Two More Potential Oops to Watch For on Appeal

by Elwood E. "Sandy" Sanders Jr.

In two recent published orders, the Supreme Court of Virginia has underscored the critical importance of diligence at both the trial court and in the Court of Appeals.

In the first case, *Alondo Davis v. Commonwealth*, Record No. 102420 (November 4, 2011), the Supreme Court makes clear what many have suspected all along and that I have spoken about at local and specialty bar seminars: If you are appealing from the Court of Appeals to the Supreme Court of Virginia, you must assign error to the Court of Appeals, not to the trial court. The Court is clear:

"Accordingly, because Davis's sole assignment of error in this appeal does not address any finding or ruling of the Court of Appeals, the appeal is **dismissed**." Slip Opinion, p. 2. (Emphasis added).

It is a "new rules" error to appeal from the Court of Appeals to the Supreme Court without alleging error to the decision of the Court of Appeals. The Court raised its own jurisdictional bar to limit the language of the assignment of error: "…the failure to comply with this requirement deprives this Court of active jurisdiction to consider the appeal." *Id.*

An assignment of error should generally cite the trial court's error, as in: "The Court of Appeals erred when it upheld the trial court's holding denying suppression of evidence for (whatever reason)." But procedural bars can cause new issues as the *McDowell* case shows. The effect of the holding in both *Davis* and *McDowell* requires the procedural bar (not just contemporaneous objection but ANY procedural bar) to be raised as a separate assignment of error if the Court of Appeals applied it to bar review. You must track the holding(s) of the Court of Appeals exactly in your assignment of error or risk procedural default. Even if the Court of Appeals reaches the merits or does not even raise the procedural bar, you are not safe from further review, as the *McDowell* case recognizes.

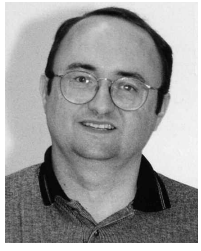
In *Wayne R. McDowell, II v. Commonwealth of Virginia*, Record No. 102478 (November 4, 2011), the Supreme Court held that failure to preserve the trial court's error can be raised at the Supreme Court, even if the Court of Appeals reached the merits and did not discuss the contemporaneous objection rule at all.

McDowell is a "motion to strike" case, and it underscores the need to renew the motion to strike if the defendant introduces his or her own evidence and to recall that the standard of review changes if the defendant puts on evidence.

The Court of Appeals decided the case on its merits and affirmed the trial court's denial of the motion to strike. The Supreme Court held and perhaps raised the waiver rule as one that must be resolved before an appellate court in Virginia can reach the merits: "…although the Court of Appeals addressed this issue in its opinion, this issue also was **not properly before** the Court of Appeals." Slip Opinion, p. 4 (emphasis added).

This may also be a fruitful area for cross-error if you are being appealed from the Court of Appeals and you believe the rule barred determination. It seems that even a finding of good cause shown or ends of justice by the Court of Appeals is reviewable by the Court.

Preservation of error at trial is now essential to protect your win at the Court of Appeals. Rule 5A:18 cannot be ignored if it arises or arguably arises in any appeal involving both Virginia appellate courts.



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Conference Goes Big on Diversity

by Clarence M. Dunnaville Jr.

Given the globalization of the legal profession, it is clear that diversity is increasingly critical. As lawyers are called upon to play ever growing roles in leadership and counseling, it is essential that men and women, rich and poor, straight and gay, and people of all ethnic backgrounds be involved. Although the bar and bench are more diverse than ever, it is clear that much more work needs to be done. The questions, then, are what impediments exist to making our profession truly reflective of our diverse and global society and what can be done to eliminate them.

Manuel A. Capsalis, president of the Virginia State Bar in 2008–09, appointed a task forced to examine this issue and the Diversity Conference was established as the result. One sure sign that concerns about diversity are important is that many corporate clients send periodic questionnaires to their retained law firms requiring that the firms report on their diversity. Those clients insist that their law firms reflect their social values. The Diversity Conference in partnership with the University of Virginia School of Law, including its Center for the Study of Race, the Asian Pacific American Law Students Association, the Student Legal Forum, and the Black Law Students Association, held a three-day conference at the U.Va. School of Law on the subject of increasing diversity on November 10, 11, and 12, 2011.

Because of the wide range of concerns addressed during the discussion, I will report on the conference in two articles. In this first article I will discuss the hurdles that need to be overcome prior to being licensed as an attorney. In the second installment, I will report on discussions involving problems encountered after bar admission.

In the view of many, the nation is now in a post-racial era. These people assert that the election of an African American president is clear evidence that there are no impediments to success in our society including in the legal profession, and that a diversity conference in the State Bar was ill-conceived. To conclude this, it is necessary to ignore the facts.

Full diversity in the profession would require that all minorities be represented in the legal profession in approximately the same proportion as their populations. This is not foreseeable. However, it is possible and desirable that all groups be represented in the profession. For example, the Supreme Court of Virginia is perhaps the most diverse in the nation, but in some parts of the state there is no representation of minorities in the bar or on the bench. Moreover, the Hispanic and Asian American communities, while comprising a substantial part of our population, have almost no representation on the bench. Further, there are few African American, Asian or Hispanic lawyers in the pipeline preparing for future leadership in the bar or promotion to the bench. Unless we get more of this underrepresented population in the pipeline, there is little chance of improvement. There are a number of outstanding lawyers from minority communities serving on the Virginia State Bar Council. However, these council members have generally been appointed, not elected, and with few exceptions do not have leadership roles. The current leaders of the bar are mindful of this and are working to effect change, but it will take time. Law firms are also working to effect change, but it takes years to develop lawyers and promote them to leadership positions within the firms.

Thirty-five years after *Bakke* was decided, there remains such a concern with diversity that nearly every law firm has a separate organization dedicated to making the firm inclusive of all segments of society.

Justice Cleo Powell, a 1982 graduate of the U.Va. law school, set the tone in an inspiring keynote address to the conference. She focused on perhaps the primary challenge to increasing diversity in the profession: filling the pipeline with capable young people who have the desire and determination to enter law and are willing to work hard to achieve their goals.

Justice Powell drew on her background, as the great granddaughter of a slave from Southside, Brunswick County. She related how she was inspired as a girl of 13 by a visit to the office of the late Civil Rights giant Samuel W. Tucker, and how that encounter challenged her and prompted her to study law. She said that her favorite audiences are elementary and junior high school students, and that she seeks to reach children early in their lives and always encourages them to have a dream and believe that they can succeed.

Justice Powell mentors young people. Notwithstanding her busy schedule, she coordinated a Rule of Law program at the Martin Luther King Middle School in Richmond last year. She is planning to coordinate several Rule of Law programs during this academic year.

The Friday program began with a presentation by Shawn Chen, of Cleary Gottleib Steen & Hamilton LLP. Chen spoke of the value added by diversity. He gave three measures of the value of diversity: a business case, a judgment case, and a community case. Chen said that the business case for diversity involves the preference of clients in a global economy that its lawyers come from diverse segments of society and share their values. He related that clients send out questionnaires seeking infor-

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Erica Moeser, president of the National Conference of Bar Examiners, and Alex M. Johnson, of the University of Virginia Law School, participated in a panel discussion on whether elimination of the Law School Admission Test would impede diversity in the profession.

Justice Cleo Powell

mation on the composition of the firms, and that they will give their business to those who reflect their values.

Chen said that the law is not black-and-white and is subject to many different types of judgment. Lawyers must sift through facts, exercise judgment, and balance risks. He said that studies show that people working in groups come to better judgments that lead to better results. People with different cultural backgrounds bring different experiences to solving problems.

The community argument results from the need of the various diverse communities to have legal representation. This is particularly helpful to people coming from different cultures. It enables them to have lawyers from their own cultures to help them understand what the law requires.

The second presentation on Friday focused on whether elimination of the Law School Admission Test would impede diversity in the profession. The panel members were Alex M. Johnson, U.VA. Professor of Law; Daniel R. Ortiz, also a U.VA., law professor and immediate past president of the Law School Admissions Council; Erica Moeser, president of the National Conference of Bar Examiners; and Peter J. Pashley, principal research scientist and director of testing and research at the Law School Admission Council.

Photo credit: Tom Cogill

Among the participants in the conference on increasing diversity, held at the University of Virginia November 10–12, were (left to right) U.Va Professor Daniel R. Ortiz; U.Va. Professor Mildred Robinson; Kim Keenan, general counsel for the National Association of Colored People; and U.Va. Professor Alex M. Johnson.

It was the view of some that abolishing the LSATs could lead some law schools to make admission decisions based on connections and other non-objective means, which could have an adverse effect on diversification

W. David Harless, president elect of the State Bar, was the lunch speaker. He provided an inspiring address, recalling his origins, from the most southwestern part of the state, and emphasized the need for economic and geographic diversity.

The afternoon session began with the question of whether the law school experience is rigged against students of color. The panel included Associate Dean Okianer Christian Dark of Howard University School of Law; Professor A. Benjamin Spencer of Washington and Lee School of Law; Professor Johnson; and Christopher

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Professor A. Benjamin Spencer of Washington and Lee School of Law; Professor Johnson; and Christopher Warbush, a U.Va. third-year law student and president of the Student Legal Forum. The conferees examined some fundamental concepts relating to the training of lawyers and their mission to society.

Dean Dark quoted the late Dean Charles Hamilton Houston, of Howard, who often said that a "lawyer is either a social engineer or a parasite on society." Houston was responsible for training the lawyers who brought down segregation and changed America, through the Rule of Law. Justice Thurgood Marshall and Richmond's Oliver W. Hill were among the graduates of Houston's first class after he was named dean. They, along with Howard law school graduates who followed them, including Richmond's Spottswood W. Robinson III, were architects and implementers of the strategy in overturning the racial segregation laws resulting from *Plessy v. Ferguson*, which culminated in *Brown v. Board of Education*.

The conference included a discussion of the way law is taught in the nation's law schools, and whether it is time to change the nineteenth century Socratic teaching method established by Christopher Columbus Langdell of Harvard University more than 140 years ago. There appeared to be substantial support within the conference for moving from the Langdell method. The new Washington and Lee model in which the third year of law school is completely clinical received many favorable comments.

In 2007 the Carnegie Foundation report on the preparation for the study of law related the need for a more clinical approach to law school training. I reviewed the Carnegie Foundation report at length in the December 2009 *Virginia Lawyer* and suggested that there is a need for law schools to develop practical skills "through modeling, habituation, experiment and reflection" as recommended by Carnegie.

Another discussion encompassed the need for a better support system for students of color, for law schools to look at law journal competitions, and for them to review the ways they elevate and evaluate students. For example, some said there is a need for law professors to be more interactive with all students, and serve as mentors.

Overall, the dialogue in this session was interactive, thoughtful and perhaps groundbreaking. The Langdell method for training of all lawyers — including those of color — should be seriously reviewed and more methods used to make the law school experience for students of color more meaningful and successful. A better development of students of different cultural backgrounds is clearly desirable, the panelists concluded.

The final session on Friday afternoon focused on the bar exam. Professors Johnson and Ortiz and Moeser were joined by W. Scott Street III, of the Virginia Board of Bar Examiners. Discussions revolved around the differences in the "cut scores" among the states and whether the disparate score requirements of the respective states for bar passage has an adverse effect on minority group students.

Some participants said that the bar exam is needed to protect the public and that it provides some assurance that the people admitted to the bar are qualified. Others said that protecting the public is not the responsibility of the bar exam. Rather, it is the responsibility of the law schools to maintain high standards and to award law degrees only to those who are fully qualified and that the state bars are responsible for requiring continuing legal education and overseeing lawyers' honesty and ethics.

The desirability of a "portfolio requirement" was discussed. It would require all applicants for bar admission to assemble a portfolio during law school of sample writings and evidence of preparedness. Delaware has such a portfolio requirement.

Whether clinical experience during law school effects bar scores was yet another topic: Washington and Lee, which has initiated a requirement for clinical experience, had seen an increase in its first-time passage rate.

The conference, while focusing on the need for diversity within the profession, and the impediments to students of color and other minorities, focused on filling the pipeline and problems facing the law school community, and offered insights into how to improve diversity. The second day, which dealt with strategies and programs, and practices to enhance and strengthen diversity after bar admission, will be discussed in the next edition of *Virginia Lawyer*.

Clarence M. Dunnaville Jr. of Richmond has worked in civil rights matters throughout his career, most recently was a member of the Virginia State Bar Diversity Task Force and head of the foundation that preserves the boyhood home of Oliver W. Hill Sr. in Roanoke. He is the recipient of the 2009 Lewis F. Powell Jr. Pro Bono Award from the VSB Special Committee on Access to Legal Services. Dunnaville has a bachelor's degree from Morgan State University and a law degree from St. John's University.