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MINIMIZING YOUR RISK-THE PROPER HANDLING OF RETAINERS

Last year, the ARDC received 421 notices from banks reporting that a lawyer's trust fund account was overdrawn. The ARDC opened almost 300 additional investigations during 2012 to determine whether a lawyer mismanaged client funds.

The majority of these investigations were closed because the ARDC was satisfied that the lawyer understood the ethics rules regarding the safekeeping of client funds and because the lawyer had implemented all of the requirements of Rule 1.15 of the Illinois Rules of Professional Conduct.

Many trust account problems occur due to confusion about the proper handling of retainers. The Illinois Supreme Court recognizes only three types of retainers. These retainers are:

- ***The Classic Retainer.*** Here, funds are paid by a client in order to secure a lawyer's availability. The money is earned by the lawyer immediately upon payment and the client relinquishes all interest in its return. Classic retainers should **NEVER** be deposited into a lawyer's client trust account.
- ***The Security Retainer.*** This is a payment for prospective services and the client retains an interest in the funds until the services are actually rendered. This is the most common form of retainer. Security retainers remain the property of the client and **MUST** be deposited in a client trust account until the lawyer applies the money to charges for services actually rendered.
- ***The Advance Payment Retainer.*** Funds paid to a lawyer under this retainer are intended by the client to be present payment in exchange for the commitment to provide legal services in the future. Ownership of this retainer passes to the lawyer immediately upon payment and is the lawyer's property and **MUST NOT** be deposited in the client trust account.

Because Advance Payment Retainers differ from other types of retainers, the following practice pointers may help lawyers know when and how to accept them.

➤ **There are limits on accepting advance payment retainers**

According to the Supreme Court, Advance Payment Retainers are to be used “**sparingly**” and only when necessary to accomplish a purpose for the client that cannot be accomplished by using a security retainer. The guiding principle is to protect a client’s interests, which in most cases dictates that a retainer payment to a lawyer should be a security retainer. **ADVANCE PAYMENT RETAINERS ARE NOT INTENDED TO BE USED BY LAWYERS AS AN ACROSS-THE-BOARD, STANDARD BUSINESS PRACTICE.**

➤ **Security Retainers are appropriate for most cases**

Security Retainers are appropriate in the vast majority of cases. Security Retainers must be deposited in an IOLTA account or non-IOLTA client trust account as defined in IRPC 1.15.

➤ **Advance Payment Retainers require a prompt refund for work not performed**

Advance Payment Retainers become the property of the lawyer upon receipt. However, lawyers who accept Advance Payment Retainers are obligated to promptly refund to the client any portion that is not earned.

➤ **Additional requirements for advance payment retainers**

In the limited circumstance where a lawyer takes an Advance Payment Retainer, the rules require a writing, signed by the client, containing the following required information:

- (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.**

➤ **Other types of fee payments**

Do not confuse Security Retainers or Advance Payment Retainers with other types of allowable fee payments such as fixed fees or general retainers, which are addressed in IRPC 1.15, Comments 3B-3C.

➤ **Additional Information**

Questions about fee payments and retainers can be directed to either the ARDC or to the Lawyers Trust Fund of Illinois. The Lawyers Trust Fund Website is: www.ltf.org. More information about handling client funds is available online in the ARDC's [Client Trust Account Handbook](#), published at the ARDC website. The ARDC Website is: www.iardc.org