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November 25, 2013

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

Re: Proposed Amendments to CRPC 1.15

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 proposed amendments to Rule 1.15 of the Colorado Rules of Professional Conduct (CRPC).

These proposed amendments arose out of a September 2012 request by the Colorado Lawyer Trust Account Foundation (COLTAF) to consider amendments to CRPC 1.15 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. At the Committee's direction, a subcommittee studied the issue and presented its recommendations to the full Committee at its February 1, 2013, July 26, 2013, and October 11, 2013 meetings.[1]

At the October 11, 2013 meeting, followed by an emailed vote in November 2013 on an additional point, the Committee voted to recommend for the Court's adoption the following proposed amendments, which will implement interest rate comparability, and, in addition, will make CRPC 1.15 less cumbersome in various respects.

The Committee is recommending a new format for Rule 1.15 in order to make it more accessible. Among other changes, the Committee recommends separating Current Rule 1.15 into five new rules:

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[1] Standing Committee Member James Sudler, who serves as Chief Deputy Regulation Counsel for the Office of Attorney Regulation Counsel (OARC), chaired the Subcommittee, and the following Standing Committee members were Subcommittee members: Helen Berkman; Nancy Cohen; David Little; Cecil Morris; Alexander Rothrock; Marcus Squarrell; Anthony van Westrum; and Tuck Young. COLTAF Executive Director Diana Poole, COLTAF Board President Philip Johnson, and COLTAF Board member William Bianco also served on the Subcommittee.

- **Proposed Rule 1.15A – General Rule.** Proposed Rule 1.15A is the general rule that is based on ABA Model Rule 1.15. It states the basic ethical principles involved in holding funds or property that belong to others, including the rule of segregation of client and lawyer funds and property; the lawyer's duty to promptly deliver money or property to which a client or third person is entitled; and the lawyer's duty to hold disputed funds or property in trust.

- **Proposed Rule 1.15B – Required Accounts.** Proposed Rule 1.15B describes the accounts that a lawyer in private practice must maintain, and states the requirements for a trust account, topics that are covered by Current Rule 1.15(d)-(h).

- **Proposed Rule 1.15C – Use of Trust Account.** Proposed Rule 1.15C is based mainly upon the provisions contained in Current Rule 1.15(i). It proscribes how a lawyer may use a trust account, including by prohibiting the use of debit cards and cash transactions; providing that only a licensed lawyer may make withdrawals; and requiring reconciliation at least quarterly.

- **Proposed Rule 1.5D – Record Keeping Requirements.** Proposed Rule 1.15D, which addresses subjects addressed by Current Rule 1.15(j)-(m), states the record keeping requirements for funds or property held in trust.

- **Proposed Rule 1.15E – Approved Financial Institutions**. Proposed Rule 1.15E states the criteria for an "approved institution" that may hold attorneys' trust accounts, including that the institution must do business in Colorado; agree to report overdrafts to the OARC; cooperate with the COLTAF program; remit interest on COLTAF accounts to COLTAF; and pay comparable interest rates on COLTAF accounts. Current Rule 1.15(e) addresses most of these subjects.

CRPC 1.15 is obviously one of the most important ethics rules inasmuch as virtually every lawyer in private practice possesses funds belonging to clients or third persons, and all lawyers who receive such funds must maintain trust accounts. The Current Rule's provisions regarding COLTAF accounts are also extremely important to the implementation of the COLTAF program. Because alleged CRPC 1.15 violations frequently are the subject of requests for investigation and sometimes result in lawyer discipline, a clearer presentation of the Current Rule's requirements will benefit lawyers, clients, and third persons.

The proposed rules adhere to the basic goal of protecting funds and property belonging to clients and third persons that are in the lawyer's possession. While, the proposed changes are largely to make CRPC 1.15 clearer and more navigable, the proposed rules make the following substantive changes from the Current Rule:

1. Current Rule 1.15(a) requires that a lawyer keep funds in a trust account located in the state where the lawyer's office is situated. However, Current Rule 1.15(d) requires maintenance of accounts "in a financial institution doing business in Colorado." In part to eliminate ambiguity created by these potentially inconsistent provisions, Proposed Rule 1.15E(c)(1) requires an approved trust account to be maintained in a financial institution that "does business in Colorado."

2. Current Rule 1.15 does not make clear that its provisions apply only when a lawyer holds funds or property in connection with a representation of a client. Proposed Rule 1.15A(d) makes that point explicit.

3. As noted in paragraph 1 above, Current Rule 1.15(d) requires all accounts to be maintained "in a financial institution doing business in Colorado." Proposed Rule 1.15B(a) eliminates that requirement for business accounts. That requirement still exists for trust accounts, but it appears in Proposed Rule 1.15E(c)(1). Proposed Rule 1.15B(a) also deletes as unnecessary the reference to CRCP 265, found in Current Rule 1.15(d).

4. Proposed Rule 1.15B(c) permits designations of COLTAF or trust accounts, in addition to those permitted under Current Rules 1.15(e)(1) and (2), so long as they are not misleading.

5. Proposed Rule 1.15D(a)(1)(B), which has no counterpart in Current Rule 1.15, requires a lawyer to keep adequate records of property other than funds that the lawyer holds for a client or third person.

6. Proposed Rule 1.15E(c)(6)-(12) is new and addresses the requirements for financial institutions to be approved for COLTAF accounts, including the issue of interest comparability that COLTAF sought to incorporate in Current Rule 1.15 in the first place. COLTAF representatives were particularly instrumental in drafting these provisions.

7. Many of the proposed rules expand the reference to "interest" to "interest or dividend" (or "interest-bearing or dividend-bearing") to reflect the fact that some products allowed under the comparability amendments pay dividends instead of interest.

8. Proposed Comment [2] is new and is intended to provide guidance to lawyers who practice in more than one jurisdiction regarding where to hold funds of clients or third persons.

In addition, the proposed rules attempt to revise language in the rules that the Committee perceived as vague, confusing, or repetitive, and to eliminate language in the comments that merely repeats the requirements of a rule. The proposed rules place the comments applicable to

all five rules after Rule 1.15A, with a note following each additional rule to remind the reader to refer to those comments.

I am enclosing the Subcommittee's report regarding the proposed rules, as approved by the Standing Committee. Exhibit A to that report is a clean version of the proposed changes; Exhibit B is a chart comparing the provisions of Current Rule 1.15 to the proposed rules; this is in lieu of a redlined version because the reorganization in the Proposed Rules is so extensive as to make a redline difficult to create and follow; Exhibit C is ABA Model Rule 1.15. I have emailed a Word version of Exhibit A (the clean version of the proposed rules), with this cover letter and the full Subcommittee report, to Chris Markman. The Standing Committee respectfully asks the Court to favorably consider the proposed changes.

Sincerely,

Marcy G. Glenn
of Holland & Hart LLP

MGG:dc
Enclosure
cc: Chris Markman, Esq. (via email, w/enclosures)

bcc: CRPC Standing Committee Members (via email, w/enclosures)
Diana M. Poole, Esq.
Philip Johnson, Esq.
William A. Bianco, Esq.

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To: **Standing Committee on the Colorado Rules of Professional Conduct**

From: **Rule 1.15 Subcommittee**

Date: **November 18, 2013**

Re: **Recommended Rule Changes**

I. Overview of Subcommittee's Work

A 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 suggested many revisions to Current Rule 1.15 and submitted two reports to the whole Committee. This report summarizes the changes recommended by the Subcommittee and approved unanimously, for recommendation to the Colorado Supreme Court, by the members of the Committee in attendance at the Committee's October 11, 2013 meeting. The proposed new rules appear in Exhibit A.

Also attached as Exhibit B 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 C. The Model Rule has been changed and amended by many jurisdictions.

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.

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 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 that 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 lawyer must have a trust account if the lawyer holds funds entrusted to him or her;
    - This account may be a COLTAF account
- A lawyer must have a business account;

    - This account may be called a "business," "office," "operating," or "professional" account, without ruling out other descriptive titles for this account.
- A COLTAF account is defined as appropriate for funds to be held for short periods of time or that are 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 that 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 may not use debit cards and may not make cash transactions on a trust account;
- Only a lawyer licensed in this state or a person supervised by such lawyer may make withdrawals from a trust account;
- The lawyer must reconcile a 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.

- The lawyer must have appropriate records for other accounts (such as business account) maintained in connection with lawyer's representation;
- When a 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.

The Subcommittee recommends that the Comments be placed at the end of Rule 1.15A.

III. Detailed Discussion of Proposed Rules

A. Proposed Rule 1.15A

Current Rule 1.15 is shown below with the proposed changes redlined:[1]

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

(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. 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 the lawyer's legal service.[2]

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[1] The other proposed rules are not shown in redlined version below because there are too many changes to do so.

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

DISCUSSION OF PROPOSED RULE 1.15A

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 seven-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 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 essentially 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. The Subcommittee eliminated the requirement that the lawyer provide an "accounting" of the funds that exists in the Current Rule 1.15(c). The Subcommittee was aware of OARC's interpretation of the Current Rule. That interpretation requires a lawyer to notify a client at the time the lawyer takes money from the trust account whether the funds were advanced fees or other monies. The Subcommittee considered whether to require such notice and rejected doing so. The

Subcommittee viewed this notice as good practice, but not necessary to put in a rule. Further, the Subcommittee viewed such a requirement as burdensome on some lawyers. OARC still views such notice as an important fiduciary obligation that should be set forth in a rule, and proposed an addition to Rule 1.5(f) to make this requirement. The Subcommittee rejected this proposal.

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

B. Proposed Rule 1.15B (Current Rules 1.15(d) – (h))

With regard to Proposed Rule 1.15B, we first set forth the proposed rule (not redlined) and then discuss each of its provisions. Proposed Rule 1.15B in its entirety provides:

> Account Requirements
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> (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 have 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 from COLTAF, for the benefit of such client or third person, of the interest or dividends 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) except to change the word "has" to "have" in the first sentence in reference to "fees."

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

4. Proposed Rule 1.15B(b) defines a COLTAF account. This definition is contained in Current Rule 1.15(h)(2). The proposed rule also states that a COLTAF account is for funds that are nominal in amount or expected to be held for a short period of time, text that appears in Current Rule 1.15(h)(2).

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

6. Proposed Rule 1.15B(d) requires that each trust account, including COLTAF accounts, be in a financial institution that is approved by Regulation Counsel pursuant to Proposed Rule 1.15E, which 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 to maintaining a trust account in other than 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), like Current Rule 1.15(g), permits a lawyer to 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 Proposed 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 Proposed 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 appropriate only 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 the order of the paragraphs does not determine their substantive meaning. It is clear elsewhere in the rule that COLTAF accounts are for only nominal or short-term funds.

11. Proposed Rule 1.15B(i) is the same "look-back" provision as is 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 is contained in Current Rule 1.15(e)(3). Each lawyer consents to banks reporting insufficient 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(i). 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
>
> (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.

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 appears in Current Rule 1.15(j)(1) which is more about record keeping. The Subcommittee proposes moving this provision to Proposed Rule 1.15C(a), which deals with Use of the Trust Account.

2. The provision requiring the lawyer to request canceled 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 canceled 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 canceled 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 shall retain, or shall 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.

(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) 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. Proposed Rule 1.15D(a)(1)(B) requires 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 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 infer from the current rule that the lawyer was required to have a written fee agreement which is not required under Rule 1.5(b) except for contingent fee matters.

E. Proposed Rule 1.15E – Approved Institutions

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

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.

(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 dividend 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. 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 provisions covered by Current Rule 1.15(e)(3). 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 may 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. Proposed Rule 1.15E(c)(6)–(12) contains the new provisions regarding interest rate comparability. COLTAF representatives have been instrumental in drafting and analyzing these provisions as well as in the entire reworking of the current rule.

F. Comments to the Proposed Rules

The Subcommittee proposes the following comments, which have been tailored to fit the proposed rules. The Subcommittee also recommends placing the comments after Proposed Rule 1.15A.

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 ("COLTAF"). 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 applies even if there is no dispute as to ownership

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 an 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], which addresses "client security funds," has been eliminated as not applicable in Colorado.

8. Proposed Comment [6] is based upon Current Comment [8] and has been changed to eliminate references to "accountings" as that concept has been eliminated from 1.15A(c) over the objection of OARC. The entire last sentence of Current Comment [8] has been eliminated as being unnecessary given the change to the Rule.

IV. Conclusion

The Subcommittee recommends that the Supreme Court adopt the above Proposed Rules 1.15A, 1.15B, 1.15C, 1.15D, and 1.15E and the Proposed Comments.

Exhibit A

EXHIBIT A

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.

COMMENT

Note: The following six comments are applicable to this Rule 1.15A and to Rule 1.15B, Rule 1.15C, Rule 1.15D, and Rule 1.15E.

[1] Trust accounts containing funds of clients or third persons held in connection with a representation must be interest-bearing or dividend-paying for the benefit of the clients or third persons or, if the funds are nominal in amount or expected to be held for a short period of time, for the benefit of the Colorado Lawyer Trust Account Foundation ("COLTAF"). 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 (as defined in Rule 1.15B(2)(b)). 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 applies even if there is no dispute as to ownership.

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 have 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 by the lawyer 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 from COLTAF, for the benefit of such client or third persons, of the interest or dividends 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.

Note: See comments following Rule 1.15A.

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.

Note: See comments following Rule 1.15A.

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 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.

(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) 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.

Note: See comments following Rule 1.15A.

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.

(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 dividend 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. 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.

Note: See comments following Rule 1.15A.

Exhibit B

EXHIBIT B

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 C

EXHIBIT C
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.