

Legal Ethics

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Advance Payment Retainer Agreements

The existence of “advance payment” retainers as a valid option for Illinois lawyers and their clients was first recognized only recently by the Illinois Supreme Court in *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277, 875 N.E.2d 1012 (2007). Previously, the court had recognized only two types of retainers: the “classic” retainer and the “security” retainer. The Illinois Rules of Professional Conduct, therefore, contain no specific guidance concerning advance payment retainers.

A “classic” or “general” retainer is paid by a client to a lawyer to ensure the lawyer’s availability for a specific matter or during a specified period of time. *Dowling*, 226 Ill. 2d at 286. A classic retainer becomes the property of the lawyer immediately upon payment. The retainer is earned whether or not the lawyer ever performs any legal services for the client, since the purpose of the retainer is to ensure the lawyer’s availability.

A client pays a “security” retainer to a lawyer as security for legal services that the lawyer is expected to perform in the future. *Id.* The retainer remains the client’s property until the lawyer applies it to charges for legal services that are actually performed. Accordingly, the retainer must initially be deposited in an account that is separate from the lawyer’s own funds. Under Rules 1.15(b) and 1.16(d) of the Illinois Rules of Professional Conduct, any unearned portion of the retainer must be refunded to the client when the lawyer’s representation is completed or terminated.

In contrast, an “advance payment” retainer is paid to a lawyer in exchange for the lawyer’s commitment to provide legal services in the future. The key distinction from the security retainer is that ownership of an advance payment retainer passes to the lawyer immediately upon payment. *Dowling*, 226 Ill. 2d at 286-87. Because the lawyer becomes the owner of this type of retainer upon receipt, the lawyer may not deposit the retainer in the trust account, since that would constitute commingling of the lawyer’s and clients’ funds in violation of Rule 1.15(a). Rather, the advance payment retainer must be deposited in the lawyer’s general account.

In *Dowling*, the supreme court cautioned that the type of retainer that would be appropriate in a particular case would depend on the circumstances, considering the overriding principle of protecting the client’s interests. Where an advance payment retainer is appropriate, it must be in writing, and must clearly disclose the nature of the retainer, where it will be deposited, and how withdrawals will be made from the retainer in payment for services rendered. 226 Ill. 2d at 294.

In its opinion, the supreme court referred to the Attorney Registration and Disciplinary Commission’s Client Trust Account Handbook (ARDC 2001), which specifically referred to advance fee payments. However, the Handbook has now been revised on the ARDC’s website in light of the court’s opinion in *Dowling*. The revised handbook is available at https://www.iardc.org/clienttrusthandbook_toc.html.

Although not specifically addressed, the *Dowling* decision implicates several of the Illinois Rules of Professional Conduct, notably Rules 1.5 (Fees), 1.15 (Safekeeping Property), and 1.16 (Declining or Terminating Representation). On October 24, 2008, those rules were included on the agenda at the Illinois Supreme Court Rules Committee’s Mid-Year Public Hearing.

The rules addressed were excerpts from Proposal 04-19, Revised Final Report of the Illinois State Bar Association and Chicago Bar Association on Ethics 2000. Proposal 04-19 recommends numerous changes to the current Illinois Rules of Professional Conduct, some of which are substantial. The Proposal has its roots in the American Bar Association's recent changes to the ABA's Model Rules of Professional Conduct. The Model Rules that were first published in 1983 formed the basis for the current Illinois Rules of Professional Conduct.

A key recommendation of Proposal 4-19 is the adoption of the ABA Comments to the Model Rules. In some instances, the ABA Comments would be amended or modified, particularly to comply with positions previously expressed by the Illinois Supreme Court.

Proposed Rule 1.15(c) provides:

(c) Unless the client and lawyer agree otherwise in writing with regard to legal fees, 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.

Comment 7 to Proposed Rule 1.15 refers to paragraph (c), which must be read in conjunction with *Dowling*, and provides further guidance to lawyers in the selection and use of advance payment retainers. It makes clear that, like a classic retainer, ownership of the funds passes to the lawyer immediately upon payment, and the advance payment retainer should be deposited into the lawyer's general account, not a trust account.

Comment 7 notes that an advance payment retainer "is to be used only sparingly, when necessary to accomplish some purpose for the client that cannot be accomplished by using a security retainer." It further provides that with regard to any type of retainer, if the intent of the parties cannot be determined from the language of the agreement, the agreement will be construed as providing for a security retainer. That is in accordance with the Illinois Supreme Court's opinion in *Dowling*, which, the court notes, differs from the Illinois State Bar Association's prior interpretations of Rule 1.15.

While Illinois lawyers await further action on the proposed revisions to the Illinois Rules of Professional Conduct, and further clarification of the principles announced in *Dowling*, it appears that compliance with the following steps would be consistent with the current Rules of Professional Conduct, the ARDC's Client Trust Account Handbook, and *Dowling*:

1. In determining the type of retainer that is appropriate under the circumstances of a particular case, the guiding principle should be the protection of the client's interests. In the vast majority of cases, a security retainer would be most appropriate. Advance payment retainers should be used only sparingly and then only to accomplish some purpose that cannot be achieved by use of a security retainer. One such purpose recognized by the supreme court is to protect the client's ability to obtain legal representation, where the client's funds may be subject to attachment by creditors or to forfeiture.
2. Any retainer agreement must be in writing and clearly define the type of retainer being paid.
3. An agreement providing for an advance payment retainer must advise the client of the option for a security retainer and that the choice as to the type of retainer belongs to the client alone.
4. If the lawyer is unwilling to represent the client without receiving an advance payment retainer, the proposed agreement must state that fact along with the underlying reasons.
5. An advance payment retainer agreement must set forth the special purpose behind the retainer, and explain why it is to the client's advantage under the circumstances.

In any case, a lawyer should exercise prudence in choosing and documenting an advance payment retainer. The supreme court has made clear in *Dowling* that such agreements will be scrutinized carefully, because the client's funds may be at risk. Absent exceptional circumstances, a security retainer will generally be preferred.

About the Author

Michael J. Progar is a partner with the firm of *Doherty & Progar, LLC*. He practices in both the Indiana and Illinois offices. A trial attorney with more than 20 years of civil jury trial experience, Mr. Progar has tried over 50 jury trials to verdict in both state and federal courts. Areas of special concentration include complex product liability and toxic tort litigation, insurance coverage, fraud and bad faith litigation, construction litigation, premises liability and employers' liability. He received his J.D. from DePaul University College of Law in 1981 and his B.A. in American Studies from the University of Notre Dame. Mr. Progar is a member of DRI, IDC, Defense Trial Counsel of Indiana, Indiana State Bar Association, State Bar of Wisconsin and the Lake County, Indiana Bar Association. He has served on various bar association committees in the areas of tort and insurance litigation and alternative dispute resolution.