MRPC 1.5
Fees

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

MRPC 1.5 should:

(a) Define nonrefundable retainers as published by the Supreme Court in 1.5(f), in that a lawyer and client may agree to a lump-sum or nonrefundable fee arrangement that is earned by the lawyer at the time of engagement, provided conditions set forth in (1) through (4) are each satisfied.

(b) Provide the following factors for consideration regarding enforceable fee contracts in (f), (g) and *Comment*:

(f) Consideration of all Factors. In determining a reasonable fee, the time devoted to the representation and customary rate of fee need not be the sole or controlling factors. All factors set forth in this rule should be considered, and may be applied, in justification of a fee higher or lower than that which would result from application of only the time and rate factors.

(g) Enforceability of Fee Contracts. Contracts or agreements for attorney's fees between attorney and client will ordinarily be enforceable according to the terms of such contracts or agreements, unless found to be illegal, obtained through methods not in compliance with these Rules, prohibited by this Rule, or clearly excessive as defined by this Rule.

Comment (first paragraph, after the first sentence): A lawyer is not, however, required to return retainers that, pursuant to ~~a~~ written agreement with a client, are not refundable.

Synopsis

Under current Michigan law, a lump-sum or non-refundable fee is in doubtful status, even if it is earned at the time of engagement. The AGC has sometimes asserted the theory that no fee is "earned" until the lawyer expends "time and labor" within the meaning of MRPC 1.5(a). This ignores that a fee may be earned at the time of engagement, based on other factors such as MRPC 1.5(a): "the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer." The Supreme Court attempts to speak to this issue, but still leaves in doubtful status that a lump sum or non-refundable fee may be earned at the time of engagement. The proposed Alternative MRPC 1.5(f) and (g) would remove that doubt, emphasizing that, in determining a reasonable fee, the time devoted to the representation and customary rate of fee need NOT be the sole or controlling factors. ALL of the factors (or any of them) in MRPC 1.5(a) would be considered.

Supreme Court Version

The Supreme Court version attempts to authorize a lump sum or non-refundable fee, but adds conditions which are neither permissible under the law, nor likely in fact. In order for such a fee to be "earned" under the Supreme Court version as proposed in MRPC 1.5(f)(4), it would become mandatory that the lawyer "in fact…turns down other cases, and marshals law firm resources in reliance on the fee agreement." This would require an after-the-fact determination which is not only impossible, but also inconsistent with MRPC 1.5(a)(2), which requires only a "likelihood" that other employment will be precluded. If other existing engagements are "in fact" disregarded or terminated to obtain a lump sum fee in the new engagement, the lawyer may be violating the "hot potato" principle of conflicts of interest in MRPC 1.7. Likewise, "in fact" marshaling of law firm resources does not reasonably occur until after the inception of the engagement, at which time the fee would have already been "earned."

The Staff Comment to the published Rule states that 1.5(f) was added by the Assembly and that it specifically allows lawyers, under specified conditions (1) through (4) to charge a nonrefundable fee that is fully earned when received, even though the lawyer may perform no additional work. As currently proposed by the Supreme Court, 1.5(f) would not accomplish that goal.

Assembly Position (November 14, 2003)

At its November 14, 2003 meeting, the Assembly voted that MRPC 1.5 should expressly permit reasonable and earned nonrefundable retainers. Commentary provided to the Supreme Court stated, "Discussion focused on the unintended effects the rule could have of (1) tempting lawyers to accept cases they may not be fully qualified to handle, (2) creating enforceability issues surrounding the quantification of the value of services provided (including consulting).

Alternative 1.5(f) and (g) and Comment

The wording is taken from Florida Rule of Professional Conduct 4-1.5, where it has operated successfully and without adverse effect for several years. When adopted, the additional language should serve to reduce markedly the burden on disciplinary authorities and courts when fee disputes arise. The Amendment would also place a premium upon **express** fee agreements between lawyers and clients, without specifically requiring "written" agreements for every engagement. Thus, the amendment would encourage what is generally regarded as a good practice, but what many regard to be unsuitable and impractical as a mandatory rule for all engagements. It is also already the law of Michigan pursuant to MCL 600.919, which states that "The measure of compensation of members of the bar is left to the express or implied agreement of the parties, subject to the regulation of the supreme court.".

The addition to the Comment would also clarify a misunderstanding that any portion of the retainer paid in advance for legal services to be performed in the future, on an hourly or other basis, has **not** been "earned," and is thus **not** a nonrefundable retainer. The proposed MRPC 1.5(f) completely ignores MRPC 1.5(a)(2) ["will preclude other employment"], and would

reinforce an unfortunate practice of engaging a lawyer only long enough to create a conflict, and then terminating the engagement with a demand for refund of the retainer amount. See Michigan Informal Opinion RI-10 (1989).