



ISBA Professional Conduct Advisory Opinion

Opinion No. 12-19
July 2012

Subject: Client Funds and Property; Fees and Expenses; Fees Paid by Third Party

Digest: An “advance payment retainer” can be used by or on behalf of a spouse in a divorce case if all of the requirements of Rule 1.15 are satisfied. The advance payment retainer should not be used, however, if the client’s purpose can be accomplished with a “security retainer.”

References: Illinois Rule of Professional Conduct 1.15

Dowling v. Chicago Options Associates, Inc. 226 Ill. 2d 277, 875 N.E. 2d 1012 (2007)

FACTS

Lawyer represents spouse in a divorce. Spouse is concerned whether or not Spouse will have enough money to pay lawyer for the divorce. Lawyer sets up an advance payment retainer in full compliance with the Illinois Rule of Professional Conduct, but does not factor those funds in as part of the marital assets, and refunds unused funds to Spouse directly after the settlement is reached. Is this proper under the Illinois Rules of Professional Conduct?

Lawyer represents Spouse in a divorce, but Spouse does not have money to pay for legal services. Parent of Spouse agrees to pay for the divorce. Rather than give money to Spouse directly for fear it could be considered a marital gift and therefore joint property of the marriage, Lawyer sets up an advance payment retainer in full compliance with the Illinois Rules of Professional Conduct and Parent pays Spouse’s legal fees up front through these funds. Upon completion of the divorce, unused funds are returned to the Parent. Is this proper under the Illinois Rules of Professional Conduct?

QUESTION

Is the use of an “advance payment retainer” appropriate under the two scenarios set forth above?

OPINION

Rule 1.15 of the Illinois Rules of Professional Conduct permits the use of an “advance payment retainer” whereby the retainer, upon payment to the lawyer, becomes the property of the lawyer and is to be deposited in the lawyer’s general account rather than the lawyer’s trust account. However, any unearned portion of the retainer must be returned to the client. The Rule does not limit the use of such retainers to any particular type of legal proceeding.

Although this Opinion deals specifically with advance payment retainers, first recognized in 2007 in *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277, 875 N.E. 2d 1012 (2007), Rule 1.15 defines and discusses two other types of retainers which have been long-recognized: (1) the “general” or “classic” retainer which is paid to ensure the lawyer’s availability for a particular matter; and (2) the “security retainer” which secures payment for future services by the lawyer. The Rule also discusses and distinguishes from retainers the payment of a fixed fee for legal services. The Rule provides in part:

(c) A lawyer shall deposit in a client trust account funds received to secure payment of legal fees and expenses, to be withdrawn by the lawyer only as fees are earned and expenses incurred. Funds received as a fixed fee, a general retainer, or an advance payment retainer shall be deposited in the lawyer’s general account or other account belonging to the lawyer. An advance payment retainer may be used only when necessary to accomplish some purpose for the client that cannot be accomplished by using a security retainer. An agreement for an advance payment retainer shall be in a writing signed by the client that uses the term “advance payment retainer” to describe the retainer, and states the following:

(1) the special purpose for the advance payment retainer and an explanation why it is advantageous to the client;

(2) that the retainer will not be held in a client trust account, that it will become the property of the lawyer upon payment, and that it will be deposited in the lawyer’s general account;

(3) the manner in which the retainer will be applied for services rendered and expenses incurred;

(4) that any portion of the retainer that is not earned or required for expenses will be refunded to the client;

(5) that the client has the option to employ a security retainer, provided, however, that if the lawyer is unwilling to represent the client without receiving an advance payment retainer, the agreement must so state and provide the lawyer's reasons for that condition.

The characteristics and distinctions between these forms of payment for legal services are discussed in detail in comments [3A], [3B], [3C], and [3D] to the Rule.

While the two fact situations above involve efforts to use advance payment retainers, each situation also involves substantive divorce law. It is beyond the scope of this Committee to determine, for example, whether the Spouse's lawyer in the first scenario has violated any substantive divorce or discovery rule by not factoring the advance retainer into the mix of marital assets or whether in the second fact situation the Spouse's parents have made a marital gift.

However, we can opine upon the propriety of the use of advance payment retainers in each situation. First, we note that the comments to the Rule provide that an advance payment retainer should be used "sparingly." More importantly, the Rule itself provides that such a retainer "may be used only when necessary to accomplish some purpose for the client that cannot be accomplished by using a security retainer."

We believe that the fee payments in both fact situations could have been accomplished through the use of a security retainer and that the use of the advance payment retainer was not justified in either case.

In the first situation the Spouse could have given the lawyer the same amount of money in the form of a security retainer as he or she did with the advance payment retainer. There was no threat of bankruptcy or any other fact to indicate the Spouse was better off through the use of an advance payment retainer. The lawyer could use the funds regardless of the form of the retainer, and the client would have satisfied his or her spendthrift tendencies by giving the money to the lawyer in the form of a retainer. Moreover, the lawyer would have to determine whether the funds are marital assets regardless of the type of retainer. The funds would come from the Spouse in either case.

The same is true in the second case. Whether or not the parents of the spouse made a marital gift to the Spouse is not dependent on the type of retainer given to the lawyer. In both types of retainers the lawyer would use the funds and return any unused portion. So once again, the payment to the lawyer could have been accomplished through the use of a security retainer, and should have been done in this instance.

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