On the Trayvon Martin Case

The Trayvon Martin case was not held in Virginia and thankfully we do not have a stand your ground law. As a lawyer who watched some of the trial, the statement of Juror B-37, and the conduct and comments of defense counsel, I would like to add my thoughts to the dialogue.

First, although I do not agree with the result, I truly respect the judicial process, the responsibility of defense counsel to provide the best possible defense, and the jury results. There are a number of things that occurred during the trial that I feel should be spoken out against.

Depicting Trayvon, an innocent teenage victim, as a black thug was racist and wrong.

Disrespecting black witnesses, especially the young woman, was racist and wrong.

Making press statements that fueled the flames of racial animosity was racist and wrong.

The Trayvon Martin case was a difficult one, but playing the race card, after the verdict, by Attorney Mark O'Mara was hateful and hurtful, and over the top.

As a person of color, I have been treated the "Negro" way, as described by President Obama, many times, and so have my three sons. It is a way of life for black men. Lawyers must accept and confront the fact that racism is still alive in America, especially in the criminal justice system, and should work to wipe it out completely, root and branch.

Clarence M. Dunnaville Jr.
Richmond

Senate Bill Provides for the Transfer of a Vehicle to a Designated Beneficiary Upon the Death of the Owner

Working with the Virginia Department of Motor Vehicles, I introduced Senate Bill 715, which allows vehicle owners to designate a beneficiary on their vehicle titles. The legislation, unanimously approved by the 2013 General Assembly, became effective July 1, 2013. I must acknowledge the contribution of Milton Babirak, of Babirak Carr PC, who has practiced in the field of estate planning for many years. His experience proved invaluable as we drafted this legislation.

The law is a vast improvement. As an attorney, I have witnessed the circumstance where a client's only asset is a motor vehicle. It is not in the best interest of the client or his or her beneficiary to require the probate of such a small estate. In some situations intestacy is not an answer either. Many clients do not want to leave their vehicles to someone who would be entitled to take it under the intestacy statutes.[1] Prior to July 1 of this year, I advised my clients that the only options in Virginia were to give the motor vehicle away during the lifetime of the owner, write a will bequeathing the vehicle, or write no will but leave instructions indicating to whom the owner would want the vehicle to go to and hope that the beneficiaries of the intestate estate, if any can be found, would agree.[2]

Fourteen other states[3] provide a transfer on death designation on motor vehicle titles. While Virginia did not have a similar provision for motor vehicles, the conveyance concept is not completely novel as Virginia law has allowed transfer on death designations for bank accounts.

Giving vehicle owners the option of designating a beneficiary on the vehicle's title is a great benefit for those who want to avoid the expense of probate or drafting a will. However, before a person can designate a beneficiary on a vehicle title in Virginia, certain conditions must be met:

- The vehicle must have one owner who is a natural person[4]
- The vehicle cannot be subject to a lien
- The vehicle cannot have co-owners
- The owner can only designate one beneficiary[5]

In addition, during the lifetime of the vehicle owner:

- The beneficiary shall have no interest in the vehicle and the signature of the beneficiary shall not be required for any transaction
- A certificate of title with a designated beneficiary shall not be issued by DMV or shall be canceled if: (1) the owner files an application for a certificate of title to remove or change the beneficiary, (2) the owner sells the vehicle and delivers the certificate of title to another person, or (3) an application for the recording of a lien or security interest has been filed with DMV for the vehicle prior to the death of the owner or filed within the time limits in § 46.2-639 (30 days)

Upon the death of the vehicle's owner, the beneficiary has 120 days to claim the vehicle by providing proof of the owner's death or he or she loses any right to claim the vehicle as a designated beneficiary. If the beneficiary does not survive the owner or does not apply for title within 120 days of the owner's death, the beneficiary or his estate shall have no right to obtain title to the vehicle under the Transfer on Death provisions.

As both an attorney and a member of the Virginia General Assembly, I am particularly proud of this legislation. It provides another option for transferring a vehicle's title upon the death of the

owner that is convenient, authoritative, and affordable. I know that it will be of great benefit to the citizens of the commonwealth.

Senator Richard H. Black
13th District

Endnotes:

1 For instance, if the decedent wished to give her unrelated caretaker her vehicle, it would be difficult to do without a conveyance instrument because the caretaker would have no intestate rights. Faced with the same anecdote, a transfer on death designation would provide the caretaker with a convenient, authoritative, and affordable conveyance of the vehicle which was legally qualified by the decedent.

2 Adding a co-owner to the title as a means to convey the vehicle free from probate and the accompanying taxes would provide the recently added co-owner with more property rights than a transfer on death designation and therefore would not provide a viable option for a client. The result of the two conveyance mechanisms would be the same; however the co-owner, as opposed to the beneficiary, would enjoy the property rights but also endure the legal liabilities throughout the lifetime of the decedent.

3 Other states with a transfer on death designation for vehicle titles: Arizona, Arkansas, California, Connecticut, Delaware, Illinois, Indiana, Kansas, Missouri, Nebraska, Nevada, Ohio, Oklahoma, and Vermont.

4 Corporations and other entities cannot be designated as a beneficiary for a number of reasons, but primarily for insurance purposes. For those individuals that would like to convey their vehicle to a charity or other non-profit organization, they should designate the vehicle in the name of one of the organizations' representatives.

5 As a means of preventing DMV customer service representatives from becoming de facto probate judges, the legislation was narrowly tailored. By limiting the requisite circumstances necessary to designate a transfer on death beneficiary, the conveyance is susceptible to the least amount of possible contention.

Letters

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Judicial Vacancies Remain a Serious Problem

by Cynthia D. Kinser, Chief Justice of the Supreme Court of Virginia

On September 16, 2013, Chief Justice Cynthia D. Kinser delivered the 2013 State of the Judiciary Address in Virginia Beach. Following are her written remarks on judicial vacancies.

Obviously, the most troubling economic pressure that the judiciary faces is judicial vacancies. You will recall that in 2010, the General Assembly included language in the budget that froze the filling of judicial vacancies as of February 15, 2010. That language remains in the budget. When the 2011 General Assembly Session convened, there were thirty-five existing and announced vacancies, and twenty-one were funded. When the 2012 General Assembly session convened, the judiciary had forty-eight existing and announced vacancies, and only thirty-four were funded. When the 2013 session convened, we had forty-nine existing and announced vacancies. Governor McDonnell funded twenty-six vacancies, fifteen in his initial budget and additional ones through his budget amendments. Ultimately, thirty-two vacancies were funded, and an additional judgeship was created in the 15th Judicial Circuit.

We all know that the only way that the judiciary has been able to survive these extraordinary vacancies across the commonwealth is through the assistance of our retired, recalled judges. Our retired, recalled judges have heard cases not only in familiar surroundings but also in distant courthouses. There are currently 177 retired, recalled trial court judges statewide, and together they presided on 8,294 days during 2012, which is more than a 21 percent increase over the 6,827 days that retired, recalled judges sat in 2009, the last full calendar year before the freeze on filling judicial vacancies took effect. The willingness of our retired, recalled judges to help the judiciary has enabled us to bridge the gap during these years of vacant judgeships. On behalf of the entire judiciary in the commonwealth, I express my heartfelt thanks for their hard work and continued dedication to the judiciary and to the commonwealth.

Also, in regard to retired judges, legislation enacted in 2013 authorizes the Office of the Executive Secretary to contract with the National Center for State Courts to study the feasibility and effect of implementing a senior judge system for the circuit and district courts. The General Assembly did not appropriate any funds to pay for the study, but we are optimistic that a grant may be available that will enable us to proceed with the study.

The Weighted Caseload Study, which is being conducted by the National Center for State Courts, has been underway for over a year, and we will have the study's report this fall. Like the Judicial Boundary Realignment Study, the Weighted Caseload Study has required the participation of all judges in completing certain surveys and keeping track of judicial duties for periods of time. I thank all of you for your timely responses. Your cooperation has been vital to the development of the end product we will receive — a comprehensive report based on empirical data and objective research.

At this time, I do not know the results of the Weighted Caseload Study. But, I do know that whatever they are, the time has arrived to fund and fill all vacant judgeships. In 2010, when the freeze on filling judicial vacancies first began, we had 402 authorized judgeships in the commonwealth. Today, in 2013, we have 385 funded judgeships, a reduction of seventeen judges. Despite the extraordinary work of our retired, recalled judges, the administration of justice has suffered. As the judicial branch, we must work with the executive and legislative branches to fund the judiciary fully, and to have the judges we need to decide cases timely and effectively. In a recent State of the Commonwealth address, the governor asked the General Assembly to find the "resolve" to fund a certain program and remarked that the funds needed would be less than one percent of the entire budget of the commonwealth. Let me remind you that the entire budget for the judicial branch is less than one percent of the commonwealth's total budget. And, even in the recent economic downturn, the judiciary produced more revenues than it expended.

How do we find that resolve? I could spend the entire time at this conference discussing that question. But, let me suggest just one thing. The judicial branch does not have a natural constituency. Sadly, many people lack a true appreciation of the crucial role the judiciary plays in the lives of individuals and businesses. So we need to build a constituency, and we need to do so on a local level. We start by educating individuals about the costs to the public and to the economy when dockets are backlogged because there are not enough judges to decide the cases. Certainly, the executive and legislative branches need to hear from judges, lawyers, and statewide bar organizations. But, they also need to hear from a parent who is waiting for a court date to obtain child support and from the owner of a local business who cannot get its case heard because criminal dockets take precedence over civil cases. So, I ask for your assistance in building a coalition with individuals on a local level to carry the message that, as Justice Anthony Kennedy stated, "A functioning legal system is part of the capitol infrastructure. It is as important as roads, bridges, schools." If justice has to be rationed because the judiciary is not adequately funded, we cannot provide an independent forum to adjudicate disputes.

Changing Law Firms or "Breaking Up Is Hard To Do"[1]: Ethical Issues When Lawyers Move Between Law Firms

by James M. McCauley, ethics counsel

This is an abstract drawn from a more detailed article. To read the entire article, go to http://www.vsb.org/docs/valawyermagazine/changing-firms-2013-10.pdf

Firms that want to stay viable in today's environment need to accept and anticipate lateral movement between firms as a common and practical reality. Before preparing to leave one law firm for another, the departing lawyer should also inform himself of applicable law other than the ethics rules, including the law of fiduciaries, property, and unfair competition.[2]

When a lawyer leaves a firm, the ethics rules and opinions tend to focus more on the rights of clients and less on the fiduciary duties owed to the other lawyers in the firm. Bar counsel generally do not investigate intra-firm squabbles over clients, fees, and other issues unless there is a clear violation of duties owed to a client or dishonest conduct associated with a lawyer's separation from a firm. From a "client-centered" ethical framework, following are some of the issues raised when a lawyer plans to "jump ship" and leave a firm to join another.

1. *Conflicts of Interest—when the lawyer that wants to leave negotiates employment with a firm that is representing an adverse party to a client the lawyer or his firm is representing in a pending or active matter*

The ABA addressed this issue in Formal Op. 96-401:

> A lawyer's pursuit of employment with a firm or party that he is opposing in a matter may materially limit his representation of his client, in violation of Model Rule 1.7(a)(2). Therefore, the lawyer must consult with his client and obtain the client's consent before that point in the discussions when such discussions are reasonably likely to materially interfere with the lawyer's professional judgment. … If client consent is not given, the lawyer may not pursue such discussions unless he is permitted to withdraw from the matter.[3]

2. *Notification and communication with the firm's clients*

Lawyers have a duty to inform or notify active clients when a lawyer that has been working on their matter intends to leave the firm. Virginia LEOs 1332 and 1506 recommend a neutral letter issued jointly by the firm and the departing lawyer to current clients on whose matters the departing lawyer has worked giving the client the options of remaining with the law firm; going with the departing lawyer; or choosing counsel other than the departing lawyer or the law firm. If the firm and departing lawyer cannot agree, the duty to notify falls on the departing lawyer.

3. *Current Clients' Right of Access to Contact Information of Departing Lawyer, Departing Lawyer's Right of Access to Current Client Contact Information and Delivery of Files*

LEO 1332 holds that the remaining lawyers may not deny the departing lawyer access to the office during normal business hours to retrieve client files and other information. The remaining lawyers may not withhold files or the departing lawyer's contact information from clients that have chosen to go with the departing lawyer.

4. *Disputes between Departing and Remaining Lawyers over Division of Fees*

Disputes between the departing lawyer and the remaining lawyer over work in progress, division of fees, and matters taken by the departing lawyer to the new firm usually fall outside the purview of the rules governing fee division between lawyers not in the same firm.

5. *Penalty Provisions that Punish the Lawyer for Withdrawing From and Competing with the Firm*

Virginia's LEOs track a leading case, *Cohen v. Lord Day & Lord*, 75 N.Y.2d 95 (1989), holding that provisions in law firm agreements that penalize the withdrawing lawyer for competing with the firm are unethical, because they impose improper restrictions on the departing lawyer's right to practice law. LEOs 1232 and 1402.

6. *Sharing Client Information with New Law Firm to Check for Conflicts*

When a lawyer moves between law firms, both the moving lawyer and the prospective new firm have a duty to detect and resolve conflicts of interest. The ABA amended MR 1.6 in August 2012, adding a new subsection to provide that "[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or

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ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client." See also ABA Formal Op. 09-455. Virginia's rules would appear to allow similar disclosures.

7. *Conflict of Interest When Lawyers Switch Firms*

An associate's prior representation of a client is not "imputed" to the lawyers in the new firm he has joined provided the "screening" procedures set out in Model Rule 1.10 are followed. This is called "non-consensual screening." Virginia's rules do not allow non-consensual screening. Conflicts created by lateral hires must be resolved either by client consent or withdrawal.

Endnotes:

1 "Breaking Up Is Hard to Do" is a song recorded by Neil Sedaka, and co-written by Sedaka and Howard Greenfield. Sedaka recorded this song twice, in 1962 and 1975, in two vastly different arrangements. The song has been covered by many recording artists and was popularized by The Carpenters and Alvin and the Chipmunks.

2 Va. LEO 1822 (2006) *citing* ABA Formal Op. 99-414 (1999).

3 ABA Standing Comm. on Ethics and Prof'l Resp. Formal Op. 96-401 (1996)(opinion syllabus).

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