

MRPC 1.15
Safekeeping Property

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 16, 2005

Should MRPC 1.15 (c) require that nonrefundable fees comply with the factors set forth in the Assembly's recommendation regarding MRPC 1.5, namely (f), (g) and *Comment*?

- (a) Yes
- (b) No

Synopsis

On November 14, 2003, the Representative Assembly debated many Proposals dealing with proposed changes to the Michigan Rules of Professional Conduct ("Rules"). With regard to MRPC 1.5 (Fees), the Assembly took the following position:

MRPC 1.5 should "expressly permit reasonable and earned nonrefundable retainers". Proceeding Transcript, Page 155.

The Assembly then addressed MRPC 1.15 (Safekeeping Property). The relevant issue was described as follows:

"The reason for this is that neither the current nor the proposed rules provide guidance regarding where to place nonrefundable retainers." Proceeding Transcript, Page 156.

"The point here is that when a lawyer receives a nonrefundable retainer, they expect that it's not refundable, they expect that it's their money, and the lawyer should be able to place it in the lawyer's account." Proceeding Transcript, Page 162.

The Assembly took the following position, which was included in its recommendations to the Supreme Court:

"[t]he rules should provide that nonrefundable retainers be placed in the lawyer's account." Proceeding Transcript, Page 164.

On July 2, 2004, the Supreme Court published for comment new Rules. Consistent with the Assembly's recommendations, the following language was added to MRPC 1.15 (c) and Staff Comment:

"Nonrefundable fees that comply with Rule 1.5(f) are fully earned when received and should not be deposited in a client trust account." ADM File No. 2003-62, Page 59.

Staff Comment: ... "The last sentence in paragraph (c) was added by the State Bar Representative Assembly to clarify that non-refundable retainers are earned when received and should not be placed in a trust account." ADM File No. 2003-62, Page 61.

While the proposed rules appear to allow nonrefundable retainers that can be deposited into the lawyer's account, the proposed rules (MRPC 1.5 and 1.15) go beyond what the Assembly recommended and require conditions precedent to "earn" the retainer, including that "the lawyer set aside a block of time, turns down other cases, and marshals law firm resources in reliance on the fee agreement." The lawyer's ability to place a nonrefundable retainer in the lawyer's account likewise requires compliance with these conditions precedent.

Before the Assembly on April 16, 2005, is a Proposal offering alternative conditions for assessing the reasonableness of fees and nonrefundable retainers. This Proposal proffers to remove the conditions precedent required by paragraph (f) of MRPC 1.5 as proposed by the Court. If the Assembly approves the alternative language, then MRPC 1.15 should require compliance with the same alternative language of MRPC 1.5 rather than paragraph (f) as published by the Court. The result would be consistent with the Assembly positions taken on November 14, 2003 allowing nonrefundable retainers, earned at the time of engagement, and deposit of those funds into the lawyer's account.