

# MEMORANDUM

**TO:** Statutory Revisions Committee  
**FROM:** Marc Darling, Chair, Subcommittee on Compensation and Cost Recovery  
**DATE:** August 27, 2009

---

This memo is intended to provide you with background on, and an overview of, the issues (and goals) that were addressed by the compensation subcommittee as part of their drafting of the proposed Part 6 to Article 10, of Title 15 that we will be voting on in September.

Our Subcommittee was formed in response to problems experienced by probate lawyers dealing with compensation issues, and the comments and concerns expressed by: (a) the recent audit of Colorado protective proceedings and (b) Judge Stewart, and probate judges generally (at last September's judicial training sessions).

Our work began before the 2008 Estate Planning Retreat in Santa Fe where Judges Stewart and Leopold hosted breakout sessions on compensation issues. After distilling the input we received from that Retreat, the Subcommittee developed the following areas of interest which became the focus of our work:

1. Consolidate into one area of the Colorado Probate Code ("Code") and make consistent, the various compensation statutes that currently are spread throughout the Code. The model for that approach was the "judicial tool box" that the Section approved in 2007, and became Part 5 of Article 10, of Title 15.
2. Make clear who should be entitled to reasonable fees from an estate in probate matters (and by omission who should not).
3. Create and promote a better balance between our courts' authority and discretion to determine reasonable compensation, and the entitlement of certain parties to receive that compensation.

4. Extend the new rules regarding compensation to trustees, agents under powers of attorney, and custodians in addition to personal representatives, guardians and conservators.
5. Rework the “benefit rule” to make it clear that it is a limited exception to the general rule that the fees of non-fiduciaries (such as beneficiaries) and their counsel are not payable from an estate.
6. Illuminate and expand, and thereby provide greater guidance to our courts on the probate specific “factors” that should be considered when determining a reasonable fee.
7. Provide additional clarity on what constitutes the “locality” when the “fee customarily charged in the locality for similar services” is being evaluated as part of a determination of what is a reasonable fee.
8. Develop a process and procedure for resolving fee disputes that will streamline the scope of those proceedings and give courts greater latitude to make decisions without the need for attendance hearings.
9. Provide, through a better system of checks and balances, disincentives to fee disputes.
10. Reconsider the *Painter* line of cases that arguably prohibited: (a) the charging of percentage fees and fees pursuant to published fee schedules, and (b) the ability to recover fees on fees in appropriate cases.

The Subcommittee was comprised of 31 members including: Judges Stewart and Leopold, Sandra Franklin, representatives from most of Colorado’s largest corporate fiduciaries, lawyers who specialize in elder law and protective proceedings, estate planners, estate and trust administrators, and probate trial lawyers. The challenge generated by such divergent interests was invigorating and our debates were lively. The Part 6 that you will vote on is the result of the agreements and compromises that were made to obtain the consensus reflected in its provisions.