



COMMONWEALTH of VIRGINIA

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The Honorable Jack Kennedy
Clerk, Circuit Court of Wise County
Post Office Box 1248
Wise, Virginia 24293-1248

Dear Mr. Kennedy:

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

Issue Presented

You inquire what constitutes a “proceeding” as the term is used in § 8.01-335(A) of the *Code of Virginia*. Specifically, you ask whether the filing with the Clerk of the Court of a letter to opposing counsel constitutes a “proceeding.”

Response

It is my opinion that the determination of whether a particular filing qualifies as a “proceeding” under § 8.01-335(A) requires a review of its specific contents. It further is my opinion that when an attorney files a copy of a letter to opposing counsel with the Clerk of Court, such a filing does not constitute a “proceeding” under § 8.01-335, but that the filed letter may indicate that there are other ongoing proceedings pending in the action, thereby foreclosing the discontinuance of the action.

Applicable Law and Discussion

Section 8.01-335(A) provides: “[e]xcept as provided in subsection C, any court in which is pending an action, wherein for more than two years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket, and the action shall thereby be discontinued.” The statute further provides that the “clerk of court shall notify the parties in interest if known, or their counsel of record . . . at least fifteen days before the entry of such order of discontinuance, so that all parties may have an opportunity to be heard on it.”¹

¹ I note that § 8.01-335(B), which permits the court to strike and dismiss from its docket an action in which there has been no order or proceeding for more than three years, also uses the term “proceeding.” In that instance, however, “the court may dismiss cases under this subsection without any notice to the parties.” VA. CODE ANN. § 8.01-335(B) (2007).

The Supreme Court of Virginia has noted that the purpose underlying § 8.01-335(A) is “to enable trial courts to identify cases which litigants or their counsel are not interested in pursuing to a conclusion.”² The statute “gives trial courts the discretionary authority to order law actions, dormant for more than two years, struck from their dockets[,]” and further “provides a device designed to benefit the trial courts in setting cases for trial and expediting litigation[.]”³

“Proceeding” is not defined in § 8.01-335. Nor is the term generally defined elsewhere in the *Code of Virginia*. In the absence of a statutory definition, words are to be interpreted according to their plain meaning.⁴

Black’s Law Dictionary offers several definitions:

1. The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment.
2. Any procedural means for seeking redress from a tribunal or agency.
3. An act or step that is part of a larger action.
4. The business conducted by a court or other official body; a hearing.^[5]

In a different context, the Supreme Court of Virginia found that the term “proceeding” includes “anything done in the cause, except an order of continuance; meaning any step or means taken in the prosecution of or defense of an action.”⁶ The Court concluded that the term was “broad enough to cover any act, measure, step or all steps in a course taken in conducting litigation, civil or criminal.”⁷ Accordingly, the term “proceeding” does not simply refer to a formal action that provides a complete remedy, but also to procedural steps that are part of that larger action.

Black’s Law Dictionary provides numerous examples of actions constituting a proceeding. These include:

(1) the institution of the action; (2) the appearance of the defendant; (3) all ancillary or provisional steps, such as arrest, attachment of property, garnishment, injunction . . . (4) the pleadings; (5) the taking of testimony before trial; (6) all motions . . . (7) the trial; (8) the judgment; (9) the execution; . . . (11) the taking of the appeal . . . (12) the *remittitur*, or sending back of the record to the lower court . . . (13) the enforcement of the judgment or, or a new trial . . .^[8]

Although “proceeding” is clearly broad in its scope, it is not all-inclusive. For example, it does not extend to mere requests for information.⁹

² Nash v. Jewell, 227 Va. 230, 234, 315 S.E.2d 825, 827 (1984).

³ *Id.*

⁴ Murphy v. Norfolk Cmty. Servs. Bd., 260 Va. 334, 339, 533 S.E.2d 922, 925 (2000) (citing cases).

⁵ BLACK’S LAW DICTIONARY 1221 (7th ed. 1999).

⁶ Sigmon v. Commonwealth, 200 Va. 258, 266-67, 105 S.E.2d 171, 178 (1958) (construing “proceeding” for purposes of criminal prosecutions) (citing Miller v. Whittington, 105 S.E. 907 (W. Va. 1921)).

⁷ *Id.* at 267, 105 S.E.2d at 178-79.

⁸ BLACK’S LAW DICTIONARY 1221 (quoting EDWIN E. BRYANT, THE LAW OF PLEADING UNDER THE CODES OF CIVIL PROCEDURE 3-4 (2d ed. 1899)).

⁹ Zaleski v Judicial Inquiry & Revier Comm’n, 64 Va. Cir. 495 (Richmond 2004) (applying *Sigmon* to construe “proceeding” under VA. CODE ANN. § 17.1-913).

Applying these definitions and the purpose of the statute to your inquiry, a letter between counsel does not become a “proceeding” simply because one of the attorneys filed it with the Clerk. Letters between counsel are often exchanged with little or no effect. Nonetheless, the contents of the letter may indicate that proceedings are ongoing in the case. For example, a copy of letter constituting a notice of depositions pursuant to Supreme Court Rule 4:5(b)(1) or an attorney-issued *subpoena duces tecum* under Rule 4:9(A)(2) could be filed in the Clerk’s office. Clearly, because such procedural devices progress an action towards final judicial resolution, they constitute “proceedings.”

In these, or similar potential instances, the letter demonstrates that the matter remains active. Therefore, irrespective of any requirement of the court or Clerk to act, if the Clerk has been made aware of such proceedings via the filing of the letter, then the Clerk may not employ § 8.01-335(A) to discontinue the action, provided those proceedings have occurred within the previous two years.

Conclusion

Accordingly, it is my opinion that the determination of whether a particular filing qualifies as a “proceeding” under § 8.01-335(A) requires a review of its specific contents. It further is my opinion that when an attorney files a copy of a letter to opposing counsel with the Clerk of Court, such a filing does not constitute a “proceeding” under § 8.01-335, but that the filed letter may indicate that there are other ongoing proceedings pending in the action, thereby foreclosing the discontinuance of the action.

With kindest regards, I am

Very truly yours,

A handwritten signature in blue ink, appearing to read "Ken C II". The signature is stylized and written in a cursive-like font.

Kenneth T. Cuccinelli, II
Attorney General