule 1.1 states:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, and changes in communications and other relevant technologies, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject. See Comments [18] and [19] to Rule 1.6.

(As noted in part II of this report, the subcommittee is recommending that comment [8] be amended to conform to the analogous comment in the Model Rules.) But comment [8] addresses the steps that a lawyer must take to maintain technological competence; it does not require a lawyer to take actions to ensure that the lawyer's use of technology complies with the Rules. Although this principle may be implicit, the majority believes this point should appear expressly in a Rule to educate lawyers and to heighten lawyer awareness of the potential consequences of use of AI and other technologies.

The proposed new Rule 1.19 contains eleven comments:

Comment 1

The first comment summarizes the Rules that lawyer use of technology potentially implicates. Those Rules are identified on page 19 above.

Comment 2

Consistent with comment [8] to Rule 1.1, comment 2 to proposed Rule 1.19 reiterates lawyers' need to remain abreast of changes in technology, including changes relating to AI. For the reasons noted above, the majority believes that lawyers cannot ignore AI and other technologies that are already impacting the practice of law.

Comment 3

Comment 3 alerts lawyers that they must exercise independent judgment when using technological tools and specifically notes that overreliance on technology creates the risk that a lawyer will not exercise independent judgment. The comment states that a lawyer should review any information or text obtained from a technological tool and should not assume that such information or text is accurate or complete without exercise of the lawyer's independent judgment.

Comment 4

Comment 4 addresses the efficiencies lawyers can achieve through use of AI and notes that the reasonableness of a lawyer's fee may be impacted if the lawyer seeks to recover fees for work that could have been performed in less time through use of AI. As the Florida Bar noted, "Rule 1.5 prohibits attorneys from collecting an unreasonable fee. The increased efficiency from

the proper use of generative AI must not result in duplicate charges or falsely inflated billable hours." Fla. Bar Advisory Op. 24-1 (Feb. 5, 2024).

Comment 5

Comment 5 speaks to the confidentiality concerns associated with use of technology. Many lawyers may not appreciate that AI tools may employ the information inserted in queries to further teach the tool. Thus, a lawyer may compromise the confidentiality of information input into ChatGPT in the form of a query. The comment thus states that, when using technological tools, a lawyer should take reasonable precautions to prevent information relating to the representation of a client from coming into the hands of unintended recipients. Further, the comment advises that a lawyer should periodically monitor the provider of the lawyer's technological tools to learn about changes in the tools that the confidentiality of client information.

Comment 6

Comment 6 discusses the risk that text generated through a technological tool may include inaccurate or incomplete information, including, as noted above, hallucinations in place of valid legal citations. The comment specifies that a lawyer using a technological tool should remain mindful of the duty not to bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, includes the duty to review and verify citations obtained through the use of the tool. In addition, the comment notes that this duty to verify also implicates a lawyer's duty under Rule 3.3 not to make a false statement of fact or law to a tribunal or fail to correct a false statement that the lawyer previously made to the tribunal.

Comment 7

Comment 7 concerns the duty of partners or supervisory lawyers to make reasonable efforts to ensure that the lawyers at the firm are using technological tools consistently with the Rules. The comment states that managerial and supervisory lawyers should establish clear policies regarding the permissible uses of generative AI and other technologies.

Comment 8

Similarly, Comment 8 speaks to subordinate lawyers' use of technology and specifically notes that a subordinate lawyer should not use technological tools at the direction of a supervisory lawyer in a manner that violates the subordinate lawyer's duties under the Rules.

Comment 9

Comment 9 explains that a lawyer with managerial authority has a duty to ensure that the firm has in effect measures giving reasonable assurance that use of technological tools by nonlawyers employed or retained by or associated with the lawyer is compatible with the lawyer's professional obligations. This duty includes making reasonable efforts to ensure that

use of technological tools by the nonlawyers whom the lawyer directly supervises is compatible with the professional obligations of the lawyer.

Comment 10

Comment 10 explains that the duty to supervise nonlawyer assistants under Rule 5.3 includes the duty to ensure that the lawyer's use of technological tools that are capable of performing work historically performed by human nonlawyer assistants does not violate any of the Rules. This comment implicitly acknowledges that technological tools can perform tasks that, until recently, only humans were capable of performing.

Comment 11

Finally, Comment 11 alerts lawyers to take reasonable steps to identify and address biases appearing in the outputs of technological tools.

3. Why Colorado Cannot Wait to Adopt a Standalone Technology Rule

A minority of the subcommittee has expressed the view that the Supreme Court's consideration of a separate rule regarding technology would be premature on two grounds: we do not yet fully understand the implications of lawyer use and misuse of AI and Colorado should allow the American Bar Association and other jurisdictions to take the lead on recommending and adopting amendments to the Rules. The majority respectfully disagrees.

As explained above, AI tools have arrived; lawyers and judges are employing them. We know that some lawyers have not considered their duties under the Rules when submitting AI-generated court filings peppered with hallucinated citations. The cases addressing lawyers' misuse of ChatGPT tell us that lawyers need guidance and warning regarding the risks of using technology.

For this reason, the majority believes waiting for the American Bar Association and other jurisdictions to propose or adopt technology-related amendments to the Rules would be imprudent. A number of jurisdictions, including California, New York, and Florida,[21] have issued guidelines regarding lawyers' use of AI. While such guidelines do not possess the force of a Rule of Professional Conduct, they highlight many of the concerns regarding lawyer use of AI stated above. Those concerns will not disappear. Rather, as AI usage becomes more widespread, the need to protect the public from members of the bar who misunderstand and misuse such technology will only increase. Lawyers can disregard guidelines but are bound by the Rule of Professional Conduct. The majority believes that adoption of a standalone rule on technology is critical to protecting members of the public.

[21] Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Practical Guidance for the Use of Generative AI in the Practice of Law, Nov. 16, 2023; Florida Bar Ethics Op. 24-1, Jan. 19, 2024; N.Y.S. Bar Association Report and Recommendations of the N.Y. State Bar Association Task Force on AI, Marh 2024.

A minority of the subcommittee takes the position that proposing technology-related amendments to the Rules can be read as an endorsement of certain technological tools. The majority interprets the proposed technology-related amendments, not as an endorsement, but as an acknowledgement that the technology is available and that lawyers and judges are using it. In addition, the minority questions whether the current technological tools lack sufficient accuracy and transparency for lawyers to use them without undue risk. But this assertion only underscores the need for a new, standalone Rule on technology. As noted above, since late 2023, generative AI tools have been available to lawyers through respected legal vendors. If experience shows that those tools do not consistently produce accurate results, lawyers should be particularly cautious about employing them.

For these reasons, a majority of the members of the AI subcommittee urge the Standing Committee to adopt proposed Rule 1.19.

B. Minority Report Opposing Proposed Rule 1.19

1. Introduction

Proposed Rule 1.19 should not be adopted for three reasons. First, the proposed rule is unnecessary because it simply requires a lawyer to "use reasonable efforts to ensure" that the use of AI in the lawyer's practice conforms to the Rules. The comments then cite the numerous rules that may apply. Second, no states have adopted such a rule and neither has the American Bar Association. It would be unwise to depart from the ABA Model Rules where there is not problematic conduct that falls outside the scope of an existing rule. Third, such a rule is premature and will cause confusion and uncertainty for lawyers and regulators. The technology affecting the practice is law is changing at a breakneck pace and a rule intended to regulate AI may be outdated before we know it.

2. The Proposed Rule is Unnecessary

The current Rules cover the issues and conduct the proposed rule seeks to address. A review of the comments to the proposed rule shows a list of cross-references and citations to the various current rules that apply to the use of AI and technology in general. These comments show that there is no need for a new rule.

For example, Rule 1.1 adequately addresses, as is, competent use of AI, common mistakes, and even the possibility of incompetent non-use. *People v. Crabill*, a Colorado disciplinary case, demonstrates the point.[22] In *Crabill*, which resolved on a stipulation, the Presiding Disciplinary Judge, the Respondent, and Attorney Regulation Counsel had no trouble concluding that the use of sham GPT case law violated several of the Rules. Similarly, Rules 1.2(a) and 1.4(a)(2), combined, effectively address AI as means, complete with a duty to

[22] *People v. Crabill*, 2023 WL 8111898, at *1 (Colo. O.P.D.J. Nov. 22, 2023).

"reasonably consult" with clients. Rule 1.3, as is, covers the trade-off between increased speed and the possibility of serving and managing a larger client base. Rule 1.6(a) aptly addresses AI casting a broad confidentiality net but allowing the use of AI even when confidential information is disclosed via informed consent and implied authority, subject to 1.6(c) and cmt. [18]. Even Rules 5.1 and 5.3 adequately cover supervision.

In sum, we do not need any revisions to the Rules, and at most what we need are clarifications in comments, not rule revisions, let alone a new rule.

3. Neither the ABA nor Other States Have Adopted Such a Rule

The proposed rule appears to be motivated by the well-intentioned desire to guide lawyers' conduct and to offer advice to lawyers using or considering using generative AI. It is important to note that no state has adopted a new rule of professional conduct such as is proposed in Rule 1.19. Instead, other states have offered court guidance, advisories, and ethics opinions to give lawyers important information about AI and how it might be used and abused in their practice. Colorado lawyers need this information but not in an unnecessary rule. Unfortunately, Colorado does not have such a court-approved vehicle for guidance and education of lawyers regarding the risks and benefits of AI. A CBA Ethics opinion, CLEs presented by the Office of Attorney Regulation Counsel and/or the CBA, or an article in Colorado Lawyer might be the appropriate way to convey this information.

The Colorado Supreme Court has often taken the position that it is unwise to be first in adopting a rule not listed in the ABA Model Rules, in part out of a concern for rule uniformity, in a day and age in which some Colorado lawyers have regional and even national law practices. It has been the Supreme Court's practice to let others go first and see what success and what difficulties other states have before drafting a new rule. An example is the LLP Program. Colorado waited to see how Utah and Arizona did before authorizing a program. We benefitted from this wait and see approach and learned what we should and should not do for our own program.

As an alternative to adopting the proposed Rule 1.19, the Standing Committee may inquire whether the Supreme Court would like it to forward its proposed rule for consideration by the American Bar Association's Center for Professional Responsibility.

4. The Scope and Capability of Technology Is Rapidly Changing

It is likely that yet another or a different rule or guidance might be necessary next year. Rather than adopting a new rule, it would be more appropriate to, at most, propose changes and additions to the comments to our rules to explain how problematic conduct regarding AI and other technology falls within the current rules. The proposed addition of Scope [21] is sufficient to implement the principles agreed upon by the AI subcommittee. New Scope [21] would advise

a lawyer that the use of AI does not diminish the lawyer's obligations under the Rules and would draw a lawyer's attention to that first principle.

In conclusion, the minority of the AI subcommittee view the proposed new Rule to be an unnecessary repetition of the current Rules and comments, untimely, and lacking uniformity with the current ABA Model Rules. The Standing Committee should reject the rule.

Appendix

Rules

Colo. RPC, Scope

Proposed new Scope [21]

Rule 1.1

Colo. RPC 1.1 with comments

ABA Model RPC 1.1 with comments

Proposed Amendments to Comment [8] to Colo. RPC 1.1

Redline

Final

Rule 5.3

Colo. RPC 5.3 with comments

ABA Model RPC 5.3 with comments

Proposed Amendments to Colo. RPC 5.3

Redline to text and comments

Final

New Proposed Rule 1.19

Cases

Park v. Kim, 91 F.4th 610, 612 (2d Cir. 2024)

J.G. v. NY Dept. Educ., 23 Civ. 959 (PAE), (SDNY Feb. 22, 2024)

Mata v. Avianca, Inc., 678 F. Supp. 3d 443, 449 (S.D.N.Y. 2023)

People v. Crabill, No. 23PDJ067, 2023 WL 8111898, at *1 (Colo. O.P.D.J. Nov. 22, 2023)

Kruse v. Karlen, No. ED 111172, 2024 WL 559497, at *4 (Mo. Ct. App. Feb. 13, 2024)

Will of Samuel, 82 Misc. 3d 616, 619, 206 N.Y.S.3d 888, 891 (N.Y. Sur. 2024)

ABA and State Guideline Documents

American Bar Association, House of Delegates Resolution 112 (Aug. 2019)

Mich. Judicial Ethics Opinion JI-155 (Oct. 2023)

West Virginia Judicial Investigation Commission Advisory Opinion 2023-22 (Oct. 2023)

Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Practical Guidance for the Use of Generative AI in the Practice of Law (Nov. 16, 2023)

Fla. Bar Comm. Proposals on Generative AI Ethics Guidelines Florida Bar Ethics Op. 24-1, (Jan. 2024)

Report and Recommendations of N.Y. State Bar Association Task Force on Artificial Intelligence (Mar. 2024)

Penn. Bar Association and Phila. Bar Association Opinion on Ethical Issues Regarding the Use of Artificial Intelligence (May 2024)

Publications

Maria Berkenkotter & Lino Lipinsky de Orlov, *Artificial Intelligence and Professional Conduct: Considering the Ethical Implications of Using Electronic Legal Assistants*, Colo. Law. at 20 (Jan./Feb. 2024)

Jeremy Conrad, *AI & Legal Ethics. Time to Revisit the Rules?*, Washington Lawyer (Sept./Oct. 2023)

Richard Fang, et al., LLM Agents can Autonomously Hack Websites (Feb. 16, 2024)

Katherine Medianik, *Artificially Intelligent Lawyers: Updating the Model Rules of Professional Conduct in Accordance with the New Technological Era*, 39 CARDOZO L. REV. 1497, 1520 (2018)

John Murph, *Test Driving ChatGPT. Risks, Opportunities & Regulation*, Washington Lawyer (Sept./Oct. 2023)

Kelsey Piper, *AI "agents" could do real work in the real world. That might not be a good thing.* (Mar. 29, 2024)

Kylie Robison, *OpenAI releases GPT-4o, a faster model that's free for all ChatGPT users* (May 13, 2024)

Artificial Intelligence and the Courts: Materials for Judges (Sept. 2022)

Ethics 20/20 Proposal to Amend Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants) (Feb. 27, 2012)

New Survey Data from LexisNexis Points to Seismic Shifts in Law Firm Business Models and Corporate Legal Expectations Due to Generative AI, LEXISNEXIS (Jan. 31, 2024)