**QUESTION PRESENTED:**

    May a Georgia attorney contract with a client for a non-refundable special retainer?

**SUMMARY ANSWER:**

    A Georgia attorney may contract with a client for a non-refundable special retainer so long as:  1) the contract is not a contract to violate the attorney's obligation under Rule 1.16(d) to refund "any advance payment of fee that has not been earned" upon termination of the representation by the attorney or by the client; and 2) the contracted for fee, as well as any resulting fee upon termination, does not violate Rule 1.5(a)'s requirement of reasonableness.

**OPINION:**

    This issue is governed primarily by Rule of Professional Conduct 1.16(d) which provides:  "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests such as . . . refunding any advance payment of fee that has not been earned."

    A special retainer is a contract for representation obligating a client to pay fees in advance for specified services to be provided by an attorney.  This definition applies regardless of the manner of determining the amount of the fee or the terminology used to designate the fee, e.g., hourly fee, percentage fee, flat fee, fixed fees, or minimum fees.  Generally, fees paid in advance under a special retainer are earned as the specified services are provided.  Some services, for example, the services of the attorney's commitment to the client's case and acceptance of potential disqualification from other representations, are provided as soon as the contract is signed [[1]](https://www.gabar.org/barrules/handbookdetail.cfm?what=rule&id=532#ftn1).  The portion of the fee reasonably allocated to these services is, therefore, earned immediately.  These fees, and any other fees that have been earned by providing specified services to the client, need not be refunded to the client.  In this sense, a special retainer can be made non-refundable.

    In Formal Advisory Opinion 91-2 (FAO 91-2), we said:

   "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 . . . :  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) To comply with the provisions of Standard 31 as to reasonableness of the fee."

    The same Formal Advisory Opinion citing In the Matter of Collins, 246 Ga. 325 (1980), states:

    "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." [[2]](https://www.gabar.org/barrules/handbookdetail.cfm?what=rule&id=532#ftn2)

    Contracts to violate the ethical requirements upon which FAO 91-2 was based are not permitted, because those requirements are now expressed in Rule 1.16(d) and Rule 1.5(a).  Moreover, attorneys should take care to avoid misrepresentation concerning their obligation to return unearned fees upon termination.

    The ethical obligation to refund unearned fees, however, does not prohibit an attorney from designating by contract points in a representation at which specific advance fees payments under a special retainer will have been earned, so long as this is done in good faith and not as an attempt to penalize a client for termination of the representation by refusing to refund unearned fees or otherwise avoid the requirements of Rule 1.16(d), and the resulting fee is reasonable.  Nor does this obligation call in to question the use of flat fees, minimum fees, or any other form of advance fee payment so long as such fees when unearned are refunded to the client upon termination of the representation by the client or by the attorney.  It also does not require that fees be determined on an hourly basis.  Nor need an attorney place any fees into a trust account absent special circumstances necessary to protect the interest of the client.  See Georgia Formal Advisory Opinion 91-2.  Additionally, this obligation does not restrict the non-refundability of fees for any reason other than whether they have been earned upon termination.  Finally, there is nothing in this obligation that prohibits an attorney from contracting for large fees for excellent work done quickly.  When the contracted for work is done, however quickly it may have been done, the fees have been earned and there is no issue as to their non-refundability.  Of course, such fees, like all fee agreements, are subject to Rule 1.5, which provides that the reasonableness of a fee shall be determined by the following factors:

    (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

    (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

    (3) the fee customarily charged in the locality for similar legal services;

    (4) the amount involved and the results obtained;

    (5) the time limitations imposed by the client or by the circumstances;

    (6) the nature and length of the professional relationship with the client.

    (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

    (8) Whether the fee is fixed or contingent.

   The second publication of this opinion appeared in the August 2003 issue of the Georgia Bar Journal, which was mailed to the members of the State Bar of Georgia on August 7, 2003.  The opinion was filed with the Supreme Court of Georgia on August 21, 2003.  No review was requested within the 20-day review period, and the Supreme Court of Georgia has not ordered review on its own motion.  In accordance with Rule 4-403(d), this opinion is binding only on the State Bar of Georgia and the person who requested the opinion, and not on the Supreme Court of Georgia, which shall treat the opinion as persuasive authority only.

[1] The "likelihood that the acceptance of the particular employment will preclude other employment by the lawyer" is a factor the attorney must consider in determining the reasonableness of a fee under Rule 1.5.  This preclusion, therefore, should be considered part of the service the attorney is providing to the client by agreeing to enter into the representation.

[2] Georgia Formal Advisory Opinion 91-2.