

Private Admonition -- Board Case No. 32, 1999. Date of Sanction: September 27, 1999. A panel of the Preliminary Review Committee ("PRC") offered the sanction of a private admonition to an attorney in Board Case No. 32, 1999, for certain violations of the Delaware Lawyers' Rules of Professional Conduct (the "Rules"). The attorney consented to the imposition of the private admonition.

In September 1998, the attorney was retained by an incarcerated client for the purpose of filing a petition for rehearing of a decision from the Third Circuit Court of Appeals, which had dismissed his appeal of the District Court's denial of a petition for writ of habeas corpus. The attorney was paid \$500.00 to file this petition. However, before the petition for rehearing could be filed, the client needed to prepare and file with the Court of Appeals a motion for leave to file the petition for rehearing "out of time." In October 1998, the client drafted this motion and sent it to the attorney with a letter stating that "[i]f you want me to file it with the Court, let me know."

Also in October 1998, the attorney received and reviewed for the first time a copy of the District Court's decision denying the petition for writ of habeas corpus from which the client's Third Circuit appeal had been brought. After a review of that decision, the attorney learned, for the first time, that this had been the client's second habeas corpus petition that had been denied by the District Court. It also appeared to the attorney that the second habeas corpus petition was simply a repetition of the arguments previously raised and denied in the first habeas corpus petition. Therefore, the attorney concluded that the filing of any petition for rehearing with the Third Circuit had no chance of success and would be futile.

However, the attorney did not communicate with the client in order (1) to clarify that the client needed to file the motion for leave to file a petition for rehearing "out of time" on his own; (2) to explain to the client that the attorney's legal opinion on the matter had substantially altered based upon the review of the District Court's decision; or (3) to explain to the client that, based upon the attorney's conclusions as to the futility of the appeal, the attorney no longer wished to represent the client in the case. The attorney also failed to refund the \$500.00 retainer.

In February 1999, the client wrote to the attorney requesting a refund of the \$500.00 retainer fee. The attorney failed to respond to this request. In May 1999, upon receiving a disciplinary complaint from the client, the Office of Disciplinary Counsel contacted the attorney concerning the failure to return the retainer. In response to this telephone contact, the attorney mailed the \$500.00 refund to the client the next day and apologized to the client for the delay.

The attorney accepted the PRC's offer of the sanction of a private admonition, with payment of the costs of the investigation, for the attorney's violations of Rule 1.4(b), which requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation," and Rule 1.16(d), which requires that, "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests," including by "refunding any advance payment of fee that has not been earned." The attorney had no prior disciplinary record and fully cooperated with the ODC's investigation.