COLORADO SUPREME COURT

RULES OF PROFESSIONAL CONDUCT STANDING COMMITTEE

Approved Minutes of Meeting of the Full Committee
On
July 26, 2024
Seventy-Second Meeting of the Full Committee

The seventy-second meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:06 am on Friday, July 26, 2024, by Chair Judge Lino Lipinsky de Orlov. Judge Lipinsky took attendance.

Present at the meeting in person were Judge Lipinsky (Chair), Justice Maria E. Berkenkotter, Katayoun Donnelly, Matthew Kirsch, Judge Bryon M. Large, Lois Lupica, Jason Lynch, Julia Martinez, Troy R. Rackham, Marcus L. Squarrell, David Stark, James S. Sudler, J.J. Wallace, and Jessica Yates.

Present for the meeting by virtual appearance were Nancy Cohen, Cynthia F. Covell, Thomas E. Downey, Jr., Judge Adam Espinosa, Marcy Glenn, Erika Holmes, April D. Jones, Stephen G. Masciocchi, Cecil E. Morris, Jr., Noah Patterson, Henry Reeve, Alexander R. Rothrock, and Robert W. Steinmetz.

Committee members excused were Scott L. Evans, Margaret B. Funk, Marianne Luu-Chen, Eli Wald, Judge John R. Webb, and Fred Yarger. Liaison Justice William Hood was also excused. Christopher Gray attended as a guest.

1. CALL TO ORDER. Judge Lipinsky welcomed the members in attendance and virtually and introduced two new members of the Standing Committee, Professor Lupica and Jason Lynch. Professor Lupica is a law professor at the University of Denver Sturm College of Law. She is an expert in legal process, access to justice, and professional ethics. Professor Lupica previously was a Fulbright scholar at the University of Melbourne. Professor Lupica has published numerous articles, as well as a case book on bankruptcy law.

Jason Lynch is general counsel and chief operating officer of Foundry, a venture capital company. Mr. Lynch is responsible for legal issues affecting the company and operations, and he handles corporate issues. He was with Davis Graham & Stubbs before joining Foundry.

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

3. OLD BUSINESS.

A. Report on ABA Model Rule 1.16 [Judge Lipinsky]. Judge Lipinsky reported that the Colorado Supreme Court decided to adopt a wait-and-see approach regarding ABA House of Delegates Resolution No. 100, which revised Model RPC 1.16 to impose obligations on lawyers to report clients who may be involved in money laundering, human trafficking, or similar conduct.

B. Report from the Rule 1.2 Subcommittee [Erika Holmes]. Ms. Holmes outlined the history and text of the limited representation provisions of Rule 1.2. Ms. Holmes noted the subcommittee's proposed amendments to the Rule and its commentary would replace the term "limited representation" with "limited legal services," for the reasons identified in the subcommittee's report. Additionally, revising the terminology would make Rule 1.2 consistent with C.A.R. 5(e), which uses the term "limited legal services" rather than "limited representation." Ms. Holmes summarized the subcommittee's report (attachment 2 to the packet), which contained the suggested revisions in redline form. The only change to the rule's language would be to add a cite C.A.R. 5(e). But there are significant suggested revisions to the commentary. Revised comment [6] would update and expand examples for other practice areas, such as general civil litigation and family law cases. Another proposed revision would add a new comment [6A] to Rule 1.2 to explain that the Rules apply to the lawyer even when the lawyer is providing limited legal services. Ms. Holmes asked for feedback on the proposed revisions to Rule 1.2 from members.

A member noted that the proposed revisions do not have a redline to identify a change in the rule. The current rule provides "A lawyer may limit the scope or objectives, or both, *of the representation* if the limitation is reasonable under the circumstances and the client gives informed consent. A lawyer may provide limited representation to pro se parties as permitted by C.R.C.P. 11(b) and C.R.C.P. 311(b)." (Emphasis added.) The proposed rule changes the term "of the representation" to "of the legal services provided to a client." The member suggested this should be redlined to identify the change.

Another member wondered whether the Committee should include language in Rule 1.2 that requires the lawyer to confirm the limited scope or objectives of the representation in writing. Members discussed other Rules, such as Rule 1.5(b), and believed that Rule 1.5(b) would apply to limited scope representation. A member suggested that the Committee could be inadvertently creating confusion or ambiguity in the Rules by applying a different concept in Rule 1.2 than perhaps exists in Rule 1.5 or other Rules. A member suggested that the substitution of the phrase "limited legal services" for the phrase "limited representation" also may relate to the "scope" of representation and perhaps could be addressed by including the term "scope" within the term "limited legal services," or some similarly simple way to revise the proposed changes to Rule 1.2. A member suggested it would be sufficient if the proposed revisions to Rule 1.2 included a cross-reference to Rule 1.7(b), which addresses obtaining informed consent of the client confirmed in writing.

A member discussed C.A.R. 5(e) and went through the requirements of C.A.R. 5(e). One of the critical points about C.A.R. 5(e) is that the rule addresses limited legal services rather than

limited representation. One concern of the appellate rule drafters was that volunteers in a clinic may be providing assistance that fell outside the scope of the prior version of the rule. The Civil Rules Committee is also considering amendments to C.R.C.P. 11(b) consistent with the changes to C.A.R. 5(e) to move away from the term "limited representation" and substitute it with "limited legal services." Thus, it is important to align the language of Rule 1.2(c) with C.A.R. 5(e) and expected changes to C.R.C.P. 11(b).

A member explained that the reason for informed consent to the limited representation is to ensure that the client understands that the lawyer is only doing one or a few things that are limited in scope during a representation. That situation differs significantly from providing legal advice or legal services at a clinic. In the legal clinic setting, should informed consent be required? Should the Committee consider a different rule for the situation where a lawyer is just providing advice at a clinic? A member responded that the provision of limited legal services is a subset of providing limited legal representation, so the current proposed language would be appropriate. The drafters of C.A.R. 5(e) already considered this situation and crafted the language in C.A.R. 5(e) to address the circumstance of a lawyer providing advice or services in a clinic setting.

A member wondered whether providing advice or services in a clinic setting is representation of the client. If it is, then Rule 1.5 and other Rules would apply. If not, then those Rules would not apply and perhaps there have to be different rules? If the Committee agrees that providing legal advice and services to a person in a clinic does not amount to representation, then there should be a different rule addressing the clinic setting. Rule 6.5 comment [1] references a clinic setting. There would be a lawyer-client relationship but not a reasonable expectation on the part of the clinic attendee that the lawyer-client relationship would go beyond the consultation in the clinic. It is important to require those lawyers staffing the clinic to clearly communicate to the attendee (the "client") that the services of the clinic lawyers will terminate once the attendee is finished with the clinic. It is important for the attendees of the clinic to understand when the services of the lawyer staffing the clinic will end.

Another member explained that the touchstone of whether a lawyer-client relationship exists is whether the client reasonably believes that the person is the client's lawyer, and the lawyer provides advice or legal services as a result. The member suggested that the Rules do not define a lawyer-client relationship differently than this standard. Another member suggested that there is no need to include changes about obtaining informed consent in writing because those protections already exist in the Rules of Professional Conduct.

A member asked whether clinics currently provide any written statements to the clinic attendees about the existence of a lawyer-client relationship, limitations in the services, etc. The member also suggested that Rule 6.5 comment [2] is not a model of clarity because if refers to "short term legal services" and short-term "limited representation." If Rule 6.5 comment [2] applies to clinics, then the consequence would be that every lawyer who staffs a clinic must obtain informed consent from the attendee of the clinic and obtain the signature of the "client" to the limited representation. A member familiar with the practices of Metro Volunteer Lawyers related that when it has clinics, it provides documents to the attendees that conform to the requirements of Rule 6.5 comment [2].

A member raised questions about the proposed comment [6A] to Rule 1.2. The comment says that "except as provided otherwise, the Rules of Professional Conduct are applicable to the limited legal services provided by a lawyer." The member wondered what Rules provide otherwise. If a lawyer is providing legal services, then the Rules of Professional Conduct apply, which, in the member's view, makes the "otherwise" language unnecessary.

Would be it consistent with the proposed revisions to Rule 1.2 to clarify that, if a lawyer is providing limited legal services to the client, then the lawyer is representing the client? This would then clarify that, if the lawyer is providing limited legal services, the lawyer is representing the client and must follow Rule 6.5 comment [2], Rule 1.5, and other similar rules. Committee members discussed this idea. The intent behind the proposed Rule 1.2 comment [6A] was to ensure that a lawyer providing limited legal services is acting as a lawyer for the client in that limited circumstance.

Judge Lipinsky suggested that the Rule 1.2 Subcommittee reconvene to discuss the concerns raised by Committee members and revise the proposal to amend Rule 1.2 to address the concerns. The CBA's civil appeals clinic is very specific that, if the clinic attendee requires assistance beyond the clinic informational sessions, then the written limited representation waiver needs to be provided. But if the lawyers are staffing the clinic just for an informational session, then it would not involve representation, and a written waiver need not be provided because there is no specific legal advice to a specific client on a specific legal matter.

A member expressed concern about the idea that if a lawyer provides legal advice to a person, there is no representation involved. Representation would involve providing general legal advice or legal services, whether in a clinic or otherwise. The member suggested that it is a risky proposition to suggest that if a lawyer is merely providing education, the lawyer is not providing legal advice or in a representational relationship with those persons to whom the lawyer is providing education. Another member suggested that this may be the tail wagging the dog. The member suggested that the subcommittee not tinker with the proposed Rule 1.2 draft too much, but perhaps consider revising the commentary of Rule 6.5 to clarify some of the issues.

The Rule 1.2 Subcommittee will consider the discussion from the Committee members today and bring back a revised proposal to Rule 1.2.

C. Report on outdated cross-references in the Rules [Steve Masciocchi]. Mr. Masciocchi briefly presented on the suggestions in his proposal, which was attachment 3 in the packet. After the discussion, the Chair put the proposed revisions to a vote. The Committee members voted unanimously to approve the proposed revisions.

The Chair raised the issue of whether there is a committee that is assigned the authority to revise the LLP Rules of Professional Conduct. When our Committee proposes a change to the Rules, is there some Committee to which the proposed revisions can be provided to ensure consistency between the two sets of rules? A member suggested asking the Court to authorize this Committee to consider and propose changes to the LLP Rules, as well.

D. Report from the Rule 8.4 subcommittee [Matt Kirsch]. Mr. Kirsch presented the report from the Rule 8.4 subcommittee. After consideration, the subcommittee recommended revising Rule 8.4(g) to add the terms "sex" and "identity or expression," and placing the term "sexual orientation" higher in the rule where it is consistent with the other categories. The subcommittee also suggested including the concept of "ethnicity" in Rule 8.4(g) because it captures other areas of identity discrimination that are not currently covered. Mr. Kirsch also walked through what other states or jurisdictions are doing with respect to the relevant rule. A member moved to approve the recommendations of the Rule 8.4 subcommittee. Another member seconded the motion. The Committee voted unanimously to approve the recommendations of the Rule 8.4 subcommittee.

E. Report from the trust fund subcommittee [Jamie Sudler]. The problem considered by the subcommittee was the situation when a client or some third party is entitled to funds held by the lawyer but refuses to accept or receive the funds. There is a gap in Rule 1.15(b) that does not address this situation because the rule drafters did not foresee situations where a client or owner of funds would not want to receive the funds. Mr. Sudler explained the proposed changes to Rule 1.15B(k) and Rule 1.15B(l), as described in the subcommittee's July 26, 2024, memorandum included in the packet as attachment 5.

A member suggested revising the cross-reference to Rule 1.15D(a)(1)(C). Rule 1.15B(b) provides that "[a] 'COLTAF account' is a pooled trust account for funds of clients or third persons that are nominal in amount or are expected to be held for a short period of time." This definition may be inconsistent with the proposed revisions to Rule 1.15B(l), which allow for larger amounts of funds to be held indefinitely. Another member suggested that this rule is merely a definition and would not be inconsistent with the proposed revisions to Rule 1.15B(l).

Another member asked whether the Unclaimed Property Act applies to funds held in trust accounts. A member responded that the legislature carved out from the Unclaimed Property Act funds being held in a COLTAF account.

A member suggested that there are too many revisions being discussed to effectively address during the meeting. The member suggested that the subcommittee meet again and consider additional revisions in light of the discussion amongst the Committee. Another member suggested that there could be many unintended consequences of the proposed revisions that need to be considered, such as the scenario involving an incarcerated client or when third parties may be using or attempting to use the funds held by the lawyer for the client. The members generally agreed to refer the matter back to the subcommittee.

F. Report from the reproductive health subcommittee [Nancy Cohen]. Ms. Cohen presented the proposed revisions to the comments in Rule 1.2. Ms. Cohen noted that Washington recently has proposed amending Washington RPC 1.2 comment [18] to include providing legal advice on laws "related to reproductive health care services, gender-affirming care, or cannabis," as reflected in attachment 6 in the packet. The proposed revisions are:

> [15] A lawyer may provide legal services to a client regarding conduct in Colorado that the lawyer reasonably believes is legal in Colorado, even if the conduct or its

likely effects may be unlawful in another jurisdiction. Those services can include counseling the client regarding the validity, scope, and meaning of Colorado law relevant to the conduct in Colorado. However, the lawyer shall also advise the client that the conduct or its likely effects may be unlawful in another relevant jurisdiction and encourage the client to seek legal advice from counsel admitted in that jurisdiction.

For purposes of this comment, "another jurisdiction" does not include a federal or tribal jurisdiction.

A member suggested that the proposed draft comment is much broader on its face and could permit a lawyer to provide advice to a client to commit criminal conduct. The member did not like the idea that the Rules would allow a lawyer to aid conduct that is criminal, even if it is criminal in another jurisdiction and not Colorado. A member also suggested that the choice of law issues are difficult because our rule would not be binding on another jurisdiction and would not protect a Colorado lawyer from discipline in the other jurisdiction. Further, the lawyer would not be subject to discipline in Colorado, so the proposed comment may not provide any protection and therefore not have much value. The risks of adopting the revision outweigh the benefits of the proposed comment from the member's perspective. Another member agreed with these comments.

A member suggested that, if there is a need for revision, the revision should be put in the rule rather because otherwise the comment masquerades as a rule when it is just a comment to provide extra guidance. Rule 1.2(d) provides a "lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." This language is positive and clear. The proposed comment would be inconsistent with Rule 1.2(d) and create ambiguities.

A member suggested that Colorado lawyers already can advise on Colorado law, even if it is inconsistent with other jurisdictions' laws. A member applauded the work of the subcommittee and believed the work was well done and the proposed comment is well written and appropriate. The member moved for approval of the Rule 1.2 Subcommittee proposal.

A member asked about a hypothetical where a Colorado lawyer gets a call from a Colorado student attending the University of Texas who wants an abortion that may be legal in Colorado but illegal in Texas. Could the lawyer give advice to the Colorado resident who is a student in Texas about what options the student has? A member suggested that this issue is covered by Rule 1.2(d) because the term uses "assist" rather than just advice. The member suggested that the adoption of comment [14] and now this proposed comment [15] would make the issue narrower because it would allow assistance or advice to the client about conduct that is criminal somewhere, and there is no geographical limitation in Rule 1.2(d) about "conduct that the lawyer knows is criminal." Criminal where? If not criminal in Colorado, but criminal in another jurisdiction, then Rule 1.2(d) seems to prohibit the advice or assistance to a client who intends to engage in conduct that is criminal in another jurisdiction.

A member agreed that the existing comment [14] amends the rules, but that was the choice the Supreme Court made when it drafted and approved the comment. Given that comment [14] is already in place, there is little risk of creating more confusion or narrowing of the term "assist" because that already exists. It is possible that the court may want to revise Rule 1.2 by putting this issue directly in the Rule rather than in comment [14]. The member suggested that the Committee needs to do something, but perhaps the best thing to do is to seek guidance from the Court about whether there is an appetite for a wholesale revision to Rule 1.2 that better addresses the structure and puts the guidance in the Rule instead of the commentary. Another member agreed that the proposed change belongs in Rule 1.2 rather than in the comments.

The Committee voted sixteen to four, with one abstention, to approve the Subcommittee's proposal.

E. Report from the AI subcommittee [Julia Martinez]. Ms. Martinez presented the subcommittee's research and work relating to generative artificial intelligence ("GAI") and the Rules that may need revision with the recent developments in GAI technology and its use by lawyers, firms, and courts. The subcommittee was tasked with whether the Rules should be revised to address AI and if so, which Rules? The subcommittee explained its research and analysis in its July 18, 2024, memorandum distributed to the Committee as attachment 7. There have been significant and rapid changes in the technology, including GAI changes to Westlaw, Lexis, and other legal tools after the subcommittee was formed. The subcommittee approached the work with unity on four principles. First, the fact that a lawyer elects to use technology should not make it more or less likely that the lawyer would engage in misconduct. Second, the subcommittee agreed that there is a need to draw lawyers' attention to AI and the first principle discussed above. Third, the subcommittee thought it important not to propose revisions that would discourage the use of technology, including AI. Finally, the subcommittee wanted to have the revisions be as general and simple as possible so that there would not need to be frequent additional revisions to the proposed Rules as the technology further develops.

The subcommittee has four recommendations to the Committee to be viewed like a menu of options. The subcommittee believed a cafeteria-approach might be better to allow the Committee to form some initial judgments and make recommendations to the subcommittee on some of the issues but perhaps not the others. The subcommittee, however, wanted to bring all the recommendations to the Committee for consideration.

The subcommittee's first proposal is to add comment [21] to the Scope of the Rules, which is provided on page 2 of the July 18, 2024, memorandum. The subcommittee believed this proposal was not controversial and the subcommittee unanimously agreed to the proposed comment [21]. The proposed comment [21] says:

> [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.

The members discussed the proposed addition of comment [21]. A member wondered what is meant by "directly or indirectly." If a lawyer does not know that certain technology is being used, how can the lawyer violate a Rule of Professional Conduct? Additionally, a member had a concern about the term "may be held accountable," instead of a term such as "may still violate the rules" or something similar. A member was concerned about the vagueness of the term "may be held accountable." Another member suggested that the first sentence of comment [21] is appropriate but the second sentence creates an ambiguity and does not add substance.

A member moved to amend the first sentence of comment [21] to the Scope section of the Preamble to the Rules. The amended comment [21] would say: "Technology, including artificial intelligence and similar innovations, plays an increasing role in the practice of law, but a lawyer's use of technology does not diminish the lawyer's responsibilities under these Rules." A member seconded that approach. A straw poll was taken on this proposal. A majority of the members approved this language. None opposed.

A second straw poll was taken as to whether to retain the phrase "directly or indirectly" in comment [21] to the proposed comment in the Scope section. A majority voted against including the phrase "directly or indirectly."

A member suggested revising the numbering of the proposed comment, changing it from number [21] to instead number [20A]. The member made this suggestion to make it clear that the revised comment differs from the comment in the Model Rules.

The Committee then began a discussion on the other proposed revisions, including proposed revisions to RPC 1.1 comment [8] and RPC 5.3, and adoption of the proposed RPC 1.19 and comments. A member asked whether the Committee is voting on each proposal or on all proposals together. The member noted that, if the Committee approves the proposed new Rule 1.19, then comment [21] to the scope and some of the other proposed revisions would not be necessary.

The Committee discussed the subcommittee's next proposal, which was to revise RPC 1.1 comment [8] as follows:

> [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 technologyies, 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.

After a brief discussion of the proposed revisions, a straw vote was taken. A majority of the members voted in favor of the proposed revision, with three abstentions.

The Committee turned to discussing the proposed revisions to RPC 5.3. The subcommittee provided a majority and minority report on the proposed revisions to describe fully the views of the subcommittee members. The proposed revisions were identified on pages 6 through 7 of the subcommittee's report. A member advocated for the proposed revisions, explaining that GAI technology is so advanced that it could be considered a legal assistant or paralegal of the lawyer, which would implicate a duty to supervise to ensure that the technology is used in a way that is compatible with the professional obligations of the lawyer. The core issue is whether a technology could be a nonlawyer assistant.

Another member explained that technology has advanced to the point where a lawyer may use AI technology in ways similar to paralegals, such as drafting disclosures, preparing deposition questions, and the like. Another member explained that RPC 5.3 and similar rules must only apply to humans because the concept of supervision would only logically apply to humans, and not to technological tools. The members engaged in a vigorous discussion on this topic. A member explained that lawyers already have obligations under RPC 1.1 and 1.3 to ensure competence and reasonable communications, so it would be unwise to amend RPC 5.3 when the rules already cover some of the core issues.

Another member suggested that supervision requires two-way communication. The member wondered how a lawyer could reasonably supervise a technology when there is not two-way communication or interaction, or the ability to control the supervisee through disciplinary action or termination. Another member explained that technology allows AI to communicate with clients, review all discovery, generate discovery, draft and file pleadings, and create deposition questions. Given the pace at which the technology is being developed, technology may replace the role formerly occupied by legal secretaries or paralegals. Another member expressed agreement with the view of the minority report and suggested that the current rules address most of the concerns relating to competent and appropriate use of technology.

A member explained that the proposed amendment to RPC 5.3 treats inanimate things or technology as a person and thought that was just too large of a bridge to cross. Several members expressed the view that the Rules should not treat technology in the same way as it treats humans because that could lead to a cascade of unintended consequences.

A member explained that the big picture idea behind the proposed RPC 5.3 revisions is that lawyers use nonlawyer assistants, and technology could be one of those assistants. RPC 5.3 exists to ensure that a lawyer's use of nonlawyer assistants is compatible with the professional obligations of the lawyer. AI technology allows technology to replace the tasks formerly performed by human nonlawyer assistants, so the member believed it was important to ensure that the Rules capture this concept for technology-based nonlawyer assistants. Another member responded and suggested that, even if technology could replace the role of nonlawyer assistances, there is still no need for revisions to RPC 5.3. The member explained that a lawyer cannot supervise technology in the same way as a lawyer could supervise a human nonlawyer assistant.

Examining the proposed adoption of RPC 1.19, a member suggested that the term "directly or indirectly" could be used in the proposed RPC 1.19 as a comment rather than in comment [21] to the scope. The members engaged in extensive discussion about whether the Committee should

adopt a stand-alone rule, such as the proposed adoption of RPC 1.19, or whether the Committee should revise existing rules without adopting a stand-alone rule. The members of the Committee were divided on which approach to take. Several members advocated for a stand-alone separate rule addressing lawyer's use of technology, such as RPC 1.19. Several other members suggested that the current rules, with a revision, could adequately and appropriate address the concerns about lawyer's use of technology.

In light of the time, the Committee decided to resume the discussion of the AI Subcommittee at the Committee's September 27 meeting.

4. NEW BUSINESS.

A. Use of Member Names in the Minutes [Judge Lipinsky]. Judge Lipinsky reported that a member noticed that the meeting minutes have recently specified the name of the member commenting on matters before the Committee. The member explained that this deviated from the Committee's long-time practice of not identifying the specific member who commented and may have a chilling effect on comments. The Committee will return to the practice of not specifically identifying members and their comments in the minutes and instead using more general references such as "one member thought" or "another member disagreed."

5. ADJOURNMENT. A motion to adjourn was made at noon and was duly seconded. The motion carried. The meeting adjourned at 12:00 p.m. The next meeting of the Committee will be on September 27, 2024.

Respectfully submitted,

Troy R. Rackham, Secretary