

VIRGINIA:

BEFORE THE THIRD DISTRICT, SECTION TWO, SUBCOMMITTEE  
OF THE VIRGINIA STATE BAR

IN THE MATTERS OF DAVID MICHAEL GAMMINO

VSB DOCKET NOS.      05-032-2612 [Neal]  
                                 05-032-2481 [VSB/VaCtApp]  
                                 05-032-2483 [VSB/VaCtApp]  
                                 05-032-2493 [VSB/VaCtApp]  
                                 05-032-2484 [VSB/VaCtApp]

SUBCOMMITTEE DETERMINATION  
(PUBLIC ADMONITION WITH TERMS)

On December 5, 2005, a meeting in these matters was held before a duly convened Third District, Section Two, Subcommittee consisting of Judith G. Napier, Lay Member; Randall G. Johnson, Jr., Esq.; and William J. Viverette, Esq., Chair, presiding.

Pursuant to Part 6, § IV, ¶ 13.G.1.d.(1) of the Rules of the Supreme Court, the Third District, Section Two, Subcommittee of the Virginia State Bar hereby serves upon the Respondent, David Michael Gammino, the following Public Admonition with Terms:

1. At all times relevant hereto the Respondent, David Michael Gammino [Gammino], has been an attorney licensed to practice law in the Commonwealth of Virginia.

VSB Docket No. 05-032-2612 [Neal]:

I. FINDINGS OF FACT

2. In or about March of 2004, Gammino was retained by Willie Mae Lyons [Willie] and Kenny Lyons [Kenny] to represent Complainant Kelvin Neal [Kelvin] on charges of robbery, armed burglary and malicious wounding [representation]. Willie is Kelvin's mother and Kenny is Kelvin's brother. Gammino told the family he would charge a "flat rate" of between \$2,500.00 and \$5,000.00 depending upon what needed to be done in the case.

3. Willie paid Gammino a total of \$3,010.00 in three payments as attorney fees for the representation [funds].

4. According to Gammino, each payment was deposited into his operating account at the end of the week in which payment was made [Gammino's statement].

5. Willie paid Gammino \$500.00 on Thursday, March 25, 2004 [first payment]. In accordance with Gammino's statement, the first payment was deposited by or on behalf of Gammino into his operating account on Friday, March 26, 2004.

6. Willie paid Gammino \$1,000.00 on Friday, March 26, 2004 [second payment]. In accordance with Gammino's statement, the second payment was deposited by or on behalf of Gammino into his operating account on Friday, March 26, 2004.

7. Willie paid Gammino \$1,510.00 on Friday, April 16, 2004 [third payment]. In accordance with Gammino's statement, the third payment was deposited by or on behalf of Gammino into his operating account on Friday, April 16, 2004.

8. Gammino considered the funds earned upon his first appearance on behalf of Kelvin.

9. On April 16, 2004, Gammino filed a motion for discovery and a request for a certificate of analysis, thus making his first appearance in the case. A preliminary hearing occurred on May 12, 2004. Kelvin was convicted in August of 2004 on pleas of no contest to robbery and statutory burglary. The malicious wounding charge was nolle prossed.

10. The funds constituted advanced legal fees. Advanced legal fees must be deposited into a trust account until earned.

11. Gammino failed to deposit the funds into a trust account until earned.

12. Gammino does not maintain subsidiary ledgers for his clients and their funds.

## II. NATURE OF MISCONDUCT

Such conduct by David Michael Gammino constitutes misconduct in violation of the following provisions of the Virginia Rules of Professional Conduct:

RULE 1.15 Safekeeping Property

- (a) All funds received or held by a lawyer or law firm on behalf of a client, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable escrow accounts maintained at a financial institution in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
  - (1) funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution may be deposited therein; or
  - (2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.
  
- (e) Record-Keeping Requirements, Required Books and Records. As a minimum requirement every lawyer engaged in the private practice of law in Virginia, hereinafter called "lawyer," shall maintain or cause to be maintained, on a current basis, books and records which establish compliance with Rule 1.15(a) and (c). Whether a lawyer or law firm maintains computerized records or a manual accounting system, such system must produce the records and information required by this Rule.
  - (1) In the case of funds held in an escrow account subject to this Rule, the required books and records include:
    - (iii) subsidiary ledger. A subsidiary ledger containing a separate account for each client and for every other person or entity from whom money has been received in escrow shall be maintained. The ledger account shall by separate columns or otherwise clearly identify escrow funds disbursed, and escrow funds balance on hand. The ledger account for a client or a separate subsidiary ledger account for a client shall clearly indicate all fees paid from trust accounts;

I. FINDINGS OF FACT

13. Gammino was court-appointed to represent Sherman White [White] in the appeal to the Virginia Court of Appeals [Court] of his criminal convictions for possession with intent to distribute narcotics [representation].

14. On November 27, 2001, Gammino filed in the Court a motion for an extension of time to file an opening brief and an appendix. On November 30, 2001, the Court entered an order granting the extension until December 4, 2001.

15. On December 14, 2001, Gammino filed another motion to extend the filing deadline for an opening brief and an appendix stating, *inter alia*, “Due to an oversight, counsel was unaware that such extension was granted and therefore failed to file within the extended deadline.”

16. On January 14, 2002, the Court entered an order denying the second motion for an extension to file an opening brief and appendix because the motion was not timely filed, and dismissed the appeal.

17. Pursuant to Rule 5A:19(d) of the Rules of the Supreme Court of Virginia [individual rules referred to as “Rule,” hereafter], the time for filing any brief in the Court may be altered by agreement of all counsel and with the permission of a judge of the Court. An opening brief must be filed in a criminal case within forty days after the date of the certificate of appeal issued by the clerk of the Court. The certificate of the clerk was issued in White’s appeal on October 18, 2001. Rule 5A:19(c)(1). An appendix must be filed by the appellant no later than the filing of his opening brief. Rule 5A:25.

18. White successfully pursued a writ of habeas corpus based upon the failure to file an opening brief and appendix timely. Gammino was appointed again to represent White in the appeal.

19. On May 22, 2003, the Court issued a show cause order requiring a response by June 1, 2003, why the second appeal should not be dismissed for failure to file an appendix. The Court also ordered that a replacement opening brief be filed within the same time frame.

20. Gammino filed a response to the show cause on June 2, 2003. In the response, Gammino told the Court he failed to file an appendix as required. He stated, “having originally filed an appendix and brief ... albeit late, Counsel inadvertently neglected to file the same documents again.” Gammino also stated that he mistakenly filed a petition rather

than a brief. Gammino enclosed with the response a brief and appendix.

21. The Court treated Gammino's response as a motion for an extension of time to file an appendix and granted same until June 2, 2003, thus considering the appendix properly filed.

22. The Court affirmed the judgment of the trial court by order entered October 28, 2003.

23. Gammino did not appeal White's convictions to the Virginia Supreme Court.

24. Gammino did inform White of the denial of his appeal by the Court of Appeals. White wanted Gammino to appeal to the Virginia Supreme Court and believes that Gammino did so, resulting in a second denial.

25. The Supreme Court of Virginia has no record of an appeal having been filed on behalf of White by Gammino.

26. A court-appointed attorney is required to pursue the appeal of a criminal case to the Supreme Court of Virginia unless his client does not wish to do so. *Dodson v. Director*, 233 Va. 303 (1987); *Kuzminski v. Commonwealth*, 8 Va. App. 106 (1989); *Brown v. Warden*, 238 Va. 551 (1989).

27. Gammino failed to pursue the representation competently, with reasonable diligence and promptness. He failed to keep White reasonably informed about the status of the appeal and failed to explain the case sufficiently to permit White to make informed decisions about the representation.

## II. NATURE OF MISCONDUCT

Such conduct by David Michael Gammino constitutes misconduct in violation of the following provisions of the Virginia Rules of Professional Conduct:

### RULE 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

RULE 1.3 Diligence

- (a) A lawyer shall act with reasonable diligence and promptness in representing a client.

RULE 1.4 Communication

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

VSB Docket No. 05-032-2483 [VSB/VaCtApp]:

I. FINDINGS OF FACT

28. Gammino was court-appointed to represent Eric Alexander [Alexander] in an appeal of a May 8, 2003, criminal conviction.

29. On August 8, 2003, the Court of Appeals [Court] received the trial court record. Gammino filed a notice of appeal in the Court on the same date.

30. A petition for appeal was due on September 17, 2003, forty days after the filing of the record with the Court. Rule 5A:12(a).

31. Gammino filed a petition for appeal in the Court on behalf of Alexander on September 22, 2003.

32. On September 26, 2003, the Court entered an order dismissing the appeal because neither the petition for appeal nor a motion for extension of time to file a petition for appeal had been timely filed.

33. Gammino and his office staff miscalculated the due date for the filing of the petition for appeal. The petition was filed on the date which he and his office staff had incorrectly calculated as the due date.

34. Upon receiving the bar complaint, Gammino reviewed the Alexander file and realized that the client had not been informed of the dismissal of the appeal. Gammino wrote Alexander a letter dated March 11, 2005 informing him of the dismissal and forwarding him a writ of habeas corpus to complete.

35. Gammino failed to pursue the appeal on behalf of Alexander competently and with reasonable diligence and promptness. He failed to keep Alexander reasonably informed about the status of the case. He failed to make reasonable efforts to ensure that his firm had in effect measures giving reasonable assurance that the conduct of nonlawyer assistants in his office was compatible with Gammino's professional obligations.

## II. NATURE OF MISCONDUCT

Such conduct by David Michael Gammino constitutes misconduct in violation of the following provisions of the Virginia Rules of Professional Conduct:

### RULE 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

### RULE 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

### RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

### RULE 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

I. FINDINGS OF FACT

36. On July 19, 2004, Raymond Watson [Watson] was sentenced to five years with three and one-half years suspended. Watson had entered a guilty plea conditioned on his retention of a right to appeal the denial of a motion to suppress.

37. Gammino was court-appointed to represent Watson in the appeal, having served as retained counsel in the trial court.

38. During the appeal, Watson was free on an appeal bond.

39. On July 19, 2004, Gammino filed a notice of appeal in the Circuit Court of the City of Richmond and the Virginia Court of Appeals [Court]. In the notice of appeal Gammino stated that the trial transcript will be prepared. In the accompanying certificate Gammino represented that he had ordered the trial transcript.

40. On or about October 15, 2004, Gammino received notice from the Court of the receipt of the trial record.

41. On October 19, 2004, the Court entered an order of show cause requiring a response by November 3, 2004 on the failure of Gammino to file a transcript or a statement of facts.

42. Upon his receipt of the show cause order, Gammino learned that the trial transcript was not included in the record filed with the Court.

43. Neither Gammino, nor anyone from his law firm, had ordered the trial transcript.

44. Gammino did not respond to the show cause order. In his opinion there were no questions which could have been considered without resort to the transcript.

45. On November 17, 2004, the Court dismissed the appeal due to the lack of response to the show cause order.

46. When Virginia State Bar Investigator Cam Moffatt [Moffatt] interviewed Gammino on April 26, 2005, regarding this bar complaint, he stated, *inter alia*:

a. that his secretary in July of 2004, Ms. Sadowski, was unaware that the trial transcript needed to be ordered when a notice of appeal was filed;

b. that Ms. Dawson, his office manager, was responsible for training Ms. Sadowski and he assumed that Ms. Dawson had advised Ms. Sadowski to order the transcript.

c. that he accepted responsibility for the failure to order the transcript

d. that no motion for a transcript filing extension was submitted because the transcript had never been ordered;

e. that a petition for habeas corpus relief had been filed on behalf of Watson.

47. Moffatt was unable to find any record of the filing of a petition for habeas corpus relief for Watson and she reported this to counsel for Gammino. In response, on May 6, 2005, counsel for Gammino reported that Gammino had prepared a petition and sent it to Watson for review and signature but Watson had not yet returned the signed petition.

48. According to the records of the Richmond City Jail, Watson was incarcerated on or about March 18, 2005 and was serving a one year and six month sentence on a revoked bond.

49. Gammino failed to pursue the appeal for Watson competently, with reasonable diligence and promptness. The bar alleges and Gammino denies that he knowingly made a false statement of fact to the City of Richmond Circuit Court and the Court. He failed to make reasonable efforts to ensure that his firm had measures in effect which gave reasonable assurance that the conduct of nonlawyer personnel was compatible with Gammino's professional obligations. The bar also alleges and Gammino denies that he knowingly made a false statement of material fact to the bar investigator in connection with a disciplinary matter. Gammino further states that while he may have made statements to the Court and to the bar that, upon review, were incorrect, he believed his representations were factually accurate when made.

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RULE 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

RULE 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

VSB Docket No. 05-032-2484 [VSB/VaCtApp]:

I. FINDINGS OF FACT

50. Gammino was court-appointed to represent Earnest D. Wright, Jr. [Wright] in an appeal of a May 20, 2003, criminal conviction for felony possession of cocaine, having served as retained trial counsel.

51. On August 8, 2003, the Court of Appeals [Court] received the trial court record.

52. A petition for appeal was due on September 17, 2003, forty days after the filing of the trial court record with the Court. Rule 5A:12(a).

53. Gammino filed a petition for appeal in the Court on September 22, 2003.

54. On September 26, 2003, the Court entered an order dismissing the appeal because neither the petition for appeal nor a motion for extension of time to file a petition for appeal had been timely filed. An extension of thirty days may be granted in the discretion of the Court in order to attain the ends of justice but the motion for an extension must be filed before the original deadline has passed. Rule 5A:12(a).

55. Gammino and his office staff miscalculated the due date for the filing of the petition for appeal. In his interview with Virginia State Bar Investigator Cam Moffatt, Gammino indicated that he did not know who in his office was calculating due dates during the time frame of Wright's appeal since there had been a few secretaries and legal assistants who had worked for the firm throughout the years.

56. Gammino wrote a September 29, 2003 letter to Wright which was addressed to an alias for Wright at an address which was reflected in the pre-sentence report. In the letter Gammino asked Wright to contact his office as soon as possible regarding the appeal. No explanation was given to the client in the letter regarding the dismissal of the appeal. Gammino received no response to the letter and the letter was not returned by the post office.

57. Gammino failed to pursue Wright's appeal competently and with reasonable diligence and promptness. He failed to keep Wright reasonably informed about the status of his appeal. Gammino failed to make reasonable efforts to ensure that his firm had measures in effect which gave reasonable assurance that the conduct of nonlawyer personnel was compatible with Gammino's professional obligations.

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- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

### III. PUBLIC ADMONITION WITH TERMS

Accordingly, it is the decision of the subcommittee to offer the Respondent an opportunity to comply with certain terms and conditions, compliance with which will be a predicate for the disposition of a Public Admonition with Terms of the instant cases. The terms and conditions shall be met as stated. The terms with which the Respondent must comply are as follows:

1. The Respondent has advised the bar that he intends to change his Virginia State Bar membership status from Active to Associate upon completion of several cases now outstanding and that he is not accepting new client matters. The Respondent shall change his Virginia State Bar membership status from Active to Associate upon the conclusion of his present cases but no later than June 1, 2006 and certify in writing to the Office of Bar Counsel by June 1, 2006, that he has done so.

2. The Respondent shall not change his Virginia State Bar membership status from Associate to Active, or resume the practice of law in Virginia, unless and until he has first engaged the services of a law office management consultant approved by the Virginia State Bar Office of Bar Counsel to review and make written recommendations concerning the Respondent's law practice policies, methods, systems and procedures. The Respondent shall institute and thereafter follow with consistency any and all recommendations made to him by the law office management consultant following the law office management consultant's evaluation of the Respondent's intended practice.

Upon resuming the practice of law in Virginia, the Respondent shall grant the law office management consultant access to his law practice from time to time, at the consultant's request, for purposes of ensuring that the Respondent has instituted and is complying with the law office management consultant's recommendations. The Virginia State Bar shall have access, by telephone conferences and/or written reports, to the law office management consultant's findings and recommendations, as well as the consultant's assessment of the Respondent's level of compliance with said recommendations. The Respondent shall be obligated to pay when due the consultant's fees and costs, including but not limited to the provision to the Bar of information concerning this matter. The Respondent shall notify the Office of Bar Counsel in writing when he is ready to change his Virginia State Bar membership status from Associate to Active, consistent with these terms; in said writing, the Respondent shall indicate how he has fulfilled this term as it pertains to his preparation for reentry into the practice of law in Virginia, as well as the then current name and address of the law office management consultant. The remainder of this term which pertains to the period of time starting with the Respondent's resumption of the active practice of law shall be completed no later than one year after the effective date of the change of the Respondent's Virginia State Bar membership status from Associate to Active.

3. The Respondent shall complete six (6) hours of continuing legal education in the area of appellate practice. Such hours of continuing legal education may be obtained by attendance at live presentations, video replays or on-line. The continuing legal education attendance obligation set forth in this paragraph shall not be applied toward the Mandatory Continuing Legal Education attendance requirement in Virginia or any other jurisdiction(s) in which the Respondent may be licensed to practice law. The Respondent

shall certify his compliance with this term by submitting to Deputy Bar Counsel Harry Hirsch a written certification that he has completed the term. **This term shall be fully completed by March 1, 2006.**

Upon satisfactory proof that such terms and conditions have been met, these matters will be closed. If, however, the terms and conditions are not met as stated, the Third District Committee, Section Two, shall impose a Public Reprimand.

The Clerk of the Disciplinary System shall impose costs pursuant to Paragraph 13.B.8.c.

Third District, Section Two, Subcommittee  
of the Virginia State Bar

By:   
\_\_\_\_\_  
William J. Viverette  
Chair

CERTIFICATE OF SERVICE

I certify that I have this 20<sup>th</sup> day of December, 2005, caused to be mailed by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a true and correct copy of the Subcommittee Determination (Public Admonition with Terms) to the Respondent, David Michael Gammino, at 108 East Cary Street, Richmond, VA 23219, his last known address of record with the Virginia State Bar, and by first class mail to Michael L. Rigsby, Esq., counsel for Mr. Gammino.

  
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