**ADVANCE FEE PAYMENTS**

A lawyer need not place any fees into a trust account absent special circumstances necessary to protect the interest of the client. Such circumstances may be the agreement of the parties, the size and amount of the fee, and the length of time contemplated for the undertaking.

 **QUESTION PRESENTED:**

Whether a lawyer may deposit into a general operating account a retainer that represents payment of fees yet to be earned.
 **OPINION:**

The question posed by correspondent is not clear. "Fees yet to be earned" are prepaid fees. "Prepaid fees" also include "fixed" or "flat fees," which are not earned until the task is completed. The terms "retainer" and "prepaid fees" have different meanings. For purposes of clarity, the terms are defined as here used.

A retainer is "...the fee which the client pays when he retains the attorney to act for him, and thereby prevents him from acting for his adversary." Black's Law Dictionary (5th ed. 1979). Thus, retainer fees are earned by the attorney by agreeing to be "on call" for the client and by not accepting employment from the client's adversaries. McNulty, George & Hall v. Pruden, 62 Ga. 135, 141 (1878).

A "flat" or "fixed" fee is one charged by an attorney to perform a task to completion, for example, to draw a contract, prepare a will, or represent the client in court, as in an uncontested divorce or a criminal case. Such a fee may be paid before or after the task is completed.

A "prepaid fee" is a fee paid by the client with the understanding that the attorney will earn the fee as he or she performs the task agreed upon.

Under these various definitions, one can reasonably take the position that "retainers" and "flat fees" may be placed in the general operating account when paid. Prepaid fees may be placed in a trust account until earned.

Terminology as to the various types of fee arrangements does not alter the fact that the lawyer is a fiduciary. Therefore, the lawyer's duties as to fees should be uniform and governed by the same rules regardless of the particular fee arrangement. Those duties are as follows:

1.  To have a clear understanding with the client as to the details of the fee arrangement prior to undertaking the representation, preferably in writing.
2.  To return to the client any unearned portion of a fee.
3.  To accept the client's dismissal of him or her (with or without cause) without imposing any penalty on the client for the dismissal.
4.  Comply with the provisions of Standard 31 as to reasonableness of the fee.

The law is well settled that a client can dismiss a lawyer for any reason or for no reason, and the lawyer has a duty to return any unearned portion of the fee. In the Matter of Collins, 246 Ga. 325, 271 S.E.2d 473 (1980).

The exercise of the right to discharge an attorney with or without cause does not constitute a breach of contract because it is a basic term of the contract, implied by law into it by reason of the nature of the attorney-client relationship, that the client may terminate that contract at any time.

Henry, Walden & Davis v. Goodman, 294 Ark. 25, 741 S.W. 2d 233 (1987).

The client, of course, may not be penalized for exercising the right to dismiss the lawyer. Id. In view of these duties, a lawyer need not place any fees into a trust account absent special circumstances necessary to protect the interest of the client. Such circumstances may be the agreement of the parties, the size and amount of the fee, and the length of time contemplated for the undertaking. [1](https://www.gabar.org/barrules/handbookdetail.cfm?what=rule&id=521#1)

1 A fee paid for retainer of the attorney, as narrowly defined in this opinion, illustrates the importance of an agreement or understanding in writing outlining, among other things: geographic area involved, duration, scope of proposed legal services, fees and expenses for legal services rendered, and due date of future retainer fees covered by the retainer agreement. The agreement should also contain specific terms as to refunds of any portion of the fee should the agreement be terminated prior to its expiration date. See Ethical Considerations 2-19 and 2-23.