Docket Call

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The newsletter of the Young Lawyers Conference of the Virginia State Bar

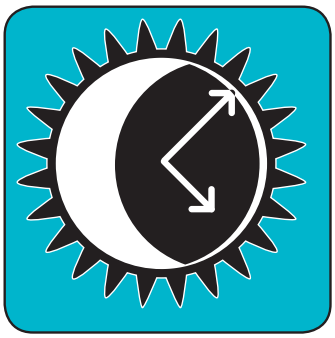
In this issue:

A Day in the Life of a Domestic Relations Attorney

Colleen M. Haddow

Every morning when I get into my office, I make a list of tasks that need to be accomplished that day and usually about six solid working hours later, most of the list has gone untouched and there are about ten things added to it…Welcome to a day in the life of a domestic relations practitioner.

One of the things I love most about my job is the unpredictability that goes along with it. While I might have an agenda for the day, my clients' needs could very well dictate a completely different one. I don't work for myself or even the partners at my law firm; I work for the clients of the firm. I work on a daily basis to try and meet their needs, even if they didn't fall on my own daily "to do" list.



I try to get in the office by 8:00 a.m. each day, some days I am earlier, some days I am later. I can't predict when I will leave the office each evening because it is wholly contingent on what happens in the office that day and clients' needs. I might come in one day ready to draft a property settlement agreement and by 3:00 p.m., I have instead dealt with a visitation issue that needed immediate attention, taken several client telephone calls, drafted a motion to resolve an issue that came up in a case that morning, and by chance happened to catch one of my expert witnesses during the only time he could talk to me about a case. So that property settlement agreement that the client needed by the next day? Well, it is still going to be completed; it might just be a late night.

One of the greatest things about being a domestic relations attorney is dealing directly with people during very trying times in their lives. I am directly involved in helping people find solutions for difficult circumstances in their lives, whether they involve children, money, property or enforcement of court orders. It is always important to remember that my clients are not a corporation or an entity that clocks out at 5:00 p.m.; they are the direct recipients of my services and the ones directly paying their hard-earned money for my services. I never take them for granted and work every day to serve them the best I can.

Another nearly daily aspect of my practice is being highly involved in all phases of litigation, which, as many of you know, is a constant process with sometimes numerous tasks that must occur at once. I spend a large amount of my time drafting pleadings and discovery, preparing for and taking depositions, participating in mediations, drafting settlement offers, and taking cases to trial, whether it is a thirty-minute motion on a Friday or a multi-day custody hearing. While it is sometimes a tricky balancing act, things always seem to get done, and at the end of each day it is easy to smile and look forward to the next.

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Family Law Corner

Andrew R. Tank

Will the Court Kick Him Out?

Your client and her husband are separated but living under the same roof. They intend to divorce, but have been trying to effect an in-house separation for financial reasons and for the benefit of their children. But lately it is not working. The parties fight constantly and the situation in the home is intolerable for everybody. According to your client, her husband is acting "crazy" and everything that has gone wrong is his fault. She has behaved perfectly and wants you to convince the judge to kick her husband out of the house.

You explain to your client that the way to get her husband out of the house is to file a *Pendente Lite* Motion for Exclusive Use. That part was easy, but would your motion succeed? Case law on exclusive use is sparse, but there is enough to conclude that a judge can grant a spouse exclusive use when the parties live together, and to give some guidance as to what factors a judge will consider.

Because of Virginia's public policy favoring marriage (and disfavoring separation), courts are disinclined to award exclusive use when spouses are living together in relative peace.[1] *Frazier v. Frazier*[2] provides a good example of a case where the moving party overcame the state's public policy. In support of its decision to grant the wife's motion for exclusive use, the court in *Frazier* opined that the parties could not continue to live together because they did not "communicate without anger, and they expose the children at all times of day and night to inappropriate conversations, arguments, berating, and even physical altercations." Another important factor in the court's decision was that the wife was granted temporary custody of the children, and the court expressed that the children should remain in the marital home "if otherwise proper" during the pendency of the litigation.

So what does this mean for your client? First of all, you should tell her that there will be no guarantee of success regardless of how "crazy" her husband has been acting. But if the level of conflict in the home is high enough and the children are frequently exposed to the marital discord, she has a decent chance of success. If custody has not been established, you should request that your client be awarded primary custody as part of your motion (if permitted in your jurisdiction). If her husband has custody, she should either do her best to make it work in the home with her husband, or find somewhere else to live.

1.) *See McEwen v. McEwen*, 60 Va. Cir. 401 (Henrico Cir. Ct. 2002) (court cites Virginia's public policy favoring marriage and denied both parties' motions for exclusive use, finding that "(t)here is just hostility," and no evidence of abuse or misconduct by either spouse).

2.) 60 Va. Cir. 115 (Loudon Cir. Ct. 2002). *See also Crute v. Crute*, 12 Va. Cir. 190 (Henrico Cir. Ct. 1988).

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Make a Difference. Volunteer.

The YLC Immigrant Outreach Committee is now recruiting volunteers to help organize a number of projects, including CLEs on the Immigration Consequences of Criminal Convictions, Immigration Hot Topics and Red Flags for General Practitioners, and Immigration Options for Victims of Domestic Violence. The time commitment is not large, but we do need volunteers who would like to actively participate. For more information or to sign up, please contact Emily Sumner at esumner@challaw.com or Hyojin Bae at HBae@berrylegal.com.

President's Message

Carson H. Sullivan

If you have been reading (or skimming, as the case may be) my columns so far this year, you probably have picked up on a recurring theme – join us, get involved, do more than just your job. Of course I am not going to deviate far from my theme for this column, but I thought that instead of writing another article that sounds like a pep talk, I would ask all of you to do three things. I realize that you are probably raising your eyebrow at the prospect of being given "assignments" in this fashion, but humor me and read on. These are easy, and will not take much of your time at all.

Number 1: This is by far the easiest task on the list. Log on to your Facebook account (okay, I realize not everyone has one, but most of us do these days) and join our group. You can find us at "Young Lawyers Conference of the Virginia State Bar." Admittedly, you will not see too much there because our page is relatively new; BUT, Facebook is a great way to keep up with us and our events, and we are working to maximize the potential there. Do it as a favor to me – we only have 73 members at the time I am writing this, and that is way too low!

Number 2: In the most recent edition of the *Virginia Lawyer* magazine, I put the call out for nominations for the YLC's R. Edwin Burnette, Jr. Young Lawyer of the Year Award. We present this award at the Virginia State Bar Annual Meeting to an outstanding young lawyer who has demonstrated exemplary service to the YLC, the legal profession, and the community. Award recipients are individuals who go "above and beyond." They give much of their time to helping others through pro bono and community service. They act at all times with integrity and honor, and they have distinguished themselves in their law practices and in their communities through their leadership activities. Task number 2 is to think about whether you know a young lawyer who fits this bill. If you do, let us know. Send your nominations, with a brief written summary, to our immediate past president Lesley Pate Marlin at lpmarlin@venable.com. The nominations deadline is April 1, 2011.

Your YLC To-Do List

Number 3: Our Circuit Representatives and Program Chairs have heard this before, but I am going to start lobbying early. Task number 3 is also very easy – save a date for the Virginia State Bar Annual Meeting. Pull out your calendar and mark June 16-19, 2011 with an X, or block it off in Outlook. You do not have to commit now, just save the date. The Virginia State Bar Annual Meeting is a great event (networking, CLE credit, sun and sand), and the more young lawyers there, the better. The YLC will have our luncheon on Friday, June 17th, and our new President's reception that evening. We are also sponsoring this year's showcase CLE. I am sure I will write more about all the reasons you should attend the Annual Meeting in our Spring newsletter, but for now, take my word for it — you should be there.

That does it. These are three simple things to do on a rainy spring afternoon. As always, if you are interested in getting involved with the YLC, please e-mail me, or contact our membership chair, Nathan Olson, at (703) 934-1480 or nolson@cgglawyers.com. All of our programs are listed on our website (http://www.vayounglawyers.com), and I hope you will take a look if you have not already done so.

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Free Mental Health Law CLE

On Friday, May 27th from 10 a.m. to 1 p.m. the Mental Health Law Committee will be hosting a free CLE (including one hour of ethics) on the campus of the George Mason University School of Law in Arlington regarding recent developments in mental health law. Learn about recent developments in Mental Health Law in Virginia with an emphasis on involuntary civil commitment, why these developments affect lawyers in every area of practice, and why every lawyer needs to be educated on these issues. **For more information or to register, please contact one of the Committee's co-chairs, Lara Jacobs at jacobs.lara@gmail.com or Ron Page at rpage@rpagelaw.com, or the Committee's Board liaison, Nathan Veldhuis, at nathan.veldhuis@allenandallen.com.**

Bankruptcy Bullets

Martha E. Hulley

Learning the Lingo

Welcome to the latest installment of Bankruptcy Bullets, a quick-reference guide intended to assist attorneys in navigating the sometimes intimidating and often confusing arena of bankruptcy law. This article provides some elementary explanations for words unique to the bankruptcy process. Remember that what is presented here is merely the most basic of descriptions.

- DEBTOR: In plainest terms, the debtor is the individual or entity who has filed for protection under the Bankruptcy Code. Whether or not a debtor qualifies to be a debtor is set forth in 11 U.S.C. § 109 of the Bankruptcy Code.
- CO-DEBTOR: The term "co-debtor" can have one of two meanings. Often when married individuals file together, the spouse is referred to as a "Co-Debtor" or more often a "Joint Debtor." However, a Co-Debtor can also refer to an individual or entity that is not in bankruptcy but shares a debt obligation with a bankruptcy debtor. This concept is especially important in Chapter 13 bankruptcy cases. *See*, for example, 11 U.S.C. § 1301.
- BANKRUPTCY ESTATE: The concept requires some abstract thinking for lawyers. Similar to the estates of deceased individuals, the bankruptcy estate is not created until the day the bankruptcy petition is filed. The bankruptcy estate consists of all legal or equitable interests of the debtor in existence at the time the bankruptcy petition is filed. This also applies to potential lawsuits the debtor may file, and property of the debtor being held by another. What constitutes property of the estate is enumerated in 11 U.S.C. § 541.[1]
- TRUSTEE: Regardless of the chapter under which a bankruptcy case is filed, there is always a bankruptcy trustee involved in administering a bankruptcy estate. The United States Trustee is charged with general oversight of the bankruptcy system in order to prevent fraud or abuse. A Chapter 7, Chapter 12 or Chapter 13 trustee is appointed once a case under the respective chapter is filed. These trustees are charged with marshalling the assets of the debtor and maximizing recovery for the creditors of the debtor. This may include filing actions against creditors or the debtor to recover property of the bankruptcy estate. As you may recall, a debtor usually remains in possession of his assets in a Chapter 11 case, however, Chapter 11 trustees may be appointed in the case of fraud or incompetence (among other things) of the debtor-in-possession.[2]
- PETITION: The bankruptcy petition is the document whose filing initiates the bankruptcy case. The moment that the petition is filed, the automatic stay (discussed below) is in effect and the bankruptcy estate is created. Petitions may be voluntarily filed by a debtor, or a debtor may be subject to the involuntary filing of a petition by its creditors.[3] The bankruptcy petition itself is a three-page form, which states the name and address of the debtor, and lists any prior or related bankruptcy case filings. The petition will identify the chapter under which the case is filed, the nature of the business and debts of the debtor, an initial estimate of whether funds will be available to pay creditors, and a general estimate of current assets and liabilities of the debtor.[4]
- SCHEDULES: The schedules are often filed simultaneously with the debtor's bankruptcy petition. These documents provide a comprehensive and detailed report of the assets and liabilities of the debtor. Each schedule corresponds to a particular type of asset or debt, such as real property, personal property, creditors holding secured claims against the debtor, and creditors holding general unsecured claims against the debtor.
- STATEMENT OF FINANCIAL AFFAIRS: Like the schedules, the Statement of Financial Affairs (sometimes informally referred to as the "Sofa"), is often simultaneously filed with the bankruptcy petition. The statement of financial affairs provides a comprehensive financial review of the debtor's circumstances including annual income for the prior three years, a list of pending actions against the debtor, and the nature, location and names of the business, among other things. Both the schedules and the statement of financial affairs are user-friendly and are a wealth of information for creditors.
- AUTOMATIC STAY: The automatic stay is an injunction that automatically stops all collection activity against a debtor at the moment a bankruptcy petition is filed. This means that pending lawsuits against the debtor are automatically stayed, collection agents are not permitted to collect debts, foreclosures are stopped, new lawsuits may not be filed, and liens may not be filed or enforced against the debtor. Although some specific actions are not subject to the stay, the applicability of the automatic stay is construed broadly and creditors who are notified of a bankruptcy filing should adjust their actions accordingly.[5]

1.) For Chapter 13 cases, practitioners should also consult 11 U.S.C. § 1306. For Chapter 12 cases, consult 11 U.S.C. § 1207. For Chapter 11 cases, consult 11 U.S.C. § 1115.

2.) Appointment of a Chapter 11 trustee is discussed in 11 U.S.C. § 1104.

3.) Requirements for filing an involuntary bankruptcy petition against a debtor are set forth in 11 U.S.C. § 303.

(Bankruptcy Bullets continued on page 5)

Criminal Corner

James S. Abrenio

Expungement Law

A mastery of expungement law is essential for any criminal defense attorney. After all, virtually all clients will ask: "Can I get this charge expunged?"

In Virginia, eligibility for expungement arises when: 1) the charge was dropped, or nolle prossed, by the Commonwealth; 2) the charge resulted in an acquittal before a judge or jury; or 3) the charge was "otherwise dismissed." *Va. Code Ann.* § 19.2-392.2 (2010).[1]

With regard to a charge "otherwise dismissed," the Virginia Supreme Court has opined that the client must be factually "innocent" of the charge. *Brown v. Commonwealth*, 278 Va. 92, 677 S.E.2d 220 (2009). Innocence has been narrowed to charges dismissed absent a finding of facts sufficient to establish the client's guilt. *Id.* As such, cases dismissed under first offender statutes or suspended imposition of sentences will not suffice. *Gregg v. Commonwealth*, 227 Va. 504, 316 S.E.2d 741 (1984). Seemingly, however, the "innocence" analysis contradicts the express language of the expungement statute as charges dismissed by accord and satisfaction qualify for expungement. *Va. Code Ann.* § 19.2-392.2 (A)(2). By entering an accord and satisfaction, is not an accused implicitly admitting guilt and paying off her victim to obtain a dismissal? The Virginia Supreme Court has held otherwise. *See Commonwealth v. Jackson*, 255 Va. 552, 449 S.E. 2D 276 (1998).

If eligible for expungement, a petition for expungement must be filed with the Circuit Court in the jurisdiction from which the charge originated asserting the required identifying information of the individual seeking expungement and the charge for which expungement is sought. A misdemeanor offense is presumptively ripe for expungement and the Commonwealth bears the burden of establishing why the expungement should be denied. For felonies, an individual seeking an expungement must affirmatively demonstrate "manifest injustice" to receive an expungement. *Va. Code Ann.* § 19.2–392.2(F).

The nuances of Virginia expungement law merit further review. First, the expungement statute generally makes it more difficult for those charged with felonies to obtain an expungement. This rule is counter-intuitive since felony charges will inherently cause more harm if not expunged.

Further, in requiring an individual to demonstrate "manifest injustice," the legislature failed to define this phrase. The statute seeks to protect individuals from harm to their credit, education, and employment. *Va. Code Ann.* § 19.2–391.1. Does that mean that a person seeking expungement must affirmatively show loss of a job to demonstrate manifest injustice? According to a recent Fairfax County Circuit Court decision, that may very well be the case. *Gomez v. Commonwealth*, 2010 Va. Cir. LEXIS 46 (Fairfax County Cir. Ct. April 14, 2010) (petitioner's subjective belief that his criminal record will cause difficulty obtaining employment does not constitute manifest injustice).

Not only do pitfalls exist with the eligibility and filing of an expungement, individuals often encounter difficulties with the physical expungement of records once the expungement is authorized by the courts. Clients report that expunged records continue to be maintained on private internet websites since a final order of expungement entered by a Virginia circuit court acts only to seal Virginia police and court records. *See Va. Code Ann.* § 19.2-392.2. Therefore, clients have little recourse to seal these "web records." As such, the question arises whether an expungement truly erases all record of an individual's arrest and prosecution.

The utility of an expungement remains an important tool for the criminal practitioner. Clients should be informed that if prospective employers or landlords gain knowledge of an expunged charge, they may truthfully state that the charge was dismissed and expunged by a circuit court judge.

1.) In addition to expungement by petition to the Circuit Court, Virginia law also provides for request and receipt of a pardon from the Governor of Virginia. This process is not covered in this article.

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(Bankruptcy Bullets continued from page 4)

4.) Official forms for the Petition, Schedules, Statement of Financial Affairs and other documents can be found online at http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx.

5.) For further information on the applicability of the automatic stay, see 11 U.S.C. § 362.

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Ethics Corner

Nathan J.D. Veldhuis

Mental Health Impairments and the Law: Ethical Considerations for Every Practitioner

The intersection of mental illness and the law has risen to the forefront of contemporary consideration regarding public safety and individual liberties in the wake of recent tragedies suchas the shootings in Tucson, Arizona in January and at Virginia Tech in 2007. In popular culture, the notion of the "criminally insane" has been ubiquitous for as long as one can remember, conveyed in movies, television programs, plays and literature. From a public perspective, general notions of the relationship between mental illness and the law appear most commonly associated with the criminal law—viz., "the insanity defense," competency to stand trial, sadistic crimes motivated by mental illness, the idea of "profiling" those persons who commit such acts, and the like.

However, as the Young Lawyers Conference Mental Health Law Committee (hereinafter, "YLC MHLC") explored in its recent CLE in October, mental health considerations are not confined to the criminal law or exclusively to the bizarre, extreme, or horrific; indeed, they touch every area of practice in any number of ways. To be sure, there is not a single "test" which is (or could be) applied by mental health professionals or courts to determine whether a person is "sane" or "insane" for any and all purposes. In fact, mental health impairments present in a multitude of ways and in any number of circumstances. For example, you could have a client who suffers from dementia who has hired you to draft her will. You could represent the child who is seeking services through the local school system on the basis that he suffers from ADHD. You might represent a sister who believes her brother should be involuntarily civilly committed to a state mental health facility because his personality disorder has led to what she believes is risky behavior.

Of course every lawyer in the Commonwealth of Virginia is required to adhere to the Rules of Professional Conduct promulgated by the Virginia State Bar and the Legal Ethics Opinions (hereinafter, "LEO's") issued by the Virginia State Bar Standing Committee on Legal Ethics. What follows is a very brief overview of one of the central Rules governing the professional ethics of dealing with a client with potential impairments.

Rule 1.14 deals with clients with impairment(s), including diminished capacity to accomplish certain tasks or objectives. Consideration of this Rule reveals an important distinction between the concepts of "competence" and "capacity." For example, the fact that someone is adjudicated competent to stand trial does not mean that s/he does not have diminished capacity. *See* LEO 1816 ("The facts state that a forensic psychologist evaluated the client and concluded that he is competent to stand trial. The committee suggests that the evaluation's conclusion does not necessarily remove this attorney and client from the application of Rule 1.14.")

When a client's capacity is diminished, an attorney is required, as far as is reasonably possible, to maintain a normal, professional relationship with the client. Rule 1.14(a). Furthermore, when a client's mental health impairment diminishes his capacity regarding a particular matter such that he cannot act in his own interest, and this inability puts him at risk of significant physical or financial harm, the attorney may take reasonably protective actions. Rule 1.14(b). Note that the Rule provides no affirmative duty to take any protective action.

What protective actions may be taken? The provisions included in Rule 1.14(b) are not exhaustive, but include the following:

- Conferring with those who have the ability to protect the client (e.g., medical professionals, parents or guardians, etc).
- Seeking appointment of a guardian, conservator, or guardian ad litem. Note that if the client does not already have a guardian or legal representative, the lawyer must often act as the client's de facto guardian. (*See* comment [2] of Rule 1.14).

By no means are these the only considerations lawyers must undertake in dealing with clients with mental health impairments; rather, these are presented here to help demonstrate the importance of all lawyers' understanding that mental health touches their area of practice. For more information and deeper discussion of these and many other similar issues, please register for the forthcoming CLE to be put on by the YLC MHLC in May.

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Free Mental Health Law CLE
Friday, May 27, 2011
10 a.m. to 1 p.m.
See page 3 for more details.