



COMMONWEALTH of VIRGINIA

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October 21, 2008

The Honorable Charles E. Dorsey
Chief Judge Twenty-Third Judicial Circuit
P.O. Box 211
Roanoke, Virginia 24002-0211

Dear Judge Dorsey:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You ask whether Rule 1:5 of Rules of the Supreme Court of Virginia (the “Rules”), regarding withdrawal of counsel, applies to a Commonwealth’s attorney in a civil or criminal proceeding. You also ask whether counsel of record must endorse an order to allow the Commonwealth’s attorney to withdraw and whether the Commonwealth’s attorney must give reasonable notice about the presentment of such order. Finally, you ask whether a Commonwealth’s attorney must obtain leave from the court to withdraw as counsel when he chooses not to prosecute a misdemeanor conviction that was appealed from general district court.¹

Response

Where a Commonwealth’s attorney has become “counsel of record” by making an appearance in a particular court, whether in civil or criminal proceedings, it is my opinion that Rules 1:5 and 1:13 of the Rules of the Supreme Court of Virginia apply. It is my opinion that a Commonwealth’s attorney is not required to seek leave from the circuit court to withdraw from an appeal of a misdemeanor conviction from general district court, if he has not yet made an appearance in that *de novo* proceeding. Finally, it is my opinion that although Rule 1:13 applies to Commonwealth’s attorneys regarding notice and endorsement of orders, courts have broad discretion to dispense with endorsements.

Applicable Law and Discussion

You indicate that your questions arise based on decisions of a Commonwealth’s attorney in your circuit not to prosecute certain misdemeanor cases appealed from general district court to circuit court. You relate that it is the practice of your court to treat counsel of record in a general district court proceeding as *ipso facto* counsel of record in a circuit court proceeding. For example, when a defendant appeals his conviction from the general district court under §§ 16.1-132 and 16.1-136, you ask whether that attorney must seek leave to withdraw as counsel in accordance with Rules 1:5 and 1:13.

¹You also seek guidance regarding contact between a probation officer and the court. It is my opinion that such question should be addressed by the Judicial Ethics Advisory Committee.

Part One of the Rules (“Part One”) by its terms applies to “all proceedings,” including those involving Commonwealth’s attorneys. Rule 1:5 provides, in pertinent part, that:

When used in these Rules, the word “counsel” includes a partnership, a professional corporation or an association of members of the Virginia State Bar practicing under a firm name.

When such firm name is signed to a pleading, notice or brief, the name of at least one individual member or associate of such firm must be signed to it. Signatures to briefs and petitions for rehearing may be printed or typed and need not be in handwriting.

Service on one member or associate of such firm shall constitute service on the firm....

“Counsel of record” includes a counsel or party who has signed a pleading in the case or who has notified the other parties and the clerk in writing that he appears in the case. Counsel of record shall not withdraw from a case except by leave of court after notice to the client of the time and place of a motion for leave to withdraw.

Generally, Rule 1:5 appears to be directed primarily toward attorneys in private practice. Similarly, the term “counsel of record” contemplates attorneys who have “clients” that must be notified about an attorney’s withdrawal. There are no statements that describe the unique position of a Commonwealth’s attorney whose “client” is the Commonwealth. However, no part of Rule 1:5 specifically excludes Commonwealth’s attorneys. Court rules, like statutes, should be interpreted whenever possible in a manner that harmonizes the rules.² If a Commonwealth’s attorney is not considered as “counsel” or “counsel of record” under Rule 1:5, then it follows that none of the Rules would apply to him. Such an interpretation is contrary to precedent and reason.³

Additionally, Rule 1:4(I) provides that “[e]very pleading, motion or other paper served or filed shall contain at the foot the office address and telephone number of the counsel of record submitting it, along with any facsimile number regularly used for business purposes by such counsel of record.” Rule 1.4(I), which parallels Rule 1:5, envisions that every attorney filing a pleading or motion is “counsel of record.” Therefore, I cannot interpret Rule 1:5 to apply narrowly only to private attorneys.

Upon an appeal from the general district court for a trial *de novo*, the proceeding in circuit court is an entirely new case.⁴ Indeed, the appeal wipes away the district court proceeding “as completely as if

²The Supreme Court of Virginia interprets its own rules. *See* *Brown v. Black*, 260 Va. 305, 311, 534 S.E.2d 727, 730 (2000). In interpreting rules of court, “other canons of construction are commonly used.” 3A NORMAN J. SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 67:14, at 233 (6th ed. 2003). “Courts will liberally construe [court] rules to achieve their purposes.” *Id.* at 236; *see also* *Linkenhoker’s Heirs v. Detrick*, 81 Va. 44, 50 (1885) (“One primary canon of construction, whether of private instruments or of public statutes, is to look to every part, and to construe every part so as to lead to a harmonious interpretation of the whole”).

³*See, e.g.,* *Palmer v. Commonwealth*, Record No. 1263-05-4, 2006 Va. App. LEXIS 434, *8-9 (Oct. 3, 2006) (applying Rule 1:13 in criminal case where court waived endorsements); *see also* VA. SUP. CT. R. 3A:8 (referring to “attorney for the Commonwealth” and “counsel”); VA. SUP. CT. R. 3A:21(a) (providing that written motions must be served on “counsel of record,” which necessarily must include Commonwealth’s attorneys).

⁴*See, e.g.,* *Walker v. Dep’t of Pub. Welfare*, 223 Va. 557, 563, 290 S.E.2d 887, 890 (1982); *Cregger v. Commonwealth*, 25 Va. App. 87, 91, 486 S.E.2d 554, 556 (1997).

there had been no previous trial.”⁵ Commonwealth’s attorneys have broad discretion regarding prosecution of misdemeanor appeals unless an appeal is mandated by statute or city ordinance.⁶ Being “counsel of record” is a court-by-court matter; *i.e.*, being counsel of record in a lower court does not automatically make an attorney counsel of record in other courts.⁷

When an attorney files a notice of appeal, he makes an appearance before the appellate court.⁸ After an appeal is noted, the appealing attorney must obtain leave from the appellate court to withdraw as counsel.⁹ The attorney who does not appeal and does not enter an appearance before the appellate court does not need permission to withdraw from such court.

Rule 1:13 provides that:

Drafts of orders and decrees shall be endorsed by counsel of record, or reasonable notice of the time and place of presenting such drafts together with copies thereof shall be served pursuant to Rule 1:12 upon all counsel of record who have not endorsed them. Compliance with this Rule and with Rule 1:12 may be modified or dispensed with by the court in its discretion.

As with Rule 1:5, it is my opinion that the term “counsel of record” in Rule 1:13 would include Commonwealth’s attorneys in both civil and criminal cases. Virginia courts have, in fact, applied Rule 1:13 to situations involving Commonwealth’s attorneys.¹⁰ When a Commonwealth’s attorney is counsel of record, he must comply with this rule. Of course, a court may dispense with endorsements in civil and criminal cases where, for example, a court provides notice of its ruling to all counsel from the bench.¹¹

⁵*Cregger*, 25 Va. App. at 91, 486 S.E.2d at 556 (quoting *Walker*, 223 Va. at 563, 290 S.E.2d at 890).

⁶Commonwealth’s attorneys are granted broad discretion regarding the cases they choose to take or not take. *See* VA. CODE ANN. § 15.2-1627(B) (2008) (providing that Commonwealth’s attorney “may in his discretion prosecute Class 1, 2 and 3 misdemeanors”) (emphasis added); § 15.2-1627.3 (2008) (mandating fees that are paid to Commonwealth’s attorneys for each person “which he is required by law to prosecute”) (emphasis added); *Boyd v. County of Henrico*, 42 Va. App. 495, 521, 592 S.E.2d 768, 781 (2004) (discussing broad authority of prosecutors); *see also, e.g.*, *Op. Va. Atty. Gen.*: 1994 at 9; 1990 at 141, 142 (discussing prosecutorial discretion in bringing misdemeanors before general district court, including for staffing reasons).

⁷*See, e.g.*, *Green County Dep’t of Soc. Servs. v. Green*, Record No. 2522-05-2, 2006 Va. App. LEXIS 452, *4 (Oct. 10, 2006) (holding that removal of counsel in Juvenile and Domestic Relations court did not affect such attorney’s position as counsel of record in circuit court).

⁸*Cregger*, 25 Va. App. at 91, 486 S.E.2d at 556 (noting that appeal of conviction to circuit court invokes jurisdiction of circuit court in that proceeding).

⁹*See, e.g.*, *Francis v. Francis*, 30 Va. App. 584, 589, 518 S.E.2d 842, 845 (1999); *Kuzminski v. Commonwealth*, 8 Va. App. 106, 108, 378 S.E.2d 632, 633 (1989).

¹⁰*See, e.g., Palmer*, 2006 Va. App. LEXIS 434 at *8-9 (applying Rule 1:13 in criminal case where court waived endorsements).

¹¹*See* VA. SUP. CT. R. 1:13; *Smith v. Stanaway*, 242 Va. 286, 289, 410 S.E.2d 610, 612 (1991) (holding that “[n]otice or endorsement is unnecessary because, as here, counsel are present in court when the ruling is made orally and are fully aware of the court’s decision”).

The Honorable Charles N. Dorsey
October 21, 2008
Page 4

Conclusion

Accordingly, where a Commonwealth's attorney has become "counsel of record" by making an appearance in a particular court, whether in civil or criminal proceedings, it is my opinion that Rules 1:5 and 1:13 of the Rules of the Supreme Court of Virginia apply. It is my opinion that a Commonwealth's attorney is not required to seek leave from the circuit court to withdraw from an appeal of a misdemeanor conviction from general district court, if he has not yet made an appearance in that *de novo* proceeding. Finally, it is my opinion that although Rule 1:13 applies to Commonwealth's attorneys regarding notice and endorsement of orders, courts have broad discretion to dispense with endorsements.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink that reads "Robert F. McDonnell". The signature is written in a cursive, flowing style.

Robert F. McDonnell