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

AGENDA

September 27, 2024, 9:00 a.m.
The Supreme Court Conference Room and via Webex

Webex link:
https://judicial.webex.com/judicial/j.php?MTID=mc035b3d68ba3b5f0a23d76a661d3eb53

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1. Call to Order [Judge Lipinsky].

2. Approval of minutes for July 26, 2024, meeting [to come].

3. Old business:

    a. Report on the proposed amendments to Rules 5.4, 6.1, and 8.4 and proposed new comment [15] to Rule 1.2 [Judge Lipinsky] [attachment 1].

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

    c. Report from the trust fund subcommittee [Jamie Sudler] [attachment 2].

    d. Report from the AI subcommittee [Julia Martinez] [attachment 3 (without the lengthy appendix, which was distributed before the July 26 meeting)].

    e. Update on ABA Model Rule 1.16 [Steve Masciocchi].

4. New business.

    a. Possible subcommittee to consider amendments to Rule 6.5 [Jessica Yates].

b. Discussion of the process for proposing amendments to the licensed legal paraprofessional Rules of Professional Conduct [Jessica Yates].

c. Possible subcommittee to review references to "nonlawyer" in the Rules [Judge Lipinsky].

5. Adjournment.

Upcoming meeting dates: January 24, 2025, and April 25, 2025.

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

Attachment 1

Supreme Court of Colorado

2 East 14th Avenue
Denver, CO 80203
(720) 625-5420

MARIA E. BERKENKOTTER
JUSTICE

September 12, 2024

The Honorable Lino S. Lipinsky de Orlov
Colorado Court of Appeals
Chair of the Standing Committee
2 East 14th Avenue
Denver, CO 80203
lino.lipinsky@colorado.judicial.state.co.us

VIA EMAIL

Re: Proposed amendments to C.R.P.C. 8.4(g), C.R.P.C. 5.4(f) and the Model Pro Bono Policy, and proposed new comment to C.R.P.C. 1.2

Dear Judge Lipinsky,

The Court has considered the August 21, 2024 letter from the Standing Committee on the Colorado Rules of Professional Conduct (the Standing Committee) recommending proposed amendments to C.R.P.C. 8.4(g), C.R.P.C. 5.4(f), and the Model Pro Bono Policy, as well as a proposed new comment to C.R.P.C. 1.2. The Court reviewed the attachments as well, including the memorandum from the subcommittee that drafted the proposed new comment as well as the feedback gathered at our request from the members of the Committee who opposed the proposed new comment to C.R.C.P. 1.2.

The Court voted to adopt the proposed amendments to C.R.P.C. 8.4(g), C.R.P.C. 5.4(f), and the Model Pro Bono Policy. The Court voted to reject the proposed new comment to C.R.P.C. 1.2. The Court shares some of the concerns raised by the members of the Committee who voted against recommending the new comment, including the concern regarding its breadth. In rejecting this new comment, we are not foreclosing consideration of another proposal.

We are mindful of the considerable amount of time and effort that the Committee spent in connection with the proposed new comment. We greatly appreciate the work of the Committee and the thoughtful voices of those who supported recommending the new comment and the thoughtful voices of those who did not.

Very truly yours,

Maria E. Berkenkotter
Colorado Supreme Court

Attachment 2

Memo

To: Standing Committee on the Rules of Professional Conduct

From: Subcommittee on Rule 1.15

Re: Rule about Unwanted Funds Held by Lawyer

Date: September 27 ,2014

Background

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 problem arises when a lawyer holds funds in trust that belong to a client or another person who does not want to accept the funds. Colo. RPC 1.15B(k) addresses situations in which the lawyer does not know the identity or location of the owner of funds, or the owner is deceased, and the lawyer is unable to find the personal representative or heirs. However, it does not guide a lawyer when the client or owner of the funds does not want them and will not accept them.

The issue was brought to the attention of the Committee by Joe Michaels, Chair of the Colorado Bar Association Ethics Committee who said that the Calling Committee fields inquiries about what a lawyer should do in this situation, but there is no clear answer.

On July 26, 2024, at a meeting of the full Standing Rules Committee, the subcommittee presented a proposed Rule 1.15B(l) that would guide lawyers in this situation.[1] After discussion of the proposed rule, the subcommittee was asked to consider the following issues:

1) Can a lawyer keep unwanted funds greater than a "nominal amount" or funds "expected to be held for longer than a short period of time" in their COLTAF account?

2) What is the impact of Colorado's Unclaimed Property Act on the proposed rule?

3) Should the word "must" be changed to "shall" in the proposed rule?

[1] The subcommittee also recommended an addition to Rule 1.15B(k) that would have added the phrase, "or other trust account," to the first sentence. That proposal is no longer recommended. Moreover, that rule may need amending as noted below.

Below we address these issues and some additional ones that have arisen during our meetings.

The subcommittee is also recommending revision of Colo. RPC 1.15B(k) to eliminate the possibility of a lawyer holding funds, which belong to someone who is uncommunicative, has no probate estate, or whose heirs cannot be located, in a non-COLTAF trust account. The reason for the revision is based upon the Unclaimed Property Act.

1. Proposed Colo. RPC 1.15B(l).

The subcommittee proposes the following rule which is nearly the same as the one proposed July 26, 2024 (deletions from earlier edition in red):

> 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 1.15D (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.

This proposed rule is consistent with Colo. RPC 1.15B(k) and addresses the problem of handling funds the owner does not want. It also takes into consideration the Unclaimed Property Act. We discuss below the propriety of using a COLTAF account for funds greater than a nominal amount or expected to be held longer than a short period of time.

2. Proposed revision to Colo. RPC 1.15B(k)

The subcommittee proposes revising Colo. RPC 1.15B(k) as shown in red:

> (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 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.

Deleting the option of keeping the funds in a non-COLTAF trust account would exempt them from the Unclaimed Property Act as discussed below.

3. Can a lawyer keep unwanted funds greater than a "nominal" amount" or "expected to be held" for longer than "a short period of time" in their COLTAF account?

Colo. RPC 1.15B(b) describes that a COLTAF account is for funds that are nominal in amount or expected to be held for a short period of time. That rule does place any restrictions on a lawyer's conduct; in other words, the rule does not require lawyers to place funds in a COLTAF account that are only of a nominal amount or expected to be held for a short period of time.

When funds are deposited initially in a COLTAF account, the proposed rule would allow a lawyer to keep funds that the owner does not want in a COLTAF account or remit them to COLTAF. Those funds may be considered by someone to be more than a nominal amount or may be expected to be held for longer than a short period. However, the subcommittee has concluded that the lawyer may keep those funds in a COLTAF account.

This conclusion is based upon common sense, consideration of the Colorado Revised Uniform Unclaimed Property Act, and the lack of any case or guidance that defines "nominal amount" or "short period of time."

From a practical point of view, a COLTAF account is the best place to keep unwanted funds, unless they are remitted to COLTAF. As discussed below, a

lawyer could not hold the funds in a non-COLTAF trust account because the funds, by statute, would be subject to the Unclaimed Property Act. (The same conclusion can be made about funds of a client who cannot be located or is deceased, and the heirs cannot be located, addressed by Colo. RPC 1.15B(k) as discussed above.) If held in a non-COLTAF trust account, the lawyer would need to make a report to the State Treasurer and send the funds to that office after the applicable period has passed. Practically speaking, there is no other appropriate account in which the lawyer could hold the unwanted funds.

A COLTAF account is the appropriate place for the lawyer to hold the funds, unless they are remitted to COLTAF even though Colo. RPC 1.15B(b) says such account is only for funds that are "nominal in amount" or "expected to be held for a short period of time." As mentioned, Colo. RPC 1.15B(b) does not prohibit a lawyer from depositing funds in a COLTAF account if they exceed a certain amount or are held for a more than a certain period of time.

There are no cases and no guidance about what is meant by the terms "nominal in amount" or "expected to be held for a short period of time." The terms are vague, and it seems highly unlikely that a lawyer would ever be disciplined under Colo. RPC 1.15B(b) if they are not defined. *In re Abrams*, 488 P.3d 1043, 1052 (Colo. 2021) (a state-imposed sanction violates due process if the underlying law or regulation "fails to provide a person of ordinary intelligence fair notice of what is prohibited or is so standardless that it authorizes or encourages seriously discriminatory enforcement" quoting *United States v. Williams*, 553 U.S. 285, 304, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008)).

We are also informed by OARC that they know of no matter that has addressed those terms, and the proposed rule has the support of OARC.

The subcommittee also notes that a lawyer is obligated to tell a client or other person who does not want their funds that they will not be earning interest if held in a COLTAF account or if remitted to COLTAF. The lawyer's duty to communicate with the client about this issue is based on Colo. R.P.C. 1.4 – *Communication*. We are also recommending an explicit comment to Colo. RPC 1.15A about communication (see below).

If the owner of the funds is not a client, the subcommittee has concluded that a lawyer must communicate to the owner about the funds not earning interest for their benefit. Comment [8] to Rule 1.15A states that a lawyer should hold property of others, not only clients, with the care required of a professional fiduciary. It is assumed that a professional fiduciary must advise the owner of the funds, who may not be a client, that interest is not payable to the owner, if they are held in a COLTAF account or if they are remitted to COLTAF.

The subcommittee is making two recommendations to add language to Comment 1 to Colo. RPC 1.15A to guide lawyers about their obligation to try to communicate with the owner of funds that they may not be earning interest for the owner if held in a COLTAF account.

It's our conclusion that a lawyer may keep the "unwanted" funds in a COLTAF account or remit the funds to COLTAF, and we have drafted our new proposed rule with that in mind.

4. What is the impact of Colorado's Unclaimed Property Act on the proposed rule?

Colorado's Revised Uniform Unclaimed Property Act, C.R.S. §38-13-101 *et seq*, (the Act or the Unclaimed Property Act) contains requirements to report and remit unclaimed funds to the State Treasurer.[2] When a report is made as required, the Act mandates that the unclaimed property be paid or delivered to the Colorado Treasury Unclaimed Property Division. C.R.S. §38-13-603(1).

C.R.S. §38-13-215 exempts attorney COLTAF accounts from the provisions of the Act. The Act does not exempt attorney trust accounts that are not COLTAF accounts. Therefore, we do not think that a proposed Rule 1.15B(l) should include the option of holding the funds in an "other trust account" as an alternative to a COLTAF account. (For the same reasons, we submit that Colo. RPC 1.15B(k) should be revised as discussed below.)

After reviewing the Act, the subcommittee has recognized that trust accounts, which are not COLTAF accounts, are subject to the Act. Therefore, the lawyer may be subject to reporting the unwanted funds and submitting them to the State Treasury. The Colorado Unclaimed Property website explains that all types of companies including banks, financial institutions and business entities are required to report unclaimed property.[3] This includes public institutions, courts, municipalities, governmental entities, public corporations or authorities, non-profit entities, hospitals, utilities, estates, trusts or any other legal or commercial entity.

A member of the subcommittee has communicated with the State Treasurer's Office who has said that funds in a COLTAF account are exempt

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[2] C.R.S. §38-13-201 sets forth the time periods for when property is presumed to be abandoned.

[3] https://colorado.findyourunclaimedproperty.com/app/faq-report.

from the Act. However, if they were transferred to a lawyer's non-COLTAF account, they would be subject to the Act.

The subcommittee now supports excluding non-COLTAF accounts from a new rule. Taking this route avoids asking the legislature to exempt those accounts.

Using COLTAF accounts to hold funds for an owner who does not want them continues to protect the funds. And the lawyer may remit them to COLTAF, if they choose to.

As discussed above, the subcommittee is not concerned that holding these funds in a COLTAF account will risk a disciplinary action based upon keeping more than nominal amounts, or funds expected to be held for longer than a short period of time.

5. Should the proposed rule use "must" instead of "shall"?

The subcommittee recognizes that using "must" or "shall" in the Rules of Professional Conduct has been an ongoing concern. We initially drafted our proposed rule to be consistent with Colo. RPC 1.15B(k) which uses "must."

It has been pointed out that the Colorado Appellate Rules have been revised from using "shall" to "must," or "will."

The subcommittee defers a decision on this question to the full Committee.

6. Amendments to Comment 1, Colo. RPC 1.15A

The subcommittee recommends that Comment 1, which follows Colo. RPC 1.15A be amended.

There are two reasons for additions to Comment 1. First, it should be made clear that a lawyer may hold funds of a missing client or owner in a COLTAF account so that they do not have to be reported to the State Treasurer.

Second, it should be made clear that a lawyer should tell the owner of funds in a COLTAF account that they are not earning interest for the benefit of the owner.

The subcommittee recommends the following additions shown in red to Comment 1:

[1] Trust accounts containing funds of clients or third persons held in connection with a representation must be interest-bearing or dividend-paying for the benefit of the clients or third persons or, if the funds are nominal in amount or expected to be held for a short period of time, for the benefit of the Colorado Lawyer Trust Account Foundation ("COLTAF"). However, funds held by a lawyer whose owner or heirs cannot be located or their identity determined, or whose owner refuses to accept them, may be held in a COLTAF account, or remitted to COLTAF, pursuant to Colo. RPC 1.15B(k) or (l) regardless of the amount or length of time for which they are held. A lawyer should exercise good faith judgment in determining initially whether funds are of such nominal amount or are expected to be held by the lawyer for such a short period of time that the funds should not be placed in an interest-bearing account for the benefit of the client or third person. The lawyer should also consider such other factors as (i) the costs of establishing and maintaining the account, service charges, accounting fees, and tax report procedures; (ii) the nature of the transaction(s) involved; and (iii) the likelihood of delay in the relevant proceedings. A lawyer should review at reasonable intervals whether changed circumstances require further action respecting the deposit of such funds, including without limitation the action described in paragraph 1.15B(i). A lawyer should make reasonable efforts to communicate with the owner of funds held in a COLTAF account or remitted to COLTAF that they do not earn interest for the benefit of the owner.

7. Amendments to Comment 7, Colo. RPC 1.15.

a) Revision to reflect new RPC 1.15B(l)

If the proposed Colo. RPC 1.15B(l) is added, then Comment 7 should address the new rule.

The subcommittee proposes the following changes to Comment 7 as highlighted:

[7] What constitutes "reasonable efforts," within the meaning of Colo. RPC 1.15B(k) will depend on whether the lawyer does not know the identity of the owner of certain funds held in a COLTAF account, or the lawyer knows the identity of the owner of the funds but not the owner's location or the location of a deceased owner's heirs or personal representative. When the lawyer does not know the identity of the owner of the funds or a deceased owner's heirs or personal representative, reasonable efforts include an audit of the COLTAF account to determine how and when the funds lost their association to a particular owner or owners, and whether they constitute attorneys' fees earned by the lawyer or expenses to be reimbursed to the lawyer or a third person. When the

lawyer knows the identity but not the location of the owner of the funds or the location of the owner's heirs or personal representative, reasonable efforts include attempted contact using last known contact information, reviewing the file to identify and contact third parties who may know the location of the owner or the owner's heirs or personal representative, and conducting internet searches. After making reasonable but unsuccessful efforts to identify, locate, or to communicate with the owner of the funds or the owner's heirs or personal representative, a lawyer's decision to continue to hold funds in a COLTAF ~~or other trust~~ account, as opposed to remitting the funds to COLTAF, does not relieve the lawyer of the obligation to maintain records pursuant to Rule 1.15D(a)(1)(A) ~~or to determine whether it is appropriate to maintain the funds in a COLTAF account, as opposed to a non-COLTAF trust account, pursuant to Colo. RPC 1.15B(b)~~. Under Colo. RPC 1.15B(l) reasonable efforts must be made by the lawyer to communicate that the funds are being held in a non-interest-bearing account and may be remitted to COLTAF. When COLTAF has made a refund to a lawyer following the lawyer's determination of the identity and the location of their owner or the identity and location of the owner's heirs or personal representative, the lawyer's obligations with respect to those funds are set forth in Colo. RPC 1.15A or are subject to applicable probate procedures or orders. The disposition of unclaimed funds held in the COLTAF account of a deceased lawyer is to be determined in accordance with written procedures published by COLTAF.

b) Revision to delete non-COLTAF accounts from Comment 7 to Colo. RPC 1.15A.

The current version of Comment 7 implies that a lawyer can keep the unwanted funds in a non-COLTAF account. It states in relevant part (the relevant part with emphasis added):

> [7] . . . After making reasonable but unsuccessful efforts to identify and locate the owner of the funds or the owner's heirs or personal representative, a lawyer's decision to continue to hold funds in a COLTAF or other trust account, as opposed to remitting the funds to COLTAF, does not relieve the lawyer of the obligation to maintain records pursuant to Rule 1.15D(a)(1)(A) or to determine whether it is appropriate to maintain the funds in a COLTAF account, as opposed to a non-COLTAF trust account, pursuant to Colo. RPC 1.15B(b).

The subcommittee recommends deleting the underlined phrase, because as explained above, a non-COLTAF account is not exempt from the Unclaimed Property Act, and the funds, would at some point need to be reported and remitted to the State Treasurer.

Conclusion

The subcommittee asks the full Committee to consider the above recommendations.

Attachment 3

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

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[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

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[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.

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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.

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[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

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[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.

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[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

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[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.