

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

AGENDA

July 22, 2016 9:00 a.m.

Supreme Court Conference Room 4244
Ralph Carr Colorado Judicial Center, 4th Floor
2 East 14th Avenue, Denver

Call-in numbers: 720-625-5050 – Access Code: 77674034#

WiFi Access Code: D0wnSp0ut!

1. Approval of minutes of April 29, 2016 meeting [to be distributed separately]
2. Acknowledgment of Jamie Sudler's retirement [Marcy Glenn and Jim Coyle]
3. Report from Fee Subcommittee [Nancy Cohen and Jamie Sudler, pages 1-6]
4. Report from Orphaned COLTAF Funds Subcommittee [Alec Rothrock, pages 7-14]
5. Report from Rule 1.6 Subcommittee (A.G. Coffman proposal) [Dave Stark]
6. Report on CLE on recently adopted CRPC amendments [Marcy Glenn]
7. New Business:
 - a. Proposed amendment to Rule 2.1 and Comment [5] [Joan McWilliams, pages 15-23]
 - b. Proposed amendment to Colorado Rules of Civil Procedure, with potential implications for CRPC [Judge Berger, pages 24-29]
8. Administrative matters: Select next meeting date
9. Adjournment (before noon)

Marcy G. Glenn, Chair
Holland & Hart LLP
(303) 295-8320
mglenn@hollandhart.com

To: Standing Rules Committee
From: Jamie Sudler, Co-Chair of Fee Subcommittee
Date: July 22, 2016
Subject: Flat Fee Arrangement - Proposed Rule 1.5(h)

Since the last Standing Rules Committee meeting on April 29, 2016, the Fee Subcommittee has revised a rule that would address flat fee arrangements. The proposed rule appears after this memo.

The Subcommittee received comments from a few Committee members and incorporated some of them.

From my impression, most members of the subcommittee are supportive of the attached rule. We have not formally voted on it as a subcommittee. However, no member, as far as I recall, has expressed opposition to the attached proposal (except the alternative subparagraphs (v.)).

Also I think that all members are generally in favor of a flat fee arrangement form that lawyers could use. But there may be some open questions about it. One of those is what happens if a lawyer does not follow the form? The form is also attached; however, it has not undergone rigorous analysis at this point and needs further vetting.

The Subcommittee has not revisited the issue of what happens if a lawyer does not comply with the proposed rule (alternative subparagraphs (v.)). At the last meeting of the full Committee, there was significant opposition to some of the methods to address this issue. The subcommittee has decided to leave this matter to the full Committee understanding that any rule sent to the Supreme Court may have competing versions. There were four different methods to address this issue which are shown as alternatives. A member of the Subcommittee wanted me to express that there was significant opposition to Alternatives 3 and 4, which is consistent with the full Committee's reaction to those alternatives.

As to the placement of the proposed rule the Subcommittee is recommending that, if approved, it become Colo. RPC 1.5(h) because Rule 1.5 addresses fee matters.

Lastly, the Subcommittee has reviewed the comments to Rule 1.5 to assure that they are consistent with the proposed rule. No problems have yet been identified, but Committee members may have suggestions about revising the comments.

My suggestions for the full Committee are:

- 1) Consider the proposed rule without subparagraph (v.) and revise it without that subparagraph if needed.
- 2) Decide if there is any compromise on the issue raised by subparagraph (v.). If there is no compromise, then the proposed Rule 1.5(h) could be sent to the Court, with the Committee's position regarding that issue and with any minority views also being submitted.
- 3) If a proposed rule is approved by the full Committee, then the next task would be to make sure the comments to Rule 1.5 are consistent with the proposed Rule 1.5(h).
- 4) And lastly, the Committee needs to address whether a Flat Fee Arrangement Form is desirable, and if so what revisions need to be made and where the form should be placed.

I recognize that the Committee will likely not be able to accomplish all of the above at one meeting.

NEW RULE 1.5(h)

June 2016 Subcommittee Meeting Revision

- (h) The term “flat fee arrangement” refers to an arrangement for legal services of a lawyer under which the client agrees to pay a specified maximum amount for a legal service to be performed by the attorney. Each flat fee arrangement shall be in writing and shall contain the following:
- i. A description of the services the lawyer agrees to perform;
 - ii. A statement of the amount to be paid to the lawyer for the services performed;
 - iii. A description of when or how fees are earned by the lawyer; and,
 - iv. The amount, if any, of the fees the lawyer is entitled to keep upon termination of the representation before the specified legal services or a portion of them have been performed.

[Alternative 1 – No subparagraph (v.) addressing non-compliance]

[Alternative 2]:

- v. If a flat fee arrangement is not in substantial compliance this Rule then it is unenforceable.

[Alternative 3]:

- v. If a flat fee arrangement is not in substantial compliance with this Rule and the attorney client relationship is terminated before the representation is completed, the lawyer must refund all fees to the client upon termination. However, nothing in this rule prohibits the lawyer from pursuing recovery in the event the lawyer asserts that the client has been unjustly enriched.

[Alternative 4]:

- v. If a flat fee arrangement is not in substantial compliance with the Flat Fee Arrangement form [refer to where from is placed] and the attorney client relationship is terminated before the representation is completed, the lawyer must refund all fees to the client upon termination. However, nothing in this rule prohibits the lawyer from pursuing recovery in the event the lawyer asserts that the client has been unjustly enriched.

Flat Fee Arrangement Form

_____ (“Lawyer”) will charge _____ (“Client”) fees for providing legal services on the following basis or at the following rate:

I. Legal Services to be Performed.

In exchange for the fees described in this Arrangement, Lawyer will perform the following legal services: **[Insert description of case. Example: representation in DUI criminal matter in Jefferson County.]**

II. Flat Fee.

This is a flat fee arrangement. Client will pay Lawyer the sum of \$_____ for Lawyer’s performance of “Work to be Performed” as described in Section I of this Statement. *Client understands that Client is NOT entering into an hourly rate contract for the fee. This means that Lawyer will devote such time to the case as is necessary, but Lawyer’s compensation will not be increased or decreased based upon the amount of hours expended. Instead, Lawyer has offered the Client a fixed fee for Lawyer’s services.*

III. When fee is earned.

a. Flat fees will be earned in increments, as follows:

Description of Increment: _____ Amount Earned: _____

Description of Increment: _____ Amount Earned: _____

Description of Increment: _____ Amount Earned: _____

Description of Increment: _____ Amount Earned: _____

Description of Increment: _____ Amount Earned: _____

- b. All unearned fees held by Lawyer shall be timely returned to Client at the completion of the representation.

IV. When Fee is Paid.

Client shall pay Lawyer [select one: as work is completed or in advance]. Fees paid in advance shall be placed in the Lawyer's trust account and shall remain the property of Client until they are earned. When a fee is earned pursuant to this arrangement it becomes the property of Lawyer.

V. Right to Terminate Representation.

Client and Lawyer each have the right to terminate the representation at any time and for any reason. In the event the representation is terminated by Client without cause, or by Lawyer with or without cause, Client shall pay, and Lawyer shall be entitled to, all fees earned by Lawyer as described above up to the point of termination. In a litigation matter, Client shall pay, and Lawyer shall be entitled to, all fees earned up to the point that the court grants Lawyer's motion for withdrawal. *Should the representation be terminated during a period between completions of increments described in Section III above, the client shall pay fees based on a computation of time actually worked by the Lawyer at the rate of _____ per hour. However, such fees shall not exceed the amount that would have been earned had the representation continued until the completion of the next increment.*

VI. Estimate of Costs.

Lawyer anticipates that this representation is likely to result in the following costs, which are the sole responsibility of Client:

Type: _____	Estimated Cost: _____
Type: _____	Estimated Cost: _____

VII. Fee Arbitration [Optional]

Client and Lawyer agree that any disputes that arise between them concerning the fees owed by Client or earned by Lawyer shall be submitted to fee arbitration with

June 6, 2016

The Honorable Nathan B. Coats
Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

The Honorable Monica Márquez
Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

VIA EMAIL AND U.S. MAIL

Re: Proposed Amendments to Rule 1.15B and Comment to Rule 1.15A of the Colorado Rules of Professional Conduct

Dear Justices Coats and Márquez:

I write on behalf of the Court's Standing Committee on the Colorado Rules of Professional Conduct (the Standing Committee), which is recommending the following proposed amendments to Rule 1.15B and the Comment to Rule 1.15A of the Colorado Rules of Professional Conduct (Colo. RPC).

By letter dated August 7, 2015, the Colorado Access to Justice Commission, the Colorado Bar Association, and the Colorado Lawyer Trust Account Foundation (COLTAF) (collectively, the Proponents) proposed amendments to Colo. RPC 1.15B and 1.15D (the Orphaned COLTAF Funds Amendments) to accomplish two purposes: (1) to provide direction to lawyers and law firms regarding the disposition of funds in COLTAF accounts where the proper recipient of the funds cannot be identified or, if identified, cannot be located; and (2) to serve the administration of justice by providing additional, much-needed resources for Colorado's legal aid delivery system.

At the Standing Committee's October 16, 2015 meeting, a subcommittee was formed to study the proposed Orphaned COLTAF Funds Amendments.¹ The subcommittee reported to the full

¹ Standing Committee member Alec Rothrock chaired the subcommittee. Additional members were Standing Committee members Ruthanne Polidori, Boston Stanton, Matt Samuelson, Jamie Sudler, and Anthony Van Westrum, and non-members David Kirkpatrick (a private practitioner in Durango), Diana Poole (COLTAF's Executive Director), Mark Schmidt (COLTAF Director), and Courtney Shephard (an associate at Mr. Rothrock's firm).



Standing Committee at its January 29, 2016 and April 29, 2016 meetings. At the April meeting, the subcommittee submitted a brief report with two proposed new rule provisions and one proposed new comment, which the full Standing Committee voted to recommend to the Court, with minor edits. On May 31, 2016, after further discussions, the Standing Committee voted to recommend further amendments to the Court. Word documents prepared by Jenny Moore, containing clean and redlined versions of the proposed Orphaned COLTAF Funds Amendments, are attached as, respectively, Exhibits A and B.

The proposed amendments differ in some respects from the amendments initially proposed by the Proponents. However, we have been advised that the Proponents support the proposed Orphaned COLTAF Funds Amendments.

For further background on the proposed amendments, I refer you to the Proponents' August 7, 2015 letter and attachments, which are attached as Exhibit C, and to the subcommittee's April 22, 2016 report, which is attached as Exhibit D.

The Standing Committee respectfully asks the Court to favorably consider the proposed Orphaned COLTAF Funds Amendments. We defer to the Court's judgment as to whether it is appropriate to request comments and/or to schedule these proposed amendments for hearing. However, we note that there is some urgency to adoption of the amendments. The Standing Committee was advised by practitioners and regulators alike that this problem confronts lawyers with some regularity. Previously, Colorado Bar Association Ethics Committee Formal Opinion 95, entitled "Funds of Missing Clients," advised that unclaimed trust funds may be considered abandoned property under the Unclaimed Property Act, C.R.S. §§ 38-13-101, *et seq.* However, last year the General Assembly passed, and the Governor signed, a bill that exempts orphaned COLTAF funds from the Act; this bill appears as an attachment to Exhibit C. At its May 2016 meeting, the Ethics Committee withdrew Formal Opinion 95. As a result, lawyers currently have no guidance, much less definitive rules, regarding how to handle unclaimed funds in their trust accounts.

Sincerely,

A handwritten signature in blue ink that reads "Marcy G. Glenn".

Marcy G. Glenn
of Holland & Hart LLP

MGG:ko
Enclosure

cc: Chris Markman, Esq. (via email, w/enclosures)
Melissa Meirink, Esq. (via email, w/enclosures)
Jenny Moore, Esq. (via email, w/enclosures)

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The Honorable Nathan B. Coats
The Honorable Monica Márquez
June 6, 2016
Page 3



bcc: CRPC Standing Committee Members (via email, w/enclosures)
✓ Diana M. Poole, Esq.

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EXHIBIT B

Rule 1.15A. General Duties of Lawyers Regarding Property of Clients and Third Parties

(a) – (d) [NO CHANGE]

COMMENT

[1] – [6] [NO CHANGE]

[7] What constitutes “reasonable efforts,” within the meaning of Colo. RPC 1.15B(k), will depend on whether the lawyer does not know the identity of the owner of certain funds held in a COLTAF account, or the lawyer knows the identity of the owner of the funds but not the owner’s location or the location of a deceased owner’s heirs or personal representative. When the lawyer does not know the identity of the owner of the funds or a deceased owner’s heirs or personal representative, reasonable efforts include an audit of the COLTAF account to determine how and when the funds lost their association to a particular owner or owners, and whether they constitute attorneys’ fees earned by the lawyer or expenses to be reimbursed to the lawyer or a third person. When the lawyer knows the identity but not the location of the owner of the funds or the location of the owner’s heirs or personal representative, reasonable efforts include attempted contact using last known contact information, reviewing the file to identify and contact third parties who may know the location of the owner or the owner’s heirs or personal representative, and conducting internet searches. After making reasonable but unsuccessful efforts to identify and locate the owner of the funds or the owner’s heirs or personal representative, a lawyer’s decision to continue to hold funds in a COLTAF or other trust account, as opposed to remitting the funds to COLTAF, does not relieve the lawyer of the obligation to maintain records pursuant to Rule 1.15D(a)(1)(A) or to determine whether it is appropriate to maintain the funds in a COLTAF account, as opposed to a non-COLTAF trust account, pursuant to Colo. RPC 1.15B(b). When COLTAF has made a refund to a lawyer following the lawyer’s determination of the identity and the location of their owner or the identity and location of the owner’s heirs or personal representative, the lawyer’s obligations with respect to those funds are set forth in Colo. RPC 1.15A or are subject to applicable probate procedures or orders. The disposition of unclaimed funds held in the COLTAF account of a deceased lawyer is to be determined in accordance with written procedures published by COLTAF.

Rule 1.15B. Account Requirements

(a) – (j) [NO CHANGE]

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

1.15D(a)(1)(C). If, after remitting unclaimed funds to COLTAF, the lawyer determines both the identity and the location of the owner or the owner's heirs or personal representative, the lawyer shall request a refund for the benefit of the owner or the owner's estate, in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide upon request.

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 shall retain or cause the lawyer's law firm to 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.

(C) For any unclaimed funds remitted to COLTAF pursuant to Rule 1.15B(k), the name and last known address of the owner of the funds, if the owner of the funds is known; the date of death of a deceased owner if the owner of the funds is known; the efforts made to identify or locate the owner of the funds or a deceased owner's heirs or personal representative; the amount of the funds remitted; the period of time during which the funds were held in the lawyer's or law firm's COLTAF account; and the date the funds were remitted.

(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 behalves;
 - (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) – (d) **[NO CHANGE]**

May 4, 2016

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Marcy G. Glenn, Esq., Chair
Colorado Supreme Court Standing Committee
on the Colorado Rules of Professional Conduct
Holland & Hart
555 17th Street, Suite 3200
Denver, CO 80202

Dear Marcy:

On behalf of the COLTAF Board and all those Coloradans who benefit from the services funded by COLTAF, we want to thank you and the Standing Committee for your attention to and approval of the proposed amendments to Rule 1.15 regarding unclaimed funds in COLTAF accounts. Although the amendments, if adopted by the Court, are unlikely to result in a significant increase in the resources available for the civil legal aid delivery system, every little bit helps, particularly as COLTAF and its grantees continue to suffer from this prolonged period of very low interest rates.

We want to extend a special thank you to the members of the Orphaned Funds Subcommittee for their time and attention: David Kirkpatrick, Ruthanne Polidori, Alec Rothrock, Matt Samuelson, Mark Schmidt (Citywide Banks), Courtney Shephard, Boston Stanton, Jamie Sudler, and Tony van Westrum. The proposed amendments, as approved by the Standing Committee, are an improvement over those first submitted because of the Subcommittee's attention and expertise.

Please do not hesitate to let us know if you need anything from us as you prepare your submission to the Court.

Diana M. Poole
Executive Director

Thank you again, and please thank the rest of the Committee on our behalf.

Sincerely,



Robert W. Brandes, Esq.
Board President



Diana M. Poole, Esq.
Executive Director