

Private Admonition -- Board Case No. 9, 2000. Date of Sanction: October 4, 2000. An attorney was privately admonished for professional misconduct in connection with the attorney's handling of a criminal matter on behalf of an incarcerated client. The attorney admitted violations of Rules 1.5(b) (failure to adequately communicate to the client the basis or rate of the fee), 1.5(f) (failure to provide the client with written statements regarding a fee paid in advance) and 1.15(a) (depositing unearned fees into an operating account instead of escrow account).

The attorney was retained by the client to represent the client in connection with post-trial motions, a direct appeal and post-conviction motions. The client was incarcerated at the time. (At trial, the client was represented by the public defender. The attorney was first retained by the client to represent him at sentencing.) It was agreed that the attorney would be paid a flat fee of \$10,000.00. Upon retention, there was no discussion of whether the flat fee of \$10,000.00 would cover costs, such as the transcript (which would be substantial) or a private investigator.

A written fee agreement was not utilized; nor was the basis of the fee otherwise clearly communicated to the client. Pursuant to Rule 1.5(b), a written fee agreement should have been used. *Rule 1.5(b) states: "When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation."* As a result of the failure to reduce the agreement to writing, there was a misunderstanding regarding what the fee would and would not cover. For example, the attorney eventually asked the client to pay an additional \$1,400.00 for the transcript and \$500.00 for a private investigator. The client did not pay these additional amounts and neither the transcript was ordered nor the private investigator hired. Under the circumstances, the attorney violated Rule 1.5(b) by failing to communicate the basis of the fee to the client.

The fee was paid in installments. Each payment was immediately deposited into the attorney's operating account. The total fee paid in advance was \$6,000.00. *Rule 1.15(a) states: "A lawyer shall hold property of clients or third parties that is in a lawyer's possession in connection with a representation separate from the lawyer's own property."* The fees received by the attorney were paid in advance of being earned. Therefore, upon receipt, the fees were unearned and the property of the client, not the property of the attorney. Unearned fees should be deposited into an escrow account and held in trust for the client. By depositing unearned fees into the attorney's operating account, the attorney violated Rule 1.15(a).

Because the attorney accepted fees paid in advance, the attorney had additional obligations to the attorney's client as of January 1, 1999. Effective on that date, a new Rule was enacted by the Delaware Supreme Court. *Rule 1.5(f) states: "A lawyer may require the client to pay some or all of the fee in advance of the lawyer undertaking the representation, provided that: (1) the lawyer shall provide the client with a written statement that the fee is refundable if not earned, (2) the written statement shall state the basis under which the fees shall be considered to have been earned, whether in whole or in part, and (3) all unearned fees shall be retained in the lawyer's trust account, with statement of the fees earned provided to the client at the time such funds are withdrawn from the trust account."* A payment received by the attorney from the client on April 1, 1999 was subject to the requirements of Rule 1.5(f). The attorney violated Rule 1.5(f) by failing to provide the client with written statements as required by the Rule.

In mitigation, the following were considered:

1. The attorney had no prior disciplinary record.

2. The attorney refunded the fee paid to the client, albeit after the disciplinary complaint was filed by the client and upon the ODC's suggestion.
3. The attorney has hired an experienced bookkeeper to assist the attorney with the law firm's books and records.
4. The attorney has hired additional office staff, including a runner and administrative staff with a college degree.
5. The attorney has consulted with a member of the Professional Guidance Committee.
6. At the suggestion of the member of the Professional Guidance Committee with whom the attorney is consulting, the attorney has limited the intake of new cases to ten per month.
7. The attorney has eliminated some areas of practice, including automobile lemon law cases, new worker's compensation cases, real estate matters and most personal injury cases.

The private admonition was formally imposed by consent on October 11, 2000. The attorney must fulfill the following conditions:

1. that the attorney reimburse the Office of Disciplinary Counsel for the costs of its investigation in the amount of \$72.05 and reimburse the Lawyers' Fund for Client Protection for the costs of its audit in the amount of \$90.00;
2. that the attorney be subject to semi-annual audits at the attorney's expense, for a period of two years;
3. that the attorney consult with a member of the Professional Guidance Committee about both practice management issues and substantive legal issues on at least a monthly basis for a period of two years;
4. for at least the foreseeable future (approximately two years), the attorney has agreed to limit new cases to ten per month;
5. for at least the foreseeable future (approximately two years), the attorney has agreed to limit practice areas; in particular the attorney will eliminate some areas of practice, including automobile lemon law cases, new worker's compensation cases, real estate matters and most personal injury cases; and
6. The attorney will implement the suggestions of the Professional Guidance Committee to improve office management and organizations, after a comprehensive review of the attorney's practices and policies is undertaken.