

ETHICS ADVISORY PANEL
OPINION #94-63 REQUEST #534
Issued September 28, 1994

The inquiring attorney was retained by a retired attorney to recover a referral fee. The inquiring attorney requested a retainer from the client. After the inquiring attorney sent a demand letter on behalf of the client regarding the lawsuit the client decided to discontinue the action and requested a refund of the retainer. Although the retainer agreement did not state that the retainer was "non-refundable" it was believed by the attorney that the "non-refundability of the retainer was implicit." The inquiring attorney asks whether he/she may keep the full retainer amount and if not, how should a refund be calculated and whether he/she may, in the future, asks for a non-refundable fee.

Rule 1.5 entitled "Fees" sets forth the criteria for fees. The comments to Rule 1.5 regarding fees support the position that a retainer must be refundable. The comments state "[a] lawyer may require advance payment of a fee, but is obligated to return any unearned portion. See, Rule 1.16(d).

The Rhode Island Disciplinary Board's Policy on Non-Refundable Retainer Agreements discusses the difference of opinion regarding the refundability of retainers in the absence of a clear and unambiguous written agreement. This issue differentiates between the definition of a true retainer and a fee advance. However, it is the Disciplinary Board's policy "that the term "retainer" as used by attorneys of this Bar is a fee advance and therefore refundable, minus a reasonable "quantum meruit" amount." The Panel believes that pursuant to Rule 1.5 and the comments thereof, as well as the Disciplinary Board's Policy, the attorney is obligated to return the non-earned portion of the retainer fee. The attorney is entitled to the reasonable value of the services rendered under the quantum meruit theory.