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

AGENDA

July 26, 2013 9:00 a.m.
Colorado Supreme Court Conference Room 4244
Ralph Carr Colorado Judicial Center, 4th Floor
2 East 14th Avenue, Denver
Call-in number: 720-625-5050 - Access Code 47645430#

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1. Approval of minutes – May 2, 2013 meeting [To be distributed separately]
2. Former Standing Committee member Jim Wallace – 1922-2013 [Marcy Glenn, page 1]
3. Report (brief) from Subcommittee on August 2012 Amendments to ABA Model Rules [Michael Berger]
4. Report (brief) from Subcommittee on CRPC 5.5(a)(3), Assisting in the Unauthorized Practice of Law [Tony Van Westrum]
5. Report (brief) from Subcommittee on CRPC 3.1 comment, in response to *A.L.L. v. People* (Colo. 2010) [Cindy Covell]
6. Report from Subcommittee on OARC- and COLTAF-proposed amendments to CRPC 1.15 [Jamie Sudler, pages 2-46; and materials from prior meetings]
7. Report from Subcommittee on Marijuana [Judge Webb, pages 47-54; and materials from prior meetings]
8. Administrative matters: Select next meeting date
9. Adjournment (before noon)

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In Memoriam: James E. Wallace, Professor Emeritus of Law at the University of Denver

Posted: 05 Jun 2013 08:38 AM PDT

The University of Denver Sturm College of Law reported that James E. Wallace, Professor Emeritus of Law, died peacefully at his home on Tuesday, May 28, 2013.

Professor Wallace received his A.B. in 1943 at the University of California at Los Angeles. He got his LL.B. from University of California at Berkeley in 1949, and received a B.D. from the Princeton Theological Seminary in 1960. He began his teaching career at the Princeton Theological Seminary, and was recruited to teach at DU in 1967.

Professor Wallace taught at DU for over three decades. He directed the Professional Responsibility program while faculty and continuing after his retirement. He was instrumental in developing the Law and Society Association, and was its executive director for many years. His tenure at DU also included a stint as Associate Dean of Academic Affairs.

Professor Wallace was also very active in his community. He was a frequent presenter for the Colorado Bar Association's Continuing Legal Education programs; a member of the CBA Ethics Committee and the Joint CBA Task Force on Professionalism; a member of several Colorado Supreme Court committees, including the Model Rules Committee; and a municipal judge for Greenwood Village.

His memorial service will be held Friday, June 21, at Bethany Lutheran Church. His family asks that, in lieu of flowers, donations be made in his name to the Salvation Army and Habitat for Humanity of Metro Denver.

To: **Colorado Supreme Court Standing Rules Committee**

From: **Rule 1.15 Subcommittee**[1]

Date: **July 18, 2013**

Re: **Recommended Rule Changes**

I. Overview of Subcommittee's Work

The Subcommittee was formed at the November 16, 2012, meeting of the Standing Rules Committee, after a discussion about proposed amendments to Rule 1.15. The discussion was triggered by a letter from the Colorado Lawyer Trust Account Foundation ("COLTAF") asking for consideration of rule changes to require lawyers to hold their COLTAF accounts in financial institutions that pay interest or dividend rates on those accounts that are the same as those paid on comparable non-COLTAF accounts. The Committee directed the Subcommittee to consider and, if appropriate, suggest changes to the Rule to assure that COLTAF accounts are paid rates of interest that are not less than those paid on comparable accounts. The Committee also directed the Subcommittee to review Rule 1.15 in its entirety to determine how it could be improved.

The Subcommittee is suggesting many revisions to Current Rule 1.15. Where it is possible to do so we have shown changes to the rules in a redlined version below. It is suggested that members of the committee should look at the Current Rule, attached as Exhibit A in comparison to the proposed rules attached as Exhibit B.

Attached as Exhibit C is a chart which shows where the provisions of the Current Rule have been included in the proposed rule. ABA Model Rule 1.15 is attached as Exhibit D. The Model Rule has been changed and amended by many jurisdictions.

[1] Subcommittee members: Jamie Sudler, Tony van Westrum, Marcus Squarrell, Helen Berkman, Dianna Poole, Phil Johnson, Bill Bianco, David Little, Tuck Young, Alec Rothrock, Nancy Cohen, Margaret Funk and Cecil Morris.

II. Outline of Proposed Rules

The subcommittee is recommending a new format for Rule 1.15 in order to make it more accessible and to eliminate some inconsistencies. We have separated the Current Rule into five new rules. The Subcommittee suggests changes to the Current Rule not with the intent of affecting the basic goal of protecting funds entrusted to the lawyer.

A. Rule 1.15A – General Rule

Proposed Rule 1.15A is the general rule that is based upon ABA Model Rule 1.15. Proposed Rule 1.15A maintains the ethical principles involved in holding funds or property belonging to others:

- The lawyer must keep client funds or property segregated from lawyer's own funds;
- The lawyer must promptly deliver to a clients or third persons money to which they are entitled;
- The lawyer must account to clients or third persons regarding that person's money which the lawyer holds or held;
- If there is a dispute about who is entitled to funds, the lawyer must keep the disputed portion in trust.

The Subcommittee added language that makes it clear Proposed Rules 1.15A, B, C, D and E apply only to funds held by lawyers in connection with a lawyer's representation.

B. Rule 1.15B – Required Accounts

Proposed Rule 1.15B describes what accounts are required for a lawyer in private practice in Colorado and what is required for a trust account. These requirements are:

- A trust account if the lawyer holds funds entrusted to him or her;
  - Note: this may be a COLTAF account
- A business account;

    - May be called a "business," "office," "operating," or "professional," as possible titles for this account.
- Defines COLTAF account as appropriate for funds to be held for short period of time or nominal in amount;
- Each trust account (COLTAF and non-COLTAF) must be maintained at an institution approved by Regulation Counsel pursuant to Rule 1.15E;
- A client or third person may consent to funds being held in a trust account in a non-approved institution;
- Each trust account must be interest bearing (*see* below discussion in Section III A);
- A client or third person may consent to funds being held in a trust account which is not insured;
- The lawyer may deposit funds to cover anticipated service charges in the trust account.

C. Rule 1.15C – Use of Trust Account

Proposed Rule 1.15C proscribes how a lawyer may use a trust account:

- The lawyer cannot use debit cards and cannot make cash transactions on trust account;
- Only a lawyer licensed in this state or a person supervised by such lawyer may make withdrawals from trust account;
- The lawyer must reconcile trust account no less than quarterly.

D. Rule 1.15D – Record Keeping Requirements

Proposed Rule 1.15D contains the record keeping requirements for funds or property held in trust:

- The lawyer must have a record keeping system showing:
    - Deposits and withdrawals;
    - Appropriate information about the deposits and withdrawals.
- Appropriate records for other accounts (such as business account) maintained in connection with lawyer's representation;

- When firm dissolves, appropriate arrangements must be made to maintain the records.

E. Rule 1.15E – Approved Financial Institutions for Trust Accounts

Proposed Rule 1.15E sets forth the criteria to be an "approved institution" for purposes of holding attorneys' trust accounts including that the financial institution:

- Does business in Colorado;
- Agrees to report overdrafts to OARC;
- Cooperates with the COLTAF program;
- Remits interest on COLTAF accounts to COLTAF;
- Pays rates of interest on COLTAF accounts that are no less than rates paid on other comparable accounts.

F. Comments to the Rules

The Subcommittee has attempted to eliminate language from the comments that is mere repetition of the requirements of a rule and language that does not apply to Colorado. Further, a comment is suggested about lawyers or law firms who practice in more than one jurisdiction:

> [2] If a lawyer or law firm participates in Interest on Lawyer Trust Account ("IOLTA") programs in more than one jurisdiction, including Colorado, IOLTA funds that the lawyer or law firm holds in connection with the practice of law in Colorado should be held in the lawyer or law firm's COLTAF account. The lawyer or law firm should exercise good faith judgment in determining which IOLTA funds it holds in connection with the practice of law in Colorado.

III. Issues the Subcommittee Refers to the Committee of the Whole

There are several issues that the Subcommittee believes need to be addressed by the Standing Rules Committee as a whole. The Subcommittee determined that it could not decide how to handle these issues. They are:

A. Client Consent to Non-Interest Bearing Account.

As the Current Rule and the Proposed Rule are worded, a client who is receiving the interest on the account may consent to funds being held in a non-

insured depository institution. *See* Current Rule 1.15(f) and Proposed Rule 1.15B(e). Under Proposed Rule 1.15B(d) a client who is receiving the interest on the account can also consent to funds being held in a non-approved institution. The Subcommittee considered a similar issue: whether a client who is receiving the interest on the account should be allowed to consent to funds being held in a non-interest bearing account. Neither the Current Rule nor the Proposed Rule contains such a provision. The Committee as whole should determine whether to allow such a provision. The Subcommittee recognizes that theoretically a client should be allowed to consent to client funds being held in a non-interest bearing account when the client would otherwise be entitled to the interest. However, a significant amount of discussion by the Subcommittee concerned whether allowing such consent might undermine the use of COLTAF accounts for those funds that are appropriate for COLTAF accounts. Several members of the Subcommittee were opposed to permitting a client to consent to non-interest-bearing accounts.

B. Lawyer's Right to Interest on Funds Held in Trust

It is not unusual for a lawyer to hold funds in trust for a period of time in which the lawyer has an interest. An example of this situation is when a lawyer represents a plaintiff in a personal injury case. The matter settles with a settlement check made to both lawyer and client which may be deposited in non-COLTAF trust account. The lawyer through a contingent fee agreement is entitled to a percentage of the settlement. After the settlement funds are received by the lawyer, but before those funds are disbursed, they may earn interest. Current Rule 1.15 and Proposed Rule 1.15B(h) provide that a lawyer cannot take any of the interest earned on those funds while they are in trust. The subcommittee discussed the issue that the lawyer may be entitled to interest on the portion of the settlement that belongs to the lawyer. The Proposed Rule 1.15B(h) does not allow that. The Subcommittee discussed this issue at some length There was significant support for either resolution.

IV. Detailed Discussion of Proposed Rules

A. Proposed Rule 1.15A

Current Rule 1.15 is shown below with the proposed changes redlined:[2]

> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in trust accounts maintained in compliance with Rule 1.15B.~~a separate trust account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person.~~ Other property shall be ~~identified as such and~~ appropriately safeguarded. Complete records of such funds and other property of clients or third parties shall be kept by the lawyer in compliance with Rule 1.15D.~~and shall be preserved for a period of seven years after termination of the representation.~~
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> (b) Upon receiving funds or other property ~~in which~~ of a client or third person~~has an interest~~, a lawyer shall, promptly or otherwise as permitted by law or by agreement with the client or third person, deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, promptly upon request by the client or third person, render a full accounting regarding such property.
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> (c) When in connection with a representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until there is ~~an accounting and severance of their interests~~a resolution of the claims and, when necessary a severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.
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> (d) The provisions of Rule 1.15B, Rule 1.15C, Rule 1.15D, and Rule 1.15E apply to funds and other property, and to accounts, held or maintained by the lawyer, or caused by the lawyer to be held or maintained by a law firm through which the lawyer renders legal services, in connection with the lawyer's legal service.[3]

DISCUSSION OF PROPOSED RULE 1.15A

[2] Proposed Rules 1.15B, 1.15E are not shown below in redlined version because there are too many changes to do so.

[3] Proposed Rule 1.15A(d) is a new provision in its entirety even though the redlining does not show that it has been added.

1. The requirement in Current Rule 1.15(a) that the lawyer keep funds in a trust account located in the state where the lawyer's office is situated has been eliminated. The geographic location of the trust account is covered in Proposed Rule 1.15E(c)(1) which requires an approved trust account must be in an institution doing business in Colorado. The subcommittee considered many variations about the geographic location for a lawyer's trust account. One of the main observations of the subcommittee was that the Current Rule was ambiguous as to where the trust account could be maintained. In Current Rule 1.15(a) the lawyer was required to maintain a trust account where the lawyer's office was situated (which could be any state) AND under 1.15(d) the lawyer had to have the trust account at an institution "doing business" in Colorado. Proposed Rule 1.15A(a) does not address this issue because it is covered in Proposed Rule 1.15E. The subcommittee decided that the best way to handle this issue is to require that the institution be "doing business in Colorado."

2. Regarding the time period that records must be kept, Proposed Rule 1.15A refers to Rule 1.15D which is the record keeping rule setting forth the 7 year requirement.

3. Proposed Rule 1.15A(b) still requires a lawyer to promptly distribute funds or property to a client or third person. The only change from the Current Rule 1.15(b) is to tighten up the language by eliminating the idea of a client or third person "having an interest" in funds or property. The subcommittee viewed this language as surplus.

4. Proposed Rule 1.15A(c) is basically the same as Current Rule 1.15(c) but has been changed to clarify that claims of a lawyer, client or third party may be resolved short of some sort of formalized severance proceeding.

5. Rule 1.15A(d) is new. The purpose of this addition is to state the limitation that the 1.15 series of rules apply to funds, property and accounts in connection with a representation.

B. Proposed Rule 1.15B (Current Rules 1.15(d) and (e):

With regard to Proposed Rule 1.15B, we first set forth the Proposed Rule and then discuss each of its provisions. Proposed Rule 1.15B in its entirety provides:

Account Requirements

(a) Every lawyer in private practice in this state shall maintain in the lawyer's own name, or in the name of the lawyer's law firm:

(1) A trust account or accounts, separate from any business and personal accounts and from any other fiduciary accounts that the lawyer or the law firm may maintain as executor, guardian, trustee, or receiver, or in any other fiduciary capacity, into which the lawyer shall deposit, or shall cause the law firm to deposit, all funds entrusted to the lawyer's care and any advance payment of fees that has not been earned or advance payment of expenses that have not been incurred. A lawyer shall not be required to maintain a trust account when the lawyer is not holding such funds or payments.

(2) A business account or accounts into which the lawyer shall deposit, or cause the law firm to deposit all funds received for legal services. Each business account, as well as all deposit slips and all checks drawn thereon, shall be prominently designated as a "business account," an "office account," an "operating account," or a "professional account," or with a similarly descriptive term that distinguishes the account from a trust account and a personal account.

(b) One or more of the trust accounts may be a Colorado Lawyer Trust Account Foundation ("COLTAF") account. 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, and as such would not be expected to earn interest or pay dividends for such clients or third persons in excess of the reasonably estimated cost of establishing, maintaining, and accounting for trust accounts for the benefit of such clients or third persons. Interest or dividends paid on a COLTAF account shall be paid to COLTAF, and the lawyer and the law firm shall have no right or claim to such interest or dividends.

(c) Each trust account, as well as all deposits slips and checks drawn thereon, shall be prominently designated as a "trust account," provided that each COLTAF account shall be designated as a "COLTAF Trust Account." A trust account may bear any additional descriptive designation that is not misleading.

(d) Except as provided in this paragraph (d), each trust account, including each COLTAF account, shall be maintained in a financial institution that is approved by the Regulation Counsel pursuant to Rule 1.15E. If each client and third person whose funds are in the account is informed in writing that Regulation Counsel will not be notified of any overdraft on the account, and with the informed consent of each such client and third person, a trust account in which interest or dividends are paid to the clients or third persons need not be in an approved institution.

(e) Each trust account, including each COLTAF account, shall be an interest-bearing, or dividend-paying, insured depository account; provided that, with the informed consent of each client or third person whose funds are in the account, an account in which interest or dividends are paid to clients or third persons need not be an insured depository account. For the purpose of this provision, an "insured depository account" shall mean a government insured account at a regulated financial institution, on which withdrawals or transfers can be made on demand, subject only to any notice period which the financial institution is required to reserve by law or regulation.

(f) The lawyer may deposit, or may cause the law firm to deposit, into a trust account funds reasonably sufficient to pay anticipated service charges or other fees for maintenance or operation of the account. Such funds shall be clearly identified in the lawyer's or law firm's records of the account.

(g) All funds entrusted to the lawyer shall be deposited in a COLTAF account unless the funds are deposited in a trust account described in paragraph (h) of this Rule. The foregoing requirement that funds be deposited in a COLTAF account does not apply in those instances where it is not feasible for the lawyer or the law firm to establish a COLTAF account for reasons beyond the control of the lawyer or law firm, such as the unavailability in the community of a financial institution that offers such an account; but in such case the funds shall be deposited in a trust account described in paragraph (h) of this Rule.

(h) If funds entrusted to the lawyer are not held in a COLTAF account, the lawyer shall deposit, or shall cause the law firm to deposit, the funds in a trust account that complies with all requirements of paragraphs (c), (d), and (e) of this Rule and for which all interest earned or dividends paid (less deductions for service charges or fees of the depository institution) shall belong to the clients or third persons whose funds have been so deposited. The lawyer and the law firm shall have no right or claim to such interest or dividends.

(i) If the lawyer or law firm discovers that funds of a client or third person have mistakenly been held in a COLTAF account in a sufficient amount or for a sufficiently long time so that interest or dividends on the funds being held in such account exceeds the reasonably estimated cost of establishing, maintaining, and accounting for a trust account for the benefit of such client or third person (including without limitation administrative costs of the lawyer or law firm, bank service charges, and costs of preparing tax reports of such income to the client or third person), the lawyer shall request, or shall cause the law firm to request, a refund of the interest or dividends from COLTAF in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide to any lawyer or law firm upon request.

(j) Every lawyer or law firm maintaining a trust account in this state shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements by financial institutions mandated by Rule 1.15E and shall indemnify and hold harmless the financial institution for its compliance with such reporting and production requirement.

DISCUSSION OF PROPOSED RULE 1.15B:

1. Proposed Rule 1.15B(a) eliminates the language from Current Rule 1.15(d) that requires business and trust accounts to be in financial institutions doing business in Colorado. For trust accounts that requirement still exists, but is contained in Rule 1.15E(c)(1). Also the reference in the Current Rule to C.R.C.P. 265 (defining law firms) is eliminated as being unnecessary.

2. Proposed Rule 1.15B(a)(1) makes no changes to Current Rule 1.15(d)(1).

3. The current Rule 1.15(d)(2) has been changed in the Proposed Rule to allow a lawyer's professional account to be designated as a "business" account.

4. Proposed Rule 1.15B(b) defines what a COLTAF account is. This definition is contained in Current Rule 1.15(h)(2). The Proposed Rule also contains the language that a COLTAF account is for funds that are nominal in amount, or expected to be held for a short period of time which is also contained in Current Rule 1.15(h)(2).

5. Proposed Rule 1.15B(c) contains the same designation of COLTAF account or trust account as the Current rules 1.15(e)(1) and (2). The proposed rule also allows additional designations that are not misleading.

6. Proposed Rule 1.15B(d) requires that each trust account including COLTAF accounts be in an financial institution that is approved by Regulation Counsel pursuant to Proposed Rule 1.15E. Rule 1.15E contains all the requirements that a bank or other institution must follow (including interest comparability) to be an approved institution. *See* discussion of Proposed Rule 1.15E below. This proposed subparagraph also allows a client or third person who is receiving the interest on the account to consent that a trust account not be in an approved institution. Consent must be based upon a written disclosure that such an account will not require the institution to inform OARC of an overdraft.

7. Proposed Rule 1.15B(e) requires as does, Current Rule 1.15(f) that each trust account (including COLTAF accounts) be in interest bearing OR dividend paying accounts. The concept of "dividend-paying" accounts is repeated in many new parts of the Proposed Rules. The "dividend-paying" language is added because some of the products allowed under the comparability amendments pay dividends not interest.

8. Proposed Rule 1.15B(f) continues the permission in Current Rule 1.15(g) that a lawyer may deposit in a trust account funds reasonably sufficient to pay anticipated service charges or other fees.

9. Proposed Rule 1.15B(g) requires the lawyer to deposit entrusted funds into a COLTAF account or into a non-COLTAF account that complies with other requirements noted in Proposed Rule 1.15B(h). Proposed Rule 1.15B(g) also takes into account that there may be some areas of the state in which a financial institution does not offer COLTAF accounts. In those cases a lawyer must still have an account that complies with Rule 1.15(B)(h).

10. Proposed Rule 1.15B(h) provides that a lawyer who does not use a COLTAF account, but does use a trust account must still comply with the provisions of Rule 1.15B(c), (d) and (e) which respectively require proper designation of the account, approval by OARC of the institution, and an interest-bearing or dividend paying insured account. The Subcommittee discussed whether the order of Rule

1.15B(g) and 1.15B(h) should be reversed. The view favoring this reversal was based upon the fact that COLTAF accounts are only appropriate for nominal or short term funds that cannot earn interest for the client, and thus the COLTAF rule should come second in order. The Subcommittee concluded that there was no substantive meaning from the ordering of the paragraphs. It is clear elsewhere in the rule that COLTAF accounts are only for nominal or short term funds.

11. Proposed Rule 1.15B(i) is the same "look-back" provision as contained in Current Rule 1.15(h)(3). This provision requires a lawyer to ask his/her trust account institution to remit interest if it was not properly payable to COLTAF.

12. Proposed Rule 1.15B(j) is the same consent provision as contained in Current Rule 1.15(e)(3). Each lawyer consents to banks reporting nonsufficient funds checks to OARC. And each lawyer indemnifies and holds harmless his/her trust account institution for doing so.

C. Proposed Rule 1.15C – Use of Trust Accounts

Proposed Rule 1.15C is based mainly upon the provisions that are contained in Current Rule 1.15(m) (1) – (6). The provisions of the Current Rule are continued but are arranged a bit differently without subheadings. Additionally, the Subcommittee has eliminated record-keeping-type provisions that are covered in Proposed Rule 1.15D.

Proposed Rule 1.15C states:

> Use of Trust Accounts
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> (a) A lawyer shall not use any debit card or automated teller machine card to withdraw funds from a trust account. Cash withdrawals from trust accounts and checks drawn on trust accounts payable to "Cash" are prohibited. All trust account funds intended for deposit shall be deposited intact without deductions or "cash out" from the deposit, and the duplicate deposit slip that evidences the deposit shall be sufficiently detailed to identify each item deposited.
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> (b) All trust account withdrawals and transfers shall be made only by a lawyer admitted to practice law in this state or by a person supervised by

such lawyer. Such withdrawals and transfers may be made only by authorized bank or wire transfer or by check payable to a named payee. Only a lawyer admitted to practice law in this state or a person supervised by such lawyer shall be an authorized signatory on a trust account.

(c) No less than quarterly, a lawyer admitted to practice law in this state or a person supervised by such a lawyer shall reconcile the trust account records both as to individual clients or other persons and in the aggregate with the bank statements issued by the bank in which the trust account is maintained.

DISCUSSION OF PROPROSED RULE 1.15C

1. Items for deposit in a trust account must be done so intact. This means that if a lawyer receives funds part of which are owed to the client and part to the lawyer, the funds must be deposited into a trust account and then disbursed from that account. This "intact deposit" provision is placed in Proposed Rule 1.15C(a). It appears in Current Rule 1.15(j)(1) which is more about record keeping. The subcommittee moved this provision under the Proposed Rule dealing with Use of the Trust Account.

2. The provision requiring the lawyer to request cancelled checks from his trust account bank has been eliminated from this area. A lawyer must keep adequate records for each deposit and withdrawal from the account under Proposed Rule 1.15D(a)(1) and (2). The Subcommittee views these record-keeping requirements as encompassing cancelled checks or electronic images of items on a trust account. Also, in the move to electronic records, the Current Rule is outdated when it requires cancelled checks to be returned to the lawyer. Further, Proposed Rule 1.15D(a)(7) requires the lawyer to keep paper copies or electronic copies of bank statements and canceled checks.

D. Proposed Rule 1.15D – Required Records

Proposed Rule 1.15D encompasses the concepts contained in Current Rule 1.15(j) – (m). The Proposed Rule states:

Required Records

(a) A lawyer shall maintain, or shall cause the lawyer's law firm to maintain, in a current status and retain for a period of seven years after the event that they record:

(1) An appropriate record-keeping system identifying each separate person for whom the lawyer or the law firm holds funds or other property and adequately showing the following:

(A) For each trust account the date and amount of each deposit; the name and address of each payor of the funds deposited; the name and address of each person for whom the funds are held and the amount held for the person; a description of the reason for each deposit; the date and amount of each charge against the trust account and a description of the charge; the date and amount of each disbursement; and the name and address of each person to whom the disbursement is made and the amount disbursed to the person.

(B) For each item of property other than funds, the nature of the property; the date of receipt of the property; the name and address of each person from whom the property is received, the name and address of each person for whom the property is held and, if interests in the property are held by more than one person, a statement of the nature and extent of each person's interest in the property, to the extent known; a description of the reason for each receipt; the date and amount of each charge against the property and a description of the charge; the date of each delivery of the property by the lawyer; and the name and address of each person to whom the property is delivered by the lawyer.

(2) Appropriate records of all deposits in and withdrawals from all other bank accounts maintained in connection with the lawyer's legal services, specifically identifying the date, payor, and description of each item deposited as well as the date, payee, and purpose of each disbursement;

(3) Copies of all written communications setting forth the basis or rate for the fees charged by the lawyer as required by Rule 1.5(b)), and copies of all writings, if any, stating other terms of engagement for legal services;

(4) Copies of all statements to clients and third persons showing the disbursement of funds or the delivery of property to them or on their behalf;

(5) Copies of all bills issued to clients;

(6) Records showing payments to any persons, not in the lawyer's regular employ, for services rendered or performed; and

(7) Paper copies or electronic copies of all bank statements and of all canceled checks.

(b) The records required by this Rule shall be maintained in accordance with one or more of the following recognized accounting methods: the accrual method, the cash basis method, or the income tax method. All such accounting methods shall be consistently applied. Bookkeeping records may be maintained by computer provided they otherwise comply with this Rule and provided further that printed copies can be made on demand in accordance with this Rule. They shall be located at the principal Colorado office of the lawyer or of the lawyer's law firm.

(c) Upon the dissolution of a law firm, the lawyers who rendered legal services through the law firm shall make appropriate arrangements for the maintenance or disposition of records and client files in accordance with this Rule and Rule 1.16A. Upon the departure of a lawyer from a law firm, the departing lawyer and the lawyers remaining in the law firm shall make appropriate arrangements for the maintenance or disposition of records and client files in accordance with this Rule and Rule 1.16A.

(d) Any of the records required to be kept by this Rule shall be produced in response to a subpoena duces tecum issued by the Regulation Counsel in connection with proceedings pursuant to C.R.C.P. 251. When so produced, all such records shall remain confidential except for the purposes of the particular proceeding, and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege of the lawyer's client.

DISCUSSION OF PROPOSED RULE 1.15D

1. The Subcommittee added Proposed Rule 1.15D(a)(1)(B) requiring a lawyer to keep adequate records of property other than funds that the lawyer may receive from a client or third person.

2. Proposed Rule 1.15D(a)(2) requires lawyers to keep adequate records of their business accounts or other accounts used "in connection with the lawyer's legal services." Current Rule 1.15(j)(1) requires adequate records for accounts that "concerns the lawyer's practice of law." The subcommittee concluded that the wording in the Current Rule is vague.

3. Proposed Rule 1.15D(a) eliminates some repetitive language in Current Rule 1.15(j)(1) such as "receipt and disbursement records of deposits in and withdrawals from."

4. Proposed Rule 1.15D(a)(3) requires a lawyer to keep copies of all written communications (including any writings such as a fee agreement) setting forth the basis or rate of fees as required by Rule 1.5(b). The subcommittee concluded that this was clearer language than the Current Rule 1.15(j)(3) which requires a lawyer to keep copies of all retainer and compensation agreements with clients (including written communications setting forth the basis or rate for the fees charged by the lawyer as required by Rule 1.5(b)). A lawyer could have inferred from the old rule that the lawyer was required to have a written fee agreement which is not required under Rule 1.5(b).

E. Proposed Rule 1.15E – Approved Institutions

Proposed Rule 1.15E sets forth the requirements for institutions to be approved to provide trust account. The Proposed Rule states:

> Approved Institutions
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> (a) This Rule applies to each trust account that is subject to Rule 1.15B, other than a trust account that is maintained in other than an approved financial institution pursuant to the second sentence of Rule 1.15B(d).
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> (b) Each trust account shall be maintained at a financial institution that is approved by the Regulation Counsel, pursuant to the provisions and conditions contained in this Rule. The Regulation Counsel shall maintain a list of approved financial institutions, which it shall renew not less than annually. Offering a trust account or a COLTAF account is voluntary for financial institutions.
>
> (c) The Regulation Counsel shall approve a financial institution for use for lawyers' trust accounts, including COLTAF accounts, if the financial institution files with the Regulation Counsel an agreement, in a form provided by the Regulation Counsel, with the following provisions and on the following conditions:
>
> (1) The financial institution does business in Colorado;

(2) The financial institution agrees to report to the Regulation Counsel in the event a properly payable trust account instrument is presented against insufficient funds, irrespective of whether the instrument is honored. That agreement shall apply to all branches of the financial institution and shall not be canceled except on thirty-days notice in writing to the Regulation Counsel.

(3) The financial institution agrees that all reports made by the financial institution shall be in the following format: (i) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor; (ii) in the case of an instrument that is presented against insufficient funds but that is honored, the report shall identify the financial institution, the lawyer or law firm for whom the account is maintained, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby. Report of a dishonored instrument shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any. If no such time is provided by law for notice of dishonor, or if the financial institution has honored an instrument presented against insufficient funds, then the report shall be made within five banking days of the date of presentation of the instrument.

(4) The financial institution agrees to cooperate fully with the Regulation Counsel and to produce any trust account records on receipt of a subpoena for the records issued by the Regulation Counsel in connection with any proceeding pursuant to C.R.C.P. 251. Nothing herein shall preclude a financial institution from charging a lawyer or law firm for the reasonable cost of producing the reports and records required by this Rule, but such charges shall not be a transaction cost to be charged against funds payable to the COLTAF program.

(5) The financial institution agrees to cooperate with the COLTAF program and shall offer a COLTAF account to any lawyer or law firm who wishes to open one.

(6) With respect to COLTAF accounts, the financial institution agrees:

(A) To remit electronically to COLTAF monthly interest or dividends, net of allowable reasonable COLTAF fees as defined in subparagraph (c)(10) of this Rule, if any; and

(B) To transmit electronically with each remittance to COLTAF a statement showing, as to each COLTAF account, the name of the lawyer or law firm on whose account the remittance is sent; the account number; the remittance period; the rate or rates of interest or dividends applied; the account balance or balances on which the interest or dividends are

calculated; the amount of interest or dividends paid; the amount and type of fees, if any, deducted; the amount of net earnings remitted; and such other information as is reasonably requested by COLTAF.

(7) The financial institution agrees to pay on any COLTAF account not less than (i) the highest interest or dividend rate generally available from the financial institution on non-COLTAF accounts when the COLTAF account meets the same eligibility requirements, if any, as the eligibility requirement for non-COLTAF accounts; or (ii) the rate set forth in subparagraph (c)(9) below. In determining the highest interest or dividend rate generally available from the financial institution to its non-COLTAF customers, the financial institution may consider factors customarily considered by the financial institution when setting interest or dividends rates for its non-COLTAF accounts, including account balances, provided that such factors do not discriminate between COLTAF accounts and non-COLTAF accounts. The financial institution may choose to pay on a COLTAF account the highest interest or dividend rate generally available on its comparable non-COLTAF accounts in lieu of actually establishing and maintaining the COLTAF account in the comparable highest interest or dividend rate product.

(8) A COLTAF account may be established by a lawyer or law firm and a financial institution as:

(A) A checking account paying preferred interest rates, such as market based or indexed rates;

(B) A public funds interest-bearing checking account such as an account used for other non-profit organizations or government agencies;

(C) An interest-bearing checking account such as a negotiable order of withdrawal (NOW) account, or business checking account with interest; or

(D) A business checking account with an automated investment feature in overnight daily financial institution repurchase agreements or money market funds. A daily financial institution repurchase agreement shall be fully collateralized by U.S. Government Securities (meaning U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States government) and may be established only with an approved institution that is "well-capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. A "money market fund" is a fund maintained as a money market fund by an investment company registered under the Investment Company Act of 1940, as amended, which fund is qualified to be held out to investors as a money market fund under Rules and Regulations adopted by the Securities and Exchange Commission pursuant to said Act. A money market fund

shall be invested solely in U.S. Government Securities, or repurchase agreements fully collateralized by U.S. Government Securities, and, at the time of the investment, shall have total assets of at least two hundred fifty million dollars ($250,000,000).

(9) In lieu of a rate set forth in paragraph (c)(7)(i), the financial institution may elect to pay on all deposits in its COLTAF accounts, a benchmark rate, which COLTAF is authorized to set periodically, but not more frequently than every six months, to reflect an overall comparable rate offered by financial institutions in Colorado net of allowable reasonable COLTAF fees. Election of the benchmark rate is optional, and financial institutions may choose to maintain their eligibility by paying the rate set forth in paragraph (c)(7)(i).

(10) "Allowable reasonable COLTAF fees" are per-check charges, per-deposit charges, fees in lieu of minimum balances, federal deposit insurance fees, sweep fees, and reasonable COLTAF account administrative fees. The financial institution may deduct allowable reasonable COLTAF fees from interest or dividends earned on a COLTAF account, provided that such fees (other than COLTAF account administrative fees) are calculated and imposed in accordance with the approved institution's standard practice with respect to comparable non-COLTAF accounts. The financial institution agrees not to deduct allowable reasonable COLTAF fees accrued on one COLTAF account in excess of the earnings accrued on the COLTAF account for any period from the principal of any other COLTAF account or from interest or dividends accrued on any other COLTAF account. Any fee other than allowable reasonable COLTAF fees are the responsibility of, and the financial institution may charge them to, the lawyer or law firm maintaining the COLTAF account.

(11) Nothing contained in this Rule shall preclude the financial institution from paying a higher interest or dividend rate on a COLTAF account than is otherwise required by the financial institution's agreement with the Regulation Counsel or from electing to waive any or all fees associated with COLTAF accounts.

(12) Nothing in this Rule shall be construed to require the Regulation Counsel or any lawyer or law firm to make independent determinations about whether a financial institution's COLTAF account meets the comparability requirements set forth in paragraph (c)(7). COLTAF will make such determinations and at least annually will inform Regulation Counsel of the financial institutions that are in compliance with the comparability provisions of this Rule.

(13) Each approved financial institution shall be immune from suit arising out of its actions or omissions in reporting overdrafts or insufficient funds or producing documents under this Rule 1.15(E). The agreement entered into by a financial institution with the Regulation Counsel shall not be deemed to create a duty to exercise a standard of care and shall not constitute a contract for the benefit of any third parties that may sustain a loss as a result of lawyers overdrawing lawyer trust accounts.

DISCUSSION OF PROPOSED RULE 1.15E

1. This rule encompasses some areas from the Current Rule. Generally the point of this rule is that a lawyer must maintain a trust account in an approved institution. Proposed Rule 1.15E sets out the criteria for an institution to be approved. Among those criteria are:

- The institution must be doing business in Colorado;
- The institution must agree with OARC notice of NSF checks;
- The institution agrees to cooperate with COLTAF;
- The institution agrees to cooperate with OARC;
- The institution agrees to pay interest or dividends not less than that paid on comparable accounts or a benchmark rate that is set by COLTAF.

2. Proposed Rule 1.15E(a) states that the rule applies to each trust account (COLTAF or non-COLTAF.); however, a client or third person who is receiving the interest on the account may agree after informed consent that the lawyer hold funds in an institution that is not approved by OARC. Reference in the proposed rule is made to Proposed Rule 1.15B(d) which states that a client or third person must be informed in writing that OARC will not be notified of any overdraft on the account.

3. The provisions in Proposed Rule 1.15E(c)(6) – (12) are the heart of the new rules about interest rate comparability. COLTAF representatives have been instrumental in drafting and analyzing these provisions as well as the entire reworking of the Current Rule.

F. Comments to the Proposed Rules

The Subcommittee is proposing the following comments which have been tailored to fit the Proposed Rules above. The Proposed Comments are:

[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. 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).

[2] If a lawyer or law firm participates in Interest on Lawyer Trust Account ("IOLTA") programs in more than one jurisdiction, including Colorado, IOLTA funds that the lawyer or law firm holds in connection with the practice of law in Colorado should be held in the lawyer or law firm's COLTAF account. The lawyer or law firm should exercise good faith judgment in determining which IOLTA funds it holds in connection with the practice of law in Colorado.

[3] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.

[4] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender

the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. See Rule 1.16(d) for standards applicable to retention of client papers.

[6] The duty to keep separate from the lawyer's own property any property in which any other person claims an interest exists whether or not there is a dispute as to ownership of the property. Likewise, although the second sentence of Rule 1.15A(c) deals specifically with disputed ownership, the first sentence of that provision — requiring some form of accounting — applies even if there is no dispute as to ownership. For example, if the lawyer receives a settlement check made payable jointly to the lawyer and the lawyer's client, covering both the lawyer's fee and the client's recovery, the lawyer must provide an accounting to the client before taking the lawyer's fee from the joint funds. Typically the check will be deposited in the lawyer's trust account and, following an accounting to the client with respect to the fee, the lawyer will "sever" the fee by withdrawing the amount of the fee from the trust account and depositing it in the lawyer's operating account. *See* Rule 1.15A(b) and Rule 1.15D for specific provisions regarding accounting and record-keeping.

DISCUSSION OF COMMENTS

1. Current Comment [1] has been eliminated because it is redundant of provisions contained in the Proposed Rules.

2. Proposed Comment [1] is essentially the same as Current Comment [2].

3. Proposed Comment [2], as noted above in this report is a new comment providing some guidance to lawyers who practice in more than one jurisdiction. If that lawyer has and IOLTA account in another state and a COLTAF account in Colorado, the lawyer should use good faith judgment to hold funds in connection with the practice of law in Colorado in the COLTAF account instead of in another state's IOLTA account.

4. Proposed Comment [3] is the same as Current Comment [4].

5. Proposed Comment [4] is the same as Current Comment [5].

6. Proposed Comment [5] is the same as Current Comment [6].

7. Current Comment [7] about "client security funds" has been eliminated as not applicable in Colorado.

8. Proposed Comment [6] is essentially the same as Current Comment [8] with proper changes to the Proposed Rules and elimination of the first words in the Comment: "It is to be noted that..."

V. Conclusion

Except for the two issues noted above for discussion the Subcommittee recommends that the Standing Rules Committee adopt the above Proposed Rules 1.15A, 1.15B, 1.15C, 1.15D, and 1.15E and the Proposed Comments.

EXHIBIT A
Current Rule 1.15

Colo. RPC 1.15(2012)
Rule 1.15. Safekeeping Property.
reflects changes received through March 13, 2012

General Duties of Lawyers Regarding Property of Clients and Third Parties

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate trust account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such funds and other property of clients or third parties shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall, promptly or otherwise as permitted by law or by agreement with the client or third person, deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, promptly upon request by the client or third person, render a full accounting regarding such property.

(c) When in connection with a representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Required Bank Accounts

(d) Every lawyer in private practice in this state shall maintain in a financial institution doing business in Colorado, in the lawyer's own name, or in the name of a partnership of lawyers, or in the name of an entity authorized pursuant to *C.R.C.P. 265* of which the lawyer is a member, or in the name of the lawyer or entity by whom the lawyer is employed or with whom the lawyer is associated:

(1) A trust account or accounts, separate from any business and personal accounts and from any fiduciary accounts that the lawyer may maintain as executor, guardian, trustee, or receiver, or in any other fiduciary capacity, into which the lawyer shall deposit funds entrusted to the lawyer's care and any advance payment of fees that has not been earned or advance payment of expenses that have not been incurred. A lawyer shall not be required to maintain a trust account if the lawyer never receives such funds or payments; and,

(2) A business account or accounts into which all funds received for professional services shall be deposited. All business accounts, as well as all deposit slips and all checks drawn thereon, shall be prominently designated as a "professional account," an "office account," or an "operating account."

(e) With respect to trust accounts established pursuant to this Rule:

(1) One or more of the trust accounts may be a Colorado Lawyer Trust Account Foundation ("COLTAF") account or accounts, as described in Rule 1.15(h)(2). All COLTAF accounts shall be designated "COLTAF Trust Account."

(2) All such trust accounts, whether general or specific, as well as all deposits slips and checks drawn thereon, shall be prominently designated as a "trust account." Nothing herein shall prohibit any additional descriptive designation for a specific trust account.

(3) Trust accounts shall be maintained only in financial institutions doing business in Colorado that are approved by the Regulation Counsel based upon policy guidelines adopted by the Board of Trustees of the Colorado Attorneys' Fund for Client Protection. Regulation Counsel shall annually publish a list of such approved institutions. A financial institution shall be approved if it shall file with the Regulation Counsel an agreement, in a form provided, to report to the Regulation Counsel in the event any properly payable trust account instrument is presented against insufficient funds, irrespective of whether the instrument is honored; any such agreement shall apply to all branches of the financial institution and shall not be canceled except on thirty-days notice in writing to the Regulation Counsel. The agreement shall further provide that all reports made by the financial institution shall be in the following format: (1) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor; (2) in the case of an instrument that is presented against insufficient funds but which instrument is honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby. Such reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any; if an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds. In addition, each financial institution approved by the Regulation Counsel must cooperate with the COLTAF program and must offer a COLTAF account to any lawyer who wishes to open one. In addition to the reports specified above, approved financial institutions shall agree to cooperate fully with the Regulation Counsel and to produce any trust account or business account records on receipt of a subpoena therefore in connection with any proceeding pursuant to C.R.C.P. 251. Nothing herein shall preclude a financial institution from charging a lawyer or law firm for the reasonable cost of producing the reports and records required by this Rule, but such charges shall not be a transaction cost to be charged against funds payable to the COLTAF program. Every lawyer or law firm maintaining a trust account in this state shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements by financial institutions mandated by this Rule and shall indemnify and hold harmless the financial institution for its compliance with such reporting and production requirement. A financial institution shall be immune from suit arising out of its actions or omissions in reporting overdrafts or insufficient funds or producing documents under this Rule. The agreement entered into by a financial institution with the Regulation Counsel shall not be deemed to create a duty to exercise a standard of care and shall not constitute a contract for the benefit of any third parties that may sustain a loss as a result of lawyers overdrawing lawyer trust accounts.

(4) The name of institutions in which such accounts are maintained and identification numbers of each account shall be recorded on a statement filed with the annual attorney registration payment pursuant to *C.R.C.P. 227(2)*. Such information shall be available for use in accordance with paragraph (j) of this Rule. For each COLTAF account, the statement shall indicate the account number, the name the account is under, and the depository institution.

Trust Account Requirements and Management; COLTAF Accounts

(f) All trust accounts shall be maintained in interest-bearing, insured depository accounts; provided, that with the consent of the client or third person whose funds are in the account, an account in which interest is paid to the client or third person need not be an insured depository account. All COLTAF accounts shall be insured depository accounts. For the purpose of this Rule, "insured depository accounts" shall mean government insured accounts at a regulated financial institution, on which withdrawals or transfers can be made on demand, subject only to any notice period which the institution is required to reserve by law or regulation.

(g) A lawyer may deposit funds reasonably sufficient to pay anticipated service charges or other fees for maintenance or operation of such account into trust accounts. Such funds shall be clearly identified in the lawyer's records of the account.

(h) COLTAF Accounts:

(1) Except as may be prescribed by subparagraph (2) below, interest earned on accounts in which the funds are deposited (less any deduction for service charges or fees of the depository institution) shall belong to the clients or third persons whose funds have been so deposited; and the lawyer or law firm shall have no right or claim to such interest.

(2) If the funds are not held in accounts with the interest paid to clients or third persons as provided in subsection (h)(1) of this Rule, a lawyer or law firm shall establish a COLTAF account, which is a pooled interest-bearing insured depository 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 in compliance with the following provisions:

(a) No interest from such an account shall be payable to a lawyer or law firm.

(b) The account shall include funds of clients or third persons that are nominal in amount or are expected to be held for a short period of time with the intent that such funds not earn interest in excess of the reasonably estimated cost of establishing, maintaining and accounting for trust accounts for the benefit of such clients or third parties.

(c) A lawyer or law firm depositing funds in a COLTAF account shall direct the depository institution:

(i) To remit interest, net of service charges or fees, if any are charged, computed in accordance with the institution's standard accounting practice, at least quarterly, to COLTAF; and

(ii) To transmit with each remittance to COLTAF a statement showing the name of the lawyer or law firm on whose account the remittance is sent and the rate of interest applied.

(d) The provisions of this subparagraph (h)(2) shall not apply in those instances where it is not feasible to establish a trust account for the benefit of COLTAF for reasons beyond the control of the lawyer or law firm, such as the unavailability of a financial institution in the community that offers such an account.

(3) If a lawyer or law firm discovers that funds of any client or third person have mistakenly been held in a trust account for the benefit of COLTAF in a sufficient amount or for a sufficiently long time so that interest on the funds being held in such account exceeds the reasonably estimated cost of establishing, maintaining and accounting for a trust account for the benefit of such client or third person (including without limitation administrative costs of the lawyer or law firm, bank service charges, and costs of preparing tax reports of such income to the client or third person) the lawyer or law firm shall request COLTAF to calculate and remit trust account interest already received by it to the lawyer or

law firm for the benefit of such client or third person in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide to any lawyer or law firm upon request.

(4) Information necessary to determine compliance or justifiable reasons for noncompliance with subparagraph (h)(2) shall be included in the annual attorney registration statement. COLTAF shall assist the Colorado Supreme Court in determining whether lawyers or law firms have complied in establishing the trust account required under subparagraph (h)(2). If it appears that a lawyer or law firm has not complied where it is feasible to do so, the matter may be referred to the Regulation Counsel for investigation and proceedings in accordance with C.R.C.P. 251.

(i) Management of Trust Accounts.

(1) ATM or Debit Cards. A lawyer shall not use any debit card or automated teller machine card to withdraw funds from a trust account.

(2) All trust account withdrawals and transfers shall be made only by a lawyer admitted to practice law in this state or by a person supervised by such lawyer and may be made only by authorized bank or wire transfer or by check payable to a named payee.

(3) Cash withdrawals and checks made payable to "Cash" are prohibited.

(4) Cancelled Checks. A lawyer shall request that the lawyer's trust account bank return to the lawyer, photo static or electronic images of cancelled checks written on the trust account. If the bank provides electronic images, the lawyer shall either maintain paper copies of the electronic images or maintain the electronic images in readily obtainable format.

(5) Persons Authorized to Sign. Only a lawyer admitted to practice law in this state or a person supervised by such lawyer shall be an authorized signatory on a trust account;

(6) Reconciliation of Trust Accounts. No less than quarterly, a lawyer or a person authorized by the lawyer shall reconcile the trust account records both as to individual clients and in the aggregate with the lawyer's trust account bank statement(s).

Required Accounting Records; Retention of Records; Availability of Records

(j) A lawyer, whether practicing as a sole practitioner, in a partnership, or through an entity authorized pursuant to*C.R.C.P. 265*, shall maintain in a current status and retain for a period of seven years after the event that they record:

(1) Appropriate receipt and disbursement records of all deposits in and withdrawals from all trust accounts and any other bank account that concerns the lawyer's practice of law, specifically identifying the date, payor and description of each item deposited as well as the date, payee, and purpose of each disbursement. All trust account monies intended for deposit shall be deposited intact without deductions or "cash out" from the deposit and the duplicate deposit slip that evidences the deposit must be sufficiently detailed to identify each item deposited;

(2) An appropriate record-keeping system identifying each separate person or entity for whom the lawyer holds money or property in trust, for all trust accounts, showing the payor of all funds deposited in such accounts, the names and addresses of all persons for whom the funds are or were held, the amount of such funds, the description and amounts of

charges or withdrawals from such accounts, and the names of all persons to whom any such funds were disbursed;

(3) Copies of all retainer and compensation agreements with clients (including written communications setting forth the basis or rate for the fees charged by the lawyer as required by Rule 1.5(b);

(4) Copies of all statements to clients showing the disbursement of funds to them or on their behalf;

(5) Copies of all bills issued to clients;

(6) Copies of all records showing payments to any persons, not in the lawyer's regular employ, for services rendered or performed; and

(7) All bank statements and photo static copies or electronic copies of all canceled checks.

(k) The financial books and other records required by this Rule shall be maintained in accordance with one or more of the following recognized accounting methods: the accrual method, the cash basis method, and the income tax method. All such accounting methods shall be consistently applied. Bookkeeping records may be maintained by computer provided they otherwise comply with this Rule and provided further that printed copies can be made on demand in accordance with this Rule. They shall be located at the principal Colorado office of each lawyer, partnership, professional corporation, or limited liability corporation.

(l) Dissolutions and Departures. Upon the dissolution of a law firm, the lawyers in the lawfirm shall make arrangements for the maintenance or disposition of records and client files in accordance with subsection (j) of this Rule and Rule 1.16A. Upon the departure of a lawyer from a law firm, the departing lawyer and the lawyers in the law firm shall make appropriate arrangements for the maintenance or disposition of records and client files in accordance with subsection (j) of this Rule and Rule 1.16A.

(m) Availability Of Records. Any of the records required to be kept by this Rule shall be produced in response to a subpoena duces tecum issued by the Regulation Counsel in connection with proceedings pursuant to C.R.C.P. 251. When so produced, all such records shall remain confidential except for the purposes of the particular proceeding and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege of the lawyer's client.

Source: (a) amended and (g) to (j) added June 25, 1998, effective January 1, 1999; (f) added June 25, 1998, effective July 1, 1999; IP(f), (f)(3), and (f)(6) amended and adopted May 13, 1999, effective July 1, 1999; (e)(3) corrected and effective November 9, 1999; (f)(7) added and adopted April 18, 2001, effective July 1, 2001; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; (d)(2) and (i)(6) amended and effective November 6, 2008; (j)(7), (l), and Comment 1 amended and (j)(8) deleted and effective February 10, 2011.

COMMENT

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box except when some other form of safekeeping is

warranted by special circumstances. "Property" generally refers to jewelry and other valuables entrusted to the lawyer by the client, as well as documents having intrinsic value or directly affecting valuable rights, such as securities, negotiable instruments, deeds, and wills. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts.

[2] Trust accounts containing funds of clients or third persons held in connection with a representation must be interest-bearing for the benefit of the client or third person or for the benefit of the Colorado Lawyer Trust Account Foundation where the funds are nominal in amount or expected to be held for a short period of time. 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 subparagraph 1.15(h)(3).

[3] Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[4] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[5] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

[6] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. See Rule 1.16(d) for standards applicable to retention of client papers.

[7] A "client's security fund" provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.

[8] It is to be noted that the duty to keep separate from the lawyer's own property any property in which any other person claims an interest exists whether or not there is a dispute as to ownership of the property. Likewise, although the second sentence of Rule 1.15(c) deals specifically with disputed ownership, the first sentence of that provision--requiring some form of accounting--applies even if there is no dispute as to ownership. For example, if the lawyer receives a settlement check made payable jointly to the lawyer and the lawyer's client, covering both the lawyer's fee and the client's recovery, the lawyer must provide an accounting to the client before taking the lawyer's fee from the joint funds. Typically the check will be deposited in the lawyer's trust account and, following an accounting to the client with respect to the fee, the lawyer will "sever" the fee by withdrawing the amount of the fee from the trust account and depositing it in the lawyer's operating account.

EXHIBIT B

Proposed
RULE 1.15A

General Duties of Lawyers Regarding Property of Clients and Third Parties
(See also Rules 1.15B, 1.15C 1.15D and 1015E)

(a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in trust accounts maintained in compliance with Rule 1.15B. Other property shall be appropriately safeguarded. Complete records of such funds and other property of clients or third parties shall be kept by the lawyer in compliance with Rule 1.15D.

(b) Upon receiving funds or other property of a client or third person, a lawyer shall, promptly or otherwise as permitted by law or by agreement with the client or third person, deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, promptly upon request by the client or third person, render a full accounting regarding such property.

(c) When in connection with a representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until there is a resolution of the claims and, when necessary, a severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(d) The provisions of Rule 1.15B, Rule 1.15C, Rule 1.15D, and Rule 1.15E apply to funds and other property, and to accounts, held or maintained by the lawyer, or caused by the lawyer to be held or maintained by a law firm through which the lawyer renders legal services, in connection with a representation.

Proposed
RULE 1.15B

Account Requirements

(a) Every lawyer in private practice in this state shall maintain in the lawyer's own name, or in the name of the lawyer's law firm:

(1) A trust account or accounts, separate from any business and personal accounts and from any other fiduciary accounts that the lawyer or the law firm may maintain as executor, guardian, trustee, or receiver, or in any other fiduciary capacity, into which the lawyer shall deposit, or shall cause the law firm to deposit, all funds entrusted to the lawyer's care and any advance payment of fees that has not been earned or advance payment of expenses that have not been incurred. A lawyer shall not be required to maintain a trust account when the lawyer is not holding such funds or payments.

(2) A business account or accounts into which the lawyer shall deposit, or cause the law firm to deposit all funds received for legal services. Each business account, as well as all deposit slips and all checks drawn thereon, shall be prominently designated as a "business account," an "office account," an "operating account," or a "professional account," or with a similarly descriptive term that distinguishes the account from a trust account and a personal account.

(b) One or more of the trust accounts may be a Colorado Lawyer Trust Account Foundation ("COLTAF") account. 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, and as such would not be expected to earn interest or pay dividends for such clients or third persons in excess of the reasonably estimated cost of establishing, maintaining, and accounting for trust accounts for the benefit of such clients or third persons. Interest or dividends paid on a COLTAF account shall be paid to COLTAF, and the lawyer and the law firm shall have no right or claim to such interest or dividends.

(c) Each trust account, as well as all deposits slips and checks drawn thereon, shall be prominently designated as a "trust account," provided that each COLTAF account shall be designated as a "COLTAF Trust Account." A trust account may bear any additional descriptive designation that is not misleading.

(d) Except as provided in this paragraph (d), each trust account, including each COLTAF account, shall be maintained in a financial institution that is approved by the Regulation Counsel pursuant to Rule 1.15E. If each client and third person whose funds are in the account is informed in writing that Regulation Counsel will not be notified of any overdraft on the account, and with the informed consent of each such client and third person, a trust account in which interest or dividends are paid to the clients or third persons need not be in an approved institution.

(e) Each trust account, including each COLTAF account, shall be an interest-bearing, or dividend-paying, insured depository account; provided that, with the informed consent of each

client or third person whose funds are in the account, an account in which interest or dividends are paid to clients or third persons need not be an insured depository account. For the purpose of this provision, an "insured depository account" shall mean a government insured account at a regulated financial institution, on which withdrawals or transfers can be made on demand, subject only to any notice period which the financial institution is required to reserve by law or regulation.

(f) The lawyer may deposit, or may cause the law firm to deposit, into a trust account funds reasonably sufficient to pay anticipated service charges or other fees for maintenance or operation of the account. Such funds shall be clearly identified in the lawyer's or law firm's records of the account.

(g) All funds entrusted to the lawyer shall be deposited in a COLTAF account unless the funds are deposited in a trust account described in paragraph (h) of this Rule. The foregoing requirement that funds be deposited in a COLTAF account does not apply in those instances where it is not feasible for the lawyer or the law firm to establish a COLTAF account for reasons beyond the control of the lawyer or law firm, such as the unavailability in the community of a financial institution that offers such an account; but in such case the funds shall be deposited in a trust account described in paragraph (h) of this Rule.

(h) If funds entrusted to the lawyer are not held in a COLTAF account, the lawyer shall deposit, or shall cause the law firm to deposit, the funds in a trust account that complies with all requirements of paragraphs (c), (d), and (e) of this Rule and for which all interest earned or dividends paid (less deductions for service charges or fees of the depository institution) shall belong to the clients or third persons whose funds have been so deposited. The lawyer and the law firm shall have no right or claim to such interest or dividends.

(i) If the lawyer or law firm discovers that funds of a client or third person have mistakenly been held in a COLTAF account in a sufficient amount or for a sufficiently long time so that interest or dividends on the funds being held in such account exceeds the reasonably estimated cost of establishing, maintaining, and accounting for a trust account for the benefit of such client or third person (including without limitation administrative costs of the lawyer or law firm, bank service charges, and costs of preparing tax reports of such income to the client or third person), the lawyer shall request, or shall cause the law firm to request, a refund of the interest or dividends from COLTAF in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide to any lawyer or law firm upon request.

(j) Every lawyer or law firm maintaining a trust account in this state shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements by financial institutions mandated by Rule 1.15E and shall indemnify and hold harmless the financial institution for its compliance with such reporting and production requirement.

Proposed
RULE 1.15C

Use of Trust Accounts

(a) A lawyer shall not use any debit card or automated teller machine card to withdraw funds from a trust account. Cash withdrawals from trust accounts and checks drawn on trust accounts payable to "Cash" are prohibited. All trust account funds intended for deposit shall be deposited intact without deductions or "cash out" from the deposit, and the duplicate deposit slip that evidences the deposit shall be sufficiently detailed to identify each item deposited.

(b) All trust account withdrawals and transfers shall be made only by a lawyer admitted to practice law in this state or by a person supervised by such lawyer. Such withdrawals and transfers may be made only by authorized bank or wire transfer or by check payable to a named payee. Only a lawyer admitted to practice law in this state or a person supervised by such lawyer shall be an authorized signatory on a trust account.

(c) No less than quarterly, a lawyer admitted to practice law in this state or a person supervised by such a lawyer shall reconcile the trust account records both as to individual clients or other persons and in the aggregate with the bank statements issued by the bank in which the trust account is maintained.

Proposed
RULE 1.15D

Required Records

(a) A lawyer shall maintain, or shall cause the lawyer's law firm to maintain, in a current status and retain for a period of seven years after the event that they record:

(1) An appropriate record-keeping system identifying each separate person for whom the lawyer or the law firm holds funds or other property and adequately showing the following:

(A) For each trust account the date and amount of each deposit; the name and address of each payor of the funds deposited; the name and address of each person for whom the funds are held and the amount held for the person; a description of the reason for each deposit; the date and amount of each charge against the trust account and a description of the charge; the date and amount of each disbursement; and the name and address of each person to whom the disbursement is made and the amount disbursed to the person.

(B) For each item of property other than funds, the nature of the property; the date of receipt of the property; the name and address of each person from whom the property is received, the name and address of each person for whom the property is held and, if interests in the property are held by more than one person, a statement of the nature and extent of each person's interest in the property, to the extent known; a description of the reason for each receipt; the date and amount of each charge against the property and a description of the charge; the date of each delivery of the property by the lawyer; and the name and address of each person to whom the property is delivered by the lawyer.

(2) Appropriate records of all deposits in and withdrawals from all other bank accounts maintained in connection with the lawyer's legal services, specifically identifying the date, payor, and description of each item deposited as well as the date, payee, and purpose of each disbursement;

(3) Copies of all written communications setting forth the basis or rate for the fees charged by the lawyer as required by Rule 1.5(b)), and copies of all writings, if any, stating other terms of engagement for legal services;

(4) Copies of all statements to clients and third persons showing the disbursement of funds or the delivery of property to them or on their behalf;

(5) Copies of all bills issued to clients;

(6) Records showing payments to any persons, not in the lawyer's regular employ, for services rendered or performed; and

(7) Paper copies or electronic copies of all bank statements and of all canceled checks.

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(b) The records required by this Rule shall be maintained in accordance with one or more of the following recognized accounting methods: the accrual method, the cash basis method, or the income tax method. All such accounting methods shall be consistently applied. Bookkeeping records may be maintained by computer provided they otherwise comply with this Rule and provided further that printed copies can be made on demand in accordance with this Rule. They shall be located at the principal Colorado office of the lawyer or of the lawyer's law firm.

(c) Upon the dissolution of a law firm, the lawyers who rendered legal services through the law firm shall make appropriate arrangements for the maintenance or disposition of records and client files in accordance with this Rule and Rule 1.16A. Upon the departure of a lawyer from a law firm, the departing lawyer and the lawyers remaining in the law firm shall make appropriate arrangements for the maintenance or disposition of records and client files in accordance with this Rule and Rule 1.16A.

(d) Any of the records required to be kept by this Rule shall be produced in response to a subpoena duces tecum issued by the Regulation Counsel in connection with proceedings pursuant to C.R.C.P. 251. When so produced, all such records shall remain confidential except for the purposes of the particular proceeding, and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege of the lawyer's client.

Proposed
Rule 1.15E

Approved Institutions

(a) This Rule applies to each trust account that is subject to Rule 1.15B, other than a trust account that is maintained in other than an approved financial institution pursuant to the second sentence of Rule 1.15B(d).

(b) Each trust account shall be maintained at a financial institution that is approved by the Regulation Counsel, pursuant to the provisions and conditions contained in this Rule. The Regulation Counsel shall maintain a list of approved financial institutions, which it shall renew not less than annually. Offering a trust account or a COLTAF account is voluntary for financial institutions.

(c) The Regulation Counsel shall approve a financial institution for use for lawyers' trust accounts, including COLTAF accounts, if the financial institution files with the Regulation Counsel an agreement, in a form provided by the Regulation Counsel, with the following provisions and on the following conditions:

(1) The financial institution does business in Colorado;

(2) The financial institution agrees to report to the Regulation Counsel in the event a properly payable trust account instrument is presented against insufficient funds, irrespective of whether the instrument is honored. That agreement shall apply to all branches of the financial institution and shall not be canceled except on thirty-days notice in writing to the Regulation Counsel.

(3) The financial institution agrees that all reports made by the financial institution shall be in the following format: (i) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor; (ii) in the case of an instrument that is presented against insufficient funds but that is honored, the report shall identify the financial institution, the lawyer or law firm for whom the account is maintained, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby. Report of a dishonored instrument shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any. If no such time is provided by law for notice of dishonor, or if the financial institution has honored an instrument presented against insufficient funds, then the report shall be made within five banking days of the date of presentation of the instrument.

(4) The financial institution agrees to cooperate fully with the Regulation Counsel and to produce any trust account records on receipt of a subpoena for the records issued by the Regulation Counsel in connection with any proceeding pursuant to C.R.C.P. 251. Nothing herein shall preclude a financial institution from charging a lawyer or law firm for the reasonable cost of producing the reports and records required by this Rule, but such charges shall not be a transaction cost to be charged against funds payable to the COLTAF program.

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(5) The financial institution agrees to cooperate with the COLTAF program and shall offer a COLTAF account to any lawyer or law firm who wishes to open one.

(6) With respect to COLTAF accounts, the financial institution agrees:

(A) To remit electronically to COLTAF monthly interest or dividends, net of allowable reasonable COLTAF fees as defined in subparagraph (c)(10) of this Rule, if any; and

(B) To transmit electronically with each remittance to COLTAF a statement showing, as to each COLTAF account, the name of the lawyer or law firm on whose account the remittance is sent; the account number; the remittance period; the rate or rates of interest or dividends applied; the account balance or balances on which the interest or dividends are calculated; the amount of interest or dividends paid; the amount and type of fees, if any, deducted; the amount of net earnings remitted; and such other information as is reasonably requested by COLTAF.

(7) The financial institution agrees to pay on any COLTAF account not less than (i) the highest interest or dividend rate generally available from the financial institution on non-COLTAF accounts when the COLTAF account meets the same eligibility requirements, if any, as the eligibility requirement for non-COLTAF accounts; or (ii) the rate set forth in subparagraph (c)(9) below. In determining the highest interest or dividend rate generally available from the financial institution to its non-COLTAF customers, the financial institution may consider factors customarily considered by the financial institution when setting interest or dividends rates for its non-COLTAF accounts, including account balances, provided that such factors do not discriminate between COLTAF accounts and non-COLTAF accounts. The financial institution may choose to pay on a COLTAF account the highest interest or dividend rate generally available on its comparable non-COLTAF accounts in lieu of actually establishing and maintaining the COLTAF account in the comparable highest interest or dividend rate product.

(8) A COLTAF account may be established by a lawyer or law firm and a financial institution as:

(A) A checking account paying preferred interest rates, such as market based or indexed rates;

(B) A public funds interest-bearing checking account such as an account used for other non-profit organizations or government agencies;

(C) An interest-bearing checking account such as a negotiable order of withdrawal (NOW) account, or business checking account with interest; or

(D) A business checking account with an automated investment feature in overnight daily financial institution repurchase agreements or money market funds. A daily financial institution repurchase agreement shall be fully collateralized by U.S. Government Securities (meaning U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States government) and may be established only with an approved institution that is "well-capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes

and regulations. A "money market fund" is a fund maintained as a money market fund by an investment company registered under the Investment Company Act of 1940, as amended, which fund is qualified to be held out to investors as a money market fund under Rules and Regulations adopted by the Securities and Exchange Commission pursuant to said Act. A money market fund shall be invested solely in U.S. Government Securities, or repurchase agreements fully collateralized by U.S. Government Securities, and, at the time of the investment, shall have total assets of at least two hundred fifty million dollars ($250,000,000).

(9) In lieu of a rate set forth in paragraph (c)(7)(i), the financial institution may elect to pay on all deposits in its COLTAF accounts, a benchmark rate, which COLTAF is authorized to set periodically, but not more frequently than every six months, to reflect an overall comparable rate offered by financial institutions in Colorado net of allowable reasonable COLTAF fees. Election of the benchmark rate is optional, and financial institutions may choose to maintain their eligibility by paying the rate set forth in paragraph (c)(7)(i).

(10) "Allowable reasonable COLTAF fees" are per-check charges, per-deposit charges, fees in lieu of minimum balances, federal deposit insurance fees, sweep fees, and reasonable COLTAF account administrative fees. The financial institution may deduct allowable reasonable COLTAF fees from interest or dividends earned on a COLTAF account, provided that such fees (other than COLTAF account administrative fees) are calculated and imposed in accordance with the approved institution's standard practice with respect to comparable non-COLTAF accounts. The financial institution agrees not to deduct allowable reasonable COLTAF fees accrued on one COLTAF account in excess of the earnings accrued on the COLTAF account for any period from the principal of any other COLTAF account or from interest or dividends accrued on any other COLTAF account. Any fee other than allowable reasonable COLTAF fees are the responsibility of, and the financial institution may charge them to, the lawyer or law firm maintaining the COLTAF account.

(11) Nothing contained in this Rule shall preclude the financial institution from paying a higher interest or dividend rate on a COLTAF account than is otherwise required by the financial institution's agreement with the Regulation Counsel or from electing to waive any or all fees associated with COLTAF accounts.

(12) Nothing in this Rule shall be construed to require the Regulation Counsel or any lawyer or law firm to make independent determinations about whether a financial institution's COLTAF account meets the comparability requirements set forth in paragraph (c)(7). COLTAF will make such determinations and at least annually will inform Regulation Counsel of the financial institutions that are in compliance with the comparability provisions of this Rule.

(13) Each approved financial institution shall be immune from suit arising out of its actions or omissions in reporting overdrafts or insufficient funds or producing documents under this Rule 1.15(E). The agreement entered into by a financial institution with the Regulation Counsel shall not be deemed to create a duty to exercise a standard of care and shall not constitute a contract for the benefit of any third parties that may sustain a loss as a result of lawyers overdrawing lawyer trust accounts.

COMMENT

[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. 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).

[2] If a lawyer or law firm participates in Interest on Lawyer Trust Account ("IOLTA") programs in more than one jurisdiction, including Colorado, IOLTA funds that the lawyer or law firm holds in connection with the practice of law in Colorado should be held in the lawyer or law firm's COLTAF account. The lawyer or law firm should exercise good faith judgment in determining which IOLTA funds it holds in connection with the practice of law in Colorado.

[3] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.

[4] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. See Rule 1.16(d) for standards applicable to retention of client papers.

[6] The duty to keep separate from the lawyer's own property any property in which any other person claims an interest exists whether or not there is a dispute as to ownership of the property. Likewise, although the second sentence of Rule 1.15A(c) deals specifically with disputed ownership, the first sentence of that provision — requiring some form of accounting — applies even if there is no dispute as to ownership. For example, if the lawyer receives a settlement check made payable jointly to the lawyer and the lawyer's client, covering both the lawyer's fee and the client's recovery, the lawyer must provide an accounting to the client before taking the lawyer's

fee from the joint funds. Typically the check will be deposited in the lawyer's trust account and, following an accounting to the client with respect to the fee, the lawyer will "sever" the fee by withdrawing the amount of the fee from the trust account and depositing it in the lawyer's operating account. *See* Rule 1.15A(b) and Rule 1.15D for specific provisions regarding accounting and record-keeping.

EXHIBIT C

Chart Comparing Current Rule 1.15 to Proposed Rules 1.15A, 1.15B, 1.15C, 1.15D and 1.15E

Current Rule	Proposed Rule	Basic Principle
Rule 1.15(a)	Rule 1.15A(a)	Segregation of client or third party funds from lawyer's own funds
Rule 1.15(b)	Rule 1.15A(b)	Promptly distribute funds to client or third person when they are entitled to receive funds
Rule 1.15(c)	Rule 1.15A(c)	Funds held by a lawyer in trust that are disputed must remain in trust until claims are resolved
No comparable Current Rule	Rule 1.15A(d)	Rules 1.15A, B, C and D apply to funds or property held by lawyer in connection with lawyers legal service
Rule 1.15(d)(1) and (2)	Rule 1.15B(a)(1) and (2)	Lawyer in private practice must have trust account and business, professional, office or operating account
Rule 1.15(e)(1) and (2)	Rule 1.15B(b) and(c)	Trust account may be a COLTAF account. Proposed Rule defines COLTAF account. Trust accounts must be designated as such. Proposed rule 1.15B(b) also includes the provision that only funds that are nominal in amount or expected to be held for short period of time should go in COLTAF account.
Rule 1.15(e)(3)	Rule 1.15B(d) and Rule 1.15E	Trust accounts must be in institutions doing business in Colorado and approved by OARC. Conditions for approval are specified in greater detail in Proposed Rule
Rule 1.15(e)(3)	Rule 1.15B(j)	Every lawyer consents to financial institution reporting requirements and every lawyer holds bank harmless for doing so

Rule 1.15(e)(3)	Rule 1.15E(b)(13)	Financial institution immunity for reporting as required to be an approved institution
No comparable current rule	Rule 1.15B(d)	Trust account need not be in approved institution if client consents and is informed in writing that OARC will not receive notices of overdrafts
Rule 1.15(e)(4)	Not included in proposed rules as it is already in C.R.C.P. 227(2)	Lawyer shall include with annual registration statement the name of trust account institution and number of account(s)
Rule 1.15(f)	Rule 1.15B(e)	Trust accounts must be interest-bearing or dividend-paying, insured accounts. (Dividend-paying is new.) Client or third person may consent to non-insured account (which was not included in current rule.)
Rule 1.15(g)	Rule 1.15B(f)	Lawyer may deposit sufficient funds into trust account to cover anticipated service charge or other fees
	Rule 1.15B(g)	Lawyer shall use a COLTAF account unless lawyer complies with Rule 1.15B(h)
Rule 1.15(h)(1)	Rule 1.15B(h)	Interest (or dividends) on trust accounts that are not COLTAF belong to client or third person
Rule 1.15(h)(2)	Rule 1.15B(h)	If funds not in COLTAF account, then lawyer must establish trust account that designates account as trust account; in an approved account; and pay interest or dividend from an insured account
Rule 1.15(h)(2)(b)	Rule 1.15B(b)	Funds in COLTAF account are to be nominal in amount or expected to be held for a short period of time.
Rule 1.15(h)(2)(c)	Rule 1.15E(c)(7)	Provisions dealing with transmitting interest (or dividends) to COLTAF
Rule 1.15(h)(2)(d)	Rule 1.15B(g)	If it is not feasible to establish COLTAF account for reasons beyond lawyer's control, then COLTAF account requirements do not apply.
Rule 1.15(h)(3)	Rule 1.15B(i)	What lawyer must do if lawyer discovers funds for some reason should not have been in COLTAF account
Rule 1.15(h)(4)	No provision in proposed rules	Annual registration statement information compliance by lawyers is eliminated from this rule – it is already contained in C.R.C.P. 227.
Rule 1.15(i)(1)-(6)	Rule 1.15C	Provisions concerning trust account ATM cards, cash withdrawals, signatories, check copies and reconciliation

Rule 1.15(j)(1)-(7)	Rule 1.15D	Provisions concerning records that lawyers must keep
Rule 1.15(k)	Rule 1.15D(b)	Lawyers books and records shall be kept according to basic accounting rules and shall be kept at the principal Colorado office of each lawyer
Rule 1.15(l)	Rule 1.15D(c)	Duties upon dissolution of or departures from law firm
Rule 1.15(m)	Rule 1.15D(d)	Records production to OARC pursuant to subpoena duces tecum and confidentiality of same
	Rule 1.15E	Proposed Rule contains requirements for financial institutions to be approved for lawyer's to use for COLTAF or non-COLTAF accounts.

EXHIBIT D
ABA MODEL RULE 1.15

Client-Lawyer Relationship
Rule 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, e.g., Model Rules for Client Trust Account Records.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

SUPPLEMENTAL REPORT OF AMENDMENT 64 SUBCOMMITTEE

Based on the straw votes taken at the Standing Committee's May 3, 2013 meeting, the subcommittee submits the following supplemental report.

I. Directions of the Standing Committee

The subcommittee understands its direction to be as follows:

- Review and, as necessary, revise proposed Rule 8.6 and the accompanying comments to implement the Standing Committee's vote, which took out the phrase "for engaging in conduct," and then approved, but only in principle, the concept of a safe harbor for lawyers who advise clients concerning their conduct involving marijuana, which is compliant with state law but violates federal law.
- Prepare an alternative, narrower version of Comment [2A] to Rule 8.4 so that the safe harbor would protect only a lawyer's private conduct involving cultivation, possession, and use of marijuana, compliant with the Colorado Constitution, but would not exempt a lawyer's commercial conduct involving marijuana, such as owning or operating a licensed distribution facility. The Standing Committee did not take a straw vote on

this question, but directed the subcommittee to present this alternative, based on concerns expressed by some members of the Standing Committee about lawyers who might become entrepreneurs in this industry.

Below, the subcommittee has set out its original proposals, track changed to show revisions made in response to the meeting of May 3. Those revisions are not necessarily the position of a majority of the subcommittee.

II. Process

The subcommittee suggests that, insofar as the Standing Committee has voted to "do something," on this issue, and appears to have recognized the social need for lawyers to give clients prospective advice in this area, efficiency would be achieved by taking up, and voting on, subissues in the following order:

- New Rule 8.6 and comments, as originally proposed
- New Rule 8.6 and comments, as revised
- Comment [2A] to Rule 8.4, as originally proposed
- Comment [2A] to Rule 8.4, as revised.

This suggestion is subject to two caveats.

First, beyond eliminating "personal conduct" from Comment [2] to proposed Rule 8.6, which conformed the Comment to the Rule as revised at the May 3 meeting, the other changes to this Comment respond to a suggestion from Tony Van Westrum. This suggestion was made before the May 3 meeting, and only to clarify language.

Second, if the Standing Committee adopts the broader version of Rule 8.6 -- which includes the phrase "for engaging in conduct" -- consistency would favor adopting the broader version of Comment [2A] to Rule 8.4. However, if the Standing Committee adopts the narrower version of proposed Rule 8.6, it must decide whether to include a safe harbor that protects all state-law-compliant marijuana conduct in which a lawyer might engage or only such conduct that is both private and noncommercial. The phrase "private, non-commercial" represents the subcommittee's effort to exclude from the safe harbor the lawyer who becomes an entrepreneur. In addition, the specific sections of the constitutional amendments cited deal only with such non-commercial conduct. However, at least one subcommittee member disagrees with this approach.

A majority of the subcommittee recognizes that the dilemma of state-law-compliant conduct which violates federal law exists in both private, noncommercial and commercial conduct. Although distinguishing between them does not have a principled basis under the constitutional amendments, it has a pragmatic one. And presenting a pragmatic approach may assist the Supreme Court, when it considers a recommendation from the Standing Committee.

U.S. Attorney Walsh has never indicated that private, non-commercial conduct would be prosecuted as a violation of federal marijuana law. However, his office has initiated a few prosecutions concerning commercial conduct, which some defendants have asserted was compliant with state law. And warnings have been sent concerning commercial operations, such as those proximate to schools. Thus, a safe harbor that protected commercial conduct could lead to a lawyer who has been convicted of a federal felony continuing to practice, at least before state courts. The majority considers this possibility troubling.

III. Revisions

New Rule 8.6

Notwithstanding any other provision of these rules, a lawyer shall not be in violation of these rules or subject to discipline for ~~engaging in conduct, or for~~ counseling or assisting a client to engage in conduct, that by virtue of a specific provision of the Colorado Constitution (and in implementing legislation or regulations) is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, solely because that same conduct, standing alone, may violate federal criminal law.

Comments to Rule 8.6

[1] This rule specifically addresses the need for legal advice in connection with two constitutional amendments: Article XVIII. Miscellaneous, § 14. *Medical use of marijuana for persons suffering from debilitating medical conditions*, and Article XVIII. Miscellaneous, § 16. *Personal use and regulation of marijuana.*

[2] The phrase "standing alone" clarifies that this rule does not preclude disciplinary action

if a ~~lawyer's personal conduct,~~lawyer counsels or ~~advice~~assists a client to ~~clients, includes, but is not limited to activity,~~engage in conduct permitted by the Colorado constitution, and that conduct ~~in total~~ contravenes federal laws other than those prohibiting use, possession ~~or,~~ cultivation, or distribution of marijuana.

* * * * *

Comment to Rule 8.4

[2A] ~~Conduct~~Private, non-commercial conduct of a lawyer ~~that~~, which by virtue of ~~a specific provision~~the following provisions of the Colorado Constitution (and in implementing legislation or regulations) is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, does not reflect adversely on the lawyer's honesty, trustworthiness, or fitness in other respects, solely because that same conduct, standing alone, may violate federal criminal law. ~~This comment specifically addresses two constitutional amendments:~~Article XVIII. Miscellaneous, § 14(4)(a)(I) and (II), *Medical use of marijuana for persons suffering from debilitating medical conditions*, and Article XVIII. Miscellaneous, § 16~~.~~(3), *Personal use*

and regulation of marijuana. The phrase "solely because" clarifies that a lawyer's use of marijuana, while itself permitted under state law, may cause a lawyer to violate other state laws, such as prohibitions against driving while impaired, and other rules, such as the lawyer's duties of competence and diligence, which may subject the lawyer to discipline. *See* Rules1.1 and 1.3. The phrase "standing alone" is explained in Comment [2] to Rule 8.6.

IV. Other Rules?

During the May 3 meeting, James Coyle said that adoption of the subcommittee's proposal would require changes to Rule 251.1A, ("All members of the Bar of Colorado, having taken an oath to support the Constitution and laws of the United States, are charged with obedience to those laws at all times"), and Preamble [5], ("A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs."). The subcommittee does not believe that the former is within the Standing Committee's jurisdiction.

The subcommittee does not perceive the adoption of its proposal -- either in the original form or as narrowed based on

discussion at the last Standing committee meeting -- as requiring that the Standing Committee address Preamble [5]. The subcommittee's proposed comment to Rule 8.4 does not contravene the "conform to the requirements of the law" mandate, but says only that a narrow area of conduct, unlawful under only federal law, does not trigger the "reflects adversely" test of Rule 8.4. In the subcommittee's view, the suggestion of a need to change Preamble [5] is at odds with the "some kinds of offenses carry no such implication" phrase in existing Comment [2].

Respectfully submitted,

_____ /s/_____

John R. Webb