

“Another Tool in the Divorce Attorney’s Chest”

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Another tool in the divorce attorney's chest

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The recent Illinois Supreme Court ruling in *Dowling v. Chicago Options Associates Inc., et al.*, No. 102578, clarifies that attorneys have a third option when considering the type of written retainer agreement to enter into with a client. Commonly, only two types of retainers have been used, the "classic retainer" and the "security retainer."

The classic retainer is paid by a client to a lawyer to secure the lawyer's representation for a specific time period or a specific matter. The retainer is earned when paid and is considered the property of the lawyer, irrespective of whether any services are actually performed by the lawyer in the future.

The security retainer, most often employed by divorce attorneys, secures payment of fees for future services that the lawyer is expected to perform on behalf of the client.

Unlike the classic retainer, the funds are not earned when paid, but remain the property of the client until the attorney applies it to charges for services rendered. For this reason, the funds must be held in a separate client trust account.

Any unearned portion of the retainer must be subsequently returned to the client when the representation ends.

The third retainer option, an "advance payment retainer," was recently recognized by the Illinois Supreme Court. In reaching its decision the court relied on the overriding principles of *In re McDonald Bros. Construction Inc.*, 114 B.R. 989, 998 (N.D. Ill. 1990) and *In re Taylor*, 66 Ill.2d 567 (1977). The court recognized the general rule of freedom of contract with respect to attorney's fees, and the importance of the client's right to protect their interest as a guiding principle when it decided to expressly recognize advance payment retainers in Illinois.

An advance payment retainer, which may be considered by, and be particularly helpful to, attorneys in divorce cases involves present payment to the attorney of a retainer in exchange for the commitment to provide legal services in the future, and provides the attorney with ownership of the retainer immediately upon payment from the client. Since it is considered the attorney's property, the attorney must deposit the retainer into his or her operating account, not his or her client trust account.

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At the conclusion of the representation the lawyer must return any unearned funds to the client.

The savvy divorce practitioner will employ the use of an advance payment retainer when it is necessary to accomplish a purpose that cannot be accomplished by using the traditional security retainer.

However, as Justice Rita B. Garman warns in her 19-page majority opinion, "advance payment retainers should be used only sparingly, when necessary to accomplish some purpose for the client that cannot be accomplished by using a security retainer." Specifically, "the type of retainer that is appropriate will depend on the circumstances of each case."

In *Dowling* the purpose of the advance payment retainer was to enable a judgment debtor to secure legal

representation to defend against the claims of his creditors. Part of the underlying motivation for the court's decision expressly recognizing advance payment retainers was to avoid the possible chilling effect of an attorney's concerns that all of the litigant's assets, including those in the attorney's client trust account, could be subject to forfeiture, eliminating the client's ability to pay.

To the divorce practitioner, a similar situation might also arise. Although a client may not come to you for protection from his creditors, a potential client, or their spouse for that matter, may still be subject to the claims of creditors. The creditor claims may be unrelated to, or even the direct cause of the divorce, but they don't alleviate a client's need for adequate representation and protection of rights.

An advance payment retainer will help to insure that fees are available to prosecute the divorce action and to protect the respective interests of the parties involved.

A similar situation exists when one spouse's actions may subject marital assets to forfeiture as a result of criminal conduct. The same logic applies. Neither the defendant in the criminal action nor their spouse should be prevented from retaining counsel in a divorce proceeding because of an attorney's hesitancy to accept a case based on the potential threat of forfeiture and the ultimate inability of that client to pay. Individuals that may become involved in bankruptcy

proceedings are yet another example.

By using an advance payment retainer, the attorney can sufficiently protect their client's payments, in a manner that will enable the client to continue litigating the divorce matter at hand, and be in a position to see that litigation to an ultimate resolution, without the threat of available funds being forfeited.

Attorneys who represent children in domestic relations matters, whether they are guardians ad litem, attorneys for the children, or child's representatives, should seriously consider the advance payment retainer as an option for their fee arrangements. In the overwhelming majority of cases where attorneys representing children are compensated for their work, it is one or both parents that are responsible for making these payments.

The work of the attorneys representing children is extremely important, and the risk of any retainer funds being subject to creditor claims or forfeiture, based on the actions of someone other

than their own client, i.e. either parent, would certainly result in a most inequitable situation.

As such, attorneys representing children should strongly consider using advance payment retainers. Another circumstance where advance payment retainers could be appropriate is when a litigant's family member is providing the funds used to pay the litigant's fees. Under the current statutes governing attorney's fees and interim attorney's fees under the Illinois Marriage and Dissolution of Marriage Act and specifically under section 501(c-1)(3), courts can allocate available funds of the parties.

In other words, payments made by a third party, such as a family member, could be subject to disgorgement, and awarded to the other side. Funds paid by a litigant's relative, and placed into a client trust account under the terms of a security retainer agreement, could be disgorged. With this very real possibility, it could have the same chilling effect in *Dowling* on a well-intentioned relative that is looking to provide their family member with means to adequate legal representation.

After all, a relative is not as likely to provide support for their family member, knowing that their family member's spouse could also benefit.

The very threat of disgorgement, could be enough to prevent that relative from providing adequate financial support to a family member that would otherwise lack ability to retain counsel, and ultimately prevent the litigant from obtaining counsel.

An advance payment retainer is a possible solution to that problem because it could offer protection of a third party's payment on behalf of a litigant from disgorgement. By using an advance payment retainer, the money would be the property of the attorney, not of the client, and not likely subject to disgorgement under *Dowling*.

Should the divorce practitioner decide that the use of an advance payment retainer is appropriate under the individual client's circumstances, the agreement must be in writing, clearly set forth the term "advance payment retainer" in the body of the document and contain the following provisions:

- That the retainer becomes the property of the lawyer when paid.
- That the funds will not be held in a client trust account.
- Where the funds will be deposited and how the attorney or law firm will handle withdrawals from the retainer for payment of services rendered.
- That the client has been advised of his or her option to place his or her money in a security retainer.
- That the client has been advised that the choice of the type of retainer to be used is the client's choice alone.
- The special purpose behind the retainer and explain why an advance payment retainer is advantageous to the client.

The practitioner should also be aware that in the event the parties' intent can not be determined from the language of the agreement, that the agreement must be construed as providing for a security-retainer agreement.

Advance payment retainers offer another option to be considered by the divorce practitioner in arranging their fee agreements. Advance payment retainers should not be looked at as a scheming way of hiding money from a creditor or similar individual or entity, but rather as a practical and effective way for a litigant to secure legal representation and to protect their rights, as well as provide assurance to the attorney that they will be compensated for their efforts. Although it is not to be used in every case, when determining whether to undertake representation or the appropriate fee agreement, the attorney should consider the advance payment retainer option.

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