VIRGINIA:

BEFORE THE THIRD DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

IN THE MATTER OF
DONALD JEROME GEE

VSB Docket Nos.06-032-2891 [Pennington]
07-032-0580 [Ayres]

SUBCOMMITTEE DETERMINATION
(PUBLIC REPRIMAND WITH TERMS)

On May 15, 2009, a meeting in these matters was held before a duly convened Third District Subcommittee consisting of Coral C. Gills, Lay Member; Randall G. Johnson, Jr., Esq.; and Martin D. Wegbreit, Esq., Chair, presiding.

Pursuant to Part 6, Section IV, Paragraph 13-15.E. of the Rules of the Virginia Supreme Court, the Third District Subcommittee of the Virginia State Bar hereby serves upon the Respondent the following Public Reprimand with Terms:

1. At all times relevant hereto, the Respondent Donald Jerome Gee [Gee], was an attorney licensed to practice law in the Commonwealth of Virginia.

VSB Docket No. 06-032-2891 [Pennington]:

I. FINDINGS OF FACT

2. On or about September 8, 2000, Complainant Edward W. Pennington [Pennington] was injured in a motor vehicle accident [first accident]. As an employee of the Virginia Department of Corrections, Pennington was driving a departmental van which collided with another vehicle. The driver of the other vehicle was insured by a liability policy with an applicable coverage limit of $50,000.00.

3. Gee's representation of Pennington in the first accident began when Gee was in the law firm of McEachin & Gee, P.C. Gee continued to represent Pennington after he left the firm.

4. Pennington signed a document entitled Attorney Authorization and Agreement [agreement] with McEachin & Gee, P.C., evidencing the representation regarding the first accident. The agreement was the basis of the representation of Pennington by Gee in the first accident case. The agreement contained, *inter alia*, the following provisions:

a. "Medical Payment Benefits: ...The client understands that McEachin & Gee may charge a small administrative fee for processing medical payments benefits."

b. "Attorney Lien After Discharge: ...If McEachin & Gee is discharged after a settlement offer is received, the client agrees to a lien in favor of McEachin & Gee in the amount of 33 1/3 percent of said offer."

Such fees are unreasonable and improper.

5. According to Gee, he represented Pennington regarding the personal injury aspects of the first accident representation but he did not represent Pennington regarding any related workers' compensation claim.

6. Gee filed suit in the first accident case on August 26, 2002.

7. Pennington was involved in a second vehicle accident on November 13, 2002 [second accident].

8. Gee was aware of the existence of a workers' compensation lien as early as August 28, 2003, and thereafter he received updated information of the amount of the lien on several occasions, through 2006.

9. Gee received an offer of settlement in the first accident case of $43,000.00, at a time when Gee was late on discovery because he did not want to inform opposing counsel of the second accident.

10. In or about December of 2003, Gee informed Pennington of the offer. According to Gee, Pennington gave him reluctant permission to do, "what [Gee] thought was best" regarding the offer.

11. On or about December 4, 2003, Gee accepted the first accident case settlement offer of $43,000.00 and informed Pennington that he had done so.

12. In or about January of 2004, Gee requested a written opinion from a nurse consultant concerning which of the two accidents was the likely causation of the pain which Pennington experienced.

13. The settlement check in the first accident case was dated January 26, 2004, and made payable to Gee and his client, Edward Pennington. The check was sent to Gee by opposing counsel by letter dated January 30, 2004, along with a release and an order of agreed dismissal. In the letter, opposing counsel stated the release of all claims was "for [Pennington] to sign and return to me" and the order was for Gee to endorse and file with the court.

14. By letter dated January 27, 2004, to Ms. Pugh, the workers' compensation benefits coordinator for the state contracted claims processor, Gee, *inter alia*, informed her of the $43,000.00 settlement offer, sought a 50% reduction of the workers' compensation lien in order for Pennington to realize net proceeds that he would be willing to accept, and indicated that Gee had recommended that Pennington accept the offer but was not willing to do so because of what his net proceeds would be.

15. Gee endorsed the order of agreed dismissal and submitted it to the court for entry. The order was entered on May 14, 2004.

16. Pennington did not sign the release of all claims.

17. Gee did not provide to Pennington a written statement setting forth the outcome of the settlement in the first accident case and showing the remittance to Pennington and the method of its determination.

18. Gee deposited the settlement check into his escrow account, disbursed his attorney's fees and costs and held the remainder in the escrow account.

19. Gee failed to notify Pennington's employer of the settlement of the first accident case or seek the employer's permission for the settlement. Ms. Pugh did not learn of the settlement until April of 2006.

20. Pennington obtained counsel with respect to his workers' compensation claim some time after the occurrence of the second accident. The workers'compensation lien amounted to $70, 552.31. Thereafter, the state reduced its lien by $5,000.00 and Gee also reduced his fees by $5,000.00, which made available $10,000.00 for Pennington out of the $43,000.00 first accident case settlement proceeds.

II. NATURE OF MISCONDUCT

Such conduct by Donald Jerome Gee constitutes misconduct in violation of the following provisions o the Rules of Professional Conduct:

RULE 1.3 Diligence

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

RULE 1.5 Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(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, if apparent to the client, 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.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall state in writing the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

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.

(c) A lawyer shall:

(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

VSB Docket No. 07-032-0580 [Ayres]:

I. FINDINGS OF FACT

Ayres Matter

21. Complainant Sherman Ayres [Ayres] was injured on or about April 11, 2003, in an elevator accident at a state college medical center when the elevator suddenly dropped and then abruptly stopped [elevator accident]. Thereafter, Ayres learned that he had broken three screws which were in his neck from previous surgery; and he also had aggravated previous lower back injuries.

22. At the date of the accident, Gee was already representing Ayres regarding a prior vehicle accident. Ayres retained Gee to represent him regarding the personal injuries sustained in the elevator accident. However, a written contingent fee agreement was not entered into by Gee and Ayres in the elevator accident case.

23. Pursuant to Va. Code Section 8.01-195.6, notice of the nature of the Ayres tort claim against the Commonwealth of Virginia must have been filed with the Attorney General of Virginia within one year of the accident, i.e., April 10, 2004.

24. By letter dated July 20, 2004, to the Attorney General of Virginia, Gee provided notice of the nature of Ayres' claim.

25. According to Gee, in late 2004 and early 2005, his office was in the process of changing computer systems and a file review was performed [file review]. It was at that time that the elevator accident case was identified as needing immediate attention and he realized that he had missed the one year notice filing deadline for a tort claim against the Commonwealth of Virginia.

26. However, according to Gee, on or about September 13, 2004, Gee met with Ayres and disclosed that he had missed the April 10, 2004, tort claim notice deadline. This discussion was not entered into Gee's case notes.

27. Ayres sought counsel regarding the elevator accident case and a possible malpractice suit.

28. By letters dated February 14, 2005, Gee notified medical care providers that he no longer represented Ayres and referred them to new counsel.

29. Ayres submitted a claim to Gee's malpractice insurance carrier, which resulted in a settlement in favor of Ayres.

30. Prior to missing the tort claim notice filing deadline, Gee was experienced in the handling of tort claims against the Commonwealth of Virginia and was aware of the one year notice filing requirement.

31. According to Gee, as a result of the file review he learned that, in addition to the Ayres matter, applicable deadlines had tolled in the cases of three other clients: Client S, Client D and Client SW. The only explanation Gee has offered for these lapsed deadlines is the probability that either dates were entered incorrectly into the firm's docket system or no dates were entered, by non-lawyer staff in his office.

Client S Matter

32. On March 26, 2003, Client S signed a document entitled Attorney Authorization and Agreement [fee agreement] with The Gee Law Firm, P.C. evidencing legal representation. The fee agreement was the basis of the representation of Client S by Gee regarding a case which Gee took over from another attorney, who had previously filed suit in York County, Virginia. The agreement contained, *inter alia*, the following provisions:

a. "Medical Payment Benefits:...The client understands that The Gee Law Firm may charge a small administrative fee for processing medical payments benefits."

b. "Attorney Lien After Discharge:...If The Gee Law Firm is discharged after a settlement offer is received, the client agrees to a lien in favor of The Gee Law Firm in the amount of 33 1/3 percent of said offer."

Such fees are unreasonable and improper.

33. On or about April 28, 2003, Gee notified the medical care providers in Client S's case of his representation.

34. Gee never substituted into Client S's court case.

35. In the Fall of 2004, Gee sent his investigator to York County to review the court file. As a result, Gee learned for the first time that the case had been dismissed on July 28, 2003 for lack of activity for three years.

36. According to Gee, in the Summer of 2005, two years after the dismissal, he telephoned Client S who lived out of state and explained what had occurred and informed Client S that he could file a bar complaint and/or pursue a malpractice claim with his insurance carrier.

Client D and Client SW Matters

37. Client D and Client SW were both injured while riding in the same motor vehicle when it was struck by a school bus on or about October 17, 1997.

38. Both clients were from New York and initially obtained New York counsel regarding their accident injuries. However, in February of 1999, the New York attorney referred both cases to the firm of McEachin & Gee. The attorney in the firm who undertook the representation retired and Gee took over the cases.

39. Gee nonsuited the pending Stafford County Circuit Court cases of Client D and Client SW by orders entered July 30, 2002. The order in Client SW's case, which was endorsed by Gee, showed Client SW's name as plaintiff in the caption, but recited that Client D, by counsel, was making the motion for nonsuit.

40. On January 24, 2003, Gee filed new motions for judgment on behalf of both Client D and Client SW and specifically instructed the Clerk of Court that the cases were to be filed only.

41. Pursuant to Rule 3.3 of the Rules of Court, Part Three, in effect at the time, no judgment could be entered against a defendant if the defendant was served with process more than one year after the commencement of the action against him or her. The deadline for service upon the defendants in the cases of Client D and Client SW was January 23, 2004.

42. According to Gee, as a result of the file review he learned that the cases of Client D and SW had not been served upon the defendants within the one year required time frame.

43. By letter to Gee dated May 26, 2004, the New York attorney for both Client D and Client SW contacted Gee seeking information about the status of the two cases so he could pass that information on to the two clients, who had called him. In his letter, the New York attorney stated he could not give the two clients any information nor assure them any action was being taken on their behalf; that he had called Gee several times after receiving a message from the two clients; he also stated:

> ...I owe my clients great representation and unwavering effort

in handling their legal matters. I'm not usually questioned and put in this situation.

44. On information and belief, Gee initiated service of process of the refiled motions for judgment on the defendants in the cases of Clients D and Client SW and service was accomplished in each case on or about March 7, 2006.

45. On March 17, 2006, opposing counsel in the cases of Client D and Client SW filed a Special Appearance to Quash Service of Process, Plea in Bar and Motion to Dismiss for Lack of Jurisdiction in each case. The motions were heard on May 1, 2006 and sustained with prejudice, and each case was dismissed.

46. By letters dated June 30, 2006 to Clients D and SW, respectively, Gee informed them that each case was dismissed upon his failure to obtain service of process on the defendants within one year of the date on which both cases were refiled

47. According to Gee, sometime after the file review, Gee met Client D and Client SW and their New York attorney in New York and explained to them what had occurred, and that they could file bar complaints and/or make a claim against his malpractice insurance carrier.

48. Malpractice insurance claims were made by both clients.

II. NATURE OF MISCONDUCT

Such conduct by Donald Jerome Gee constitutes misconduct in violation of the following provisions o the Rules of Professional Conduct:

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 1.5 Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(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, if apparent to the client, 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.

RULE 1.5 Fees

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall state in writing the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

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;

Eff. Jan. 1, 2004:

RULE 5.3 Responsibilities Regarding Nonlawyer Assistants

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

(a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority 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;

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

III. PUBLIC REPRIMAND 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 Reprimand with Terms in these complaints. The terms and conditions, compliance with which is a predicate for the disposition in these complaints, shall be met by June 30, 2009. The terms with which the Respondent must comply are as follows:

1. Docket Control System and Communication Policy:

The Respondent shall institute and maintain a docket control system which shall insure that he reviews the status of all pending matters periodically, and remind him in advance of key deadlines and other obligations. The Respondent shall institute and maintain a written office policy relating to regular and informative client communication. This policy shall include provisions for providing the client with written copies of all documentation relating to the representation, engaging in regular meetings either in person or by telephone to discuss the progress of the case and to answer client inquiries. Both the docket control system and the communication policy shall be implemented immediately. The Respondent shall provide bar counsel with a detailed written description of both the docket control system and communication policy, and shall certify in writing that he is using such systems in his office.

2. Continuing Legal Education:

The Respondent shall complete six (6) hours of continuing legal education in the area of personal injury practice. Such hours of continuing legal education shall be obtained by attendance at live presentations. 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 bar counsel a written certification that he has completed the term.

3. Legal Ethics Opinions Review:

The Respondent shall read Virginia Legal Ethics Opinion 1606, any legal ethics opinions and cases cited in said opinion, and any other related Virginia legal ethics opinions cited in Michie's compendium of Legal Ethics Opinions, 2002 Replacement Volume and any supplements thereof. The Respondent shall certify his compliance with this term by submitting to bar counsel a written certification that he has completed the term.

Upon satisfactory proof that such terms and conditions have been met, these matters shall be closed. If the terms and conditions are not met by the specified date, the Third District Committee shall impose a Certificate for Sanction Determination pursuant to Part Six, Section IV, Paragraph 13-15.G. of the Rules of Court.

Pursuant to Part Six, Section IV, Paragraph 13-9.E. of the Rules of Court, the Clerk of the Disciplinary System shall assess an administrative fee.

THIRD DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

By _____
Martin D. Wegbreit
Chair

CERTIFICATE OF SERVICE

I certify that on May 28, 2009, I caused to be mailed by Certified Mail, Return Receipt Requested, a true and correct copy of the Subcommittee Determination (Public Reprimand with Terms) to Donald Jerome Gee, Esquire, Respondent, at McEachin & Gee, P.C., 4719 Nine Mile Road, Richmond, VA 23223, Respondent's last address of record with the Virginia State Bar, and by first class mail, postage prepaid to Charlotte Peoples Hodges, Esq., Respondent's Counsel, at P.O. Box 4302, Richmond, VA 23112.

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