

**PROPERTY AND CONVEYANCES: RESIDENTIAL LANDLORD AND TENANT ACT.**

**RULES OF SUPREME COURT OF VIRGINIA: GENERAL DISTRICT COURTS-IN GENERAL — PRACTICE AND PROCEDURE IN ACTIONS AT LAW — INTEGRATION OF THE STATE BAR – UNAUTHORIZED PRACTICE RULES AND CONSIDERATIONS.**

**Individual meeting statutory definition of "landlord" may file unlawful detainer action in general district court seeking payment of rent into court escrow account, judgment against tenant, and possession of leased premises; landlord representing only his interest in court would not be engaging in unauthorized practice of law. Procedural requirement that court determine veracity of tenant's good faith defense does not necessarily require scheduling of evidentiary hearing. Court may accept tenant's oath of good faith defense on return date, prior to actual trial, and grant continuance without escrowed funds or set case for contested trial.**

The Honorable William L. Wimbish  
Chief Judge, 13<sup>th</sup> Judicial District  
July 1, 1999

You ask several questions regarding § 55-248.25:1 of the *Code of Virginia*, a new section added by the 1999 Session of the General Assembly<sup>1</sup> to the Virginia Residential Landlord and Tenant Act.<sup>2</sup>

Section 55-248.25:1 provides:

A. Where a landlord has filed an unlawful detainer action seeking possession of the premises as provided by this chapter<sup>3</sup> and the tenant seeks to obtain a continuance of the action or to set it for a contested trial, the court shall, upon request of the landlord, order the tenant to pay an amount equal to the rent that is due as of the initial court date into the court escrow account prior to granting the tenant's request for a delayed court date. However, if the tenant asserts a good faith defense, and the court so finds, the court shall not require the rent to be escrowed. If the landlord requests a continuance, or to set the case for a contested trial, the court shall not require the rent to be escrowed.

B. If the court finds that the tenant has not asserted a good faith defense, the tenant shall be required to pay an amount determined by the court to be proper into the court escrow account in order for the case to be continued or set for contested trial. To meet the ends of justice, however, the court may grant the tenant a continuance of no more than one week to make full payment of the court-ordered amount into the court escrow account. If the tenant fails to pay the entire amount ordered, the court shall, upon request of the landlord, enter judgment for the landlord and enter an order of possession of the premises.

C. The court shall further order that should the tenant fail to pay future rents due under the rental agreement into the court escrow account, the court shall, upon the request of the landlord, enter judgment for the landlord and enter an order of possession of the premises.

D. Upon motion of the landlord, the court may disburse the moneys held in the court escrow account to the landlord for payment of his mortgage or other expenses relating to the dwelling unit.

You first ask who meets the definition of "landlord," as that term is used in § 55-248.25:1, for the purpose of appearing in court to make a request for payment of rent into an escrow account, judgment against the tenant, and possession of the leased premises.

Section 55-248.25:1 is enacted as part of the Virginia Residential Landlord and Tenant Act. Statutes relating to the same subject "are not to be considered as isolated fragments of law, but as a whole, or as parts of a great connected, homogeneous system, or a single and complete statutory arrangement."<sup>4</sup> Section 55-248.4 of the Act defines "landlord" to mean "the owner, lessor or sublessor of the dwelling unit or the building of which such dwelling unit is a part, and 'landlord' also means a manager of the premises who fails to disclose the name of such owner, lessor or sublessor." The primary goal of statutory construction "is to ascertain and give effect to the legislative intent."<sup>5</sup> "[T]ake the words as written"<sup>6</sup> and determine their plain meaning.<sup>6</sup> I must, therefore, conclude that the General Assembly has clearly and unambiguously determined that "the owner, lessor or sublessor of the dwelling unit or the building of which such dwelling unit is a part"<sup>7</sup> or the manager of such premises may appear in court to make requests for payment of rent into the court escrow account, judgment against the tenant, and possession of the leased premises.

You also ask whether such landlord must retain legal representation when making such requests and/or motions before the court.

The Supreme Court of Virginia has approved rules governing appearances before a court in Virginia. Non-lawyers may represent themselves in court, provided they are not engaging in the unauthorized practice of law.

A non-lawyer may represent himself, but not the interest of another, before any tribunal. A non-lawyer regularly employed on a salary basis ... may present facts, figures, or factual conclusions, as distinguished from legal conclusions, when such presentation does not involve the examination of witnesses or preparation of briefs or pleadings.<sup>[8]</sup>

A non-lawyer regularly employed on a salary basis by a corporation appearing on behalf of his employer before a tribunal shall not engage in activities involving the examination of witnesses, the preparation and filing of briefs or pleadings or the presenting of legal conclusions.<sup>[9]</sup>

These rules clearly provide that a non-lawyer may represent himself before any court. A non-lawyer representing another before a court would be engaging in the unauthorized practice of law, unless such non-lawyer (1) is *appearing on behalf of his employer* and does not engage in "activities involving the examination of witnesses, the preparation and filing of briefs or pleadings or the presenting of legal conclusions";<sup>10</sup> or (2) is a *regular employee* acting for his employer and prepares notices or contracts incident to the regular course of conducting a business.<sup>11</sup>

An exception to the unauthorized practice of law prohibition applies to "an appeal ... noted by a party's *regular and bona fide employee* or by a person entitled to ask for judgment under any statute."<sup>12</sup> In an unlawful detainer action, a landlord normally would be representing only his interest in court. In addition, a manager of leased premises may also be the "landlord" for the

purposes of the actions authorized by § 55-248.25:1.<sup>13</sup> Based on this assumption, the landlord and manager would not, therefore, be engaged in the unauthorized practice of law. I must, therefore, conclude that such landlord and manager are not required to retain legal representation when appearing before the court to make the requests and/or motions permitted in § 55-248.25:1.

You next ask whether an evidentiary hearing must be held to determine whether a tenant has asserted a good faith defense, or, in the alternative, whether the court may accept a tenant's oath of a good faith defense on the return date and grant a continuance without escrowed funds.

Section 55-248.25:1(A) provides that if the court finds the tenant has asserted a good faith defense, "the court shall not require the rent to be escrowed." This language is directory.<sup>14</sup> Under well-accepted principles of statutory construction, when a statute contains a specific grant of authority, the authority exists only to the extent specifically granted in the statute.<sup>15</sup> Section 55-248.4 defines "good faith" as "honesty in fact in the conduct of the transaction concerned."

The procedural nature of § 55-248.25:1(A) is underscored by the Supreme Court's "repeated holding that the use of 'shall,' in a statute requiring action by a public official, is directory and not mandatory unless the statute manifests a contrary intent."<sup>16</sup> The General Assembly does not require in clear and unambiguous language that the court conduct an evidentiary hearing on the return date to find that the tenant asserts a good faith defense. When the General Assembly intends to enact a mandatory requirement, it knows how to express its intention.<sup>17</sup> A court, therefore, must determine on a case-by-case basis whether an evidentiary hearing is necessary to prove a tenant's assertion of a good faith defense on the return date. I am of the view that the good faith defense to be found by the court is a procedural requirement that does not necessarily require an evidentiary hearing be held to determine whether a tenant has asserted a good faith defense. Consequently, I am also of the opinion that the court may accept a tenant's oath of a good faith defense on the return date and grant a continuance without escrowed funds.

You also ask that the phrase "good faith" defense in newly enacted § 55-248.25:1(A) and (B) be reconciled with § 55-248.25.

When new provisions are added to existing legislation by amendment, a presumption arises that, "in making the amendment the legislature acted with full knowledge of, and in reference to, the existing law upon the same subject and the construction placed upon it by the courts."<sup>18</sup> It is presumed further that the legislature acted purposefully with the intent to change existing law.<sup>19</sup> The principles of statutory construction also require that statutes be harmonized with other existing statutes, if possible, to produce a consistently logical result that gives effect to the legislative intent.<sup>20</sup>

Section 55-248.25(a) provides that, in an action for the nonpayment of rent,

the tenant may assert as a defense that there exists upon the leased premises, a condition which constitutes or will constitute, a fire hazard or a serious threat to the life, health or safety of occupants thereof, including but not limited to a lack of heat or running water or of light or of electricity or adequate sewage disposal facilities or an infestation of rodents, or a condition which constitutes material noncompliance on the part of the landlord with the rental agreement or provisions of law.

The assertion of any defense permitted by § 55-248.25(a) must be conditioned upon specific matters set forth therein.<sup>21</sup> Section 55-248.25(b) sets forth that which "shall be a sufficient answer" to the defenses permitted by § 55-248.25(a). Section 55-248.25(c) requires that the court "make findings of fact upon any defense raised under this section or the answer to any defense."

The clear language of § 55-248.25 requires that such defenses be asserted for determination by the court at the contested trial that is set in the general district court on the initial return date. "The manifest intention of the legislature, clearly disclosed by its language, must be applied."<sup>22</sup>

Section 55-248.25:1, however, clearly applies only to the proceedings that occur on the return date in the general district court at which time the matter may be continued or set for a contested trial. It is clear that § 55-248.25:1 contemplates proceedings that occur upon return to the general district court, prior to the actual trial on the unlawful detainer, where the tenant seeks to continue the action or set the case for a contested trial. The clear intent of the General Assembly is to change the existing law by permitting a tenant to assert a defense on the return date to avoid having rent escrowed by the court when either a continued or contested trial date is requested.

<sup>1</sup>1999 Va. Acts chs. 382, 506.

<sup>2</sup>Tit. 55, ch. 13.2, §§ 55-248.2 to 55-248.40.

<sup>3</sup>See *supra* note 2.

<sup>4</sup>Prillaman v. Commonwealth, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957) (quoting former edition of 73 Am. Jur. 2d *Statutes* § 188 (1974)); see also 1995 Op. Va. Att'y Gen. 69, 70.

<sup>5</sup>Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); see also 1993 Op. Va. Att'y Gen. 237, 239.

<sup>6</sup>Adkins v. Commonwealth, 27 Va. App. 166, 169, 497 S.E.2d 896, 897 (1998) (quoting *Birdsong Peanut Co. v. Cowling*, 8 Va. App. 274, 277, 381 S.E.2d 24, 26 (1989) (quoting *Brown v. Lukhard*, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985))).

<sup>7</sup>Section 55-248.4.

<sup>8</sup>Va. Sup. Ct. R. pt. 6, § I, Rule 1, UPC 1-1.

<sup>9</sup>*Id.* UPR 1-101(B) .

<sup>10</sup>*Id.*

<sup>11</sup>*Id.* pt. 6, § I(B)(2). Rule 3:16(a) provides that motions in writing are pleadings. This rule applies only to civil actions at law in a court of record. See *id.* pt. 3, R. 3:1.

<sup>12</sup>*Id.* pt. 7, R. 7A:13 (emphasis added).

<sup>13</sup>See § 55-248.4 (defining "landlord").

<sup>14</sup>"A statute directing the mode of proceeding by public officers is to be deemed directory, and a precise compliance is not to be deemed essential to the validity of the proceedings, unless so declared by statute." *Nelms v. Vaughan*, 84 Va. 696, 699, 5 S.E. 704, 706 (1988), *quoted in Jamborsky*, 247 Va. 506, 511, 442 S.E.2d 636, 638 (1994); *Commonwealth v. Rafferty*, 241 Va. 319, 324, 402 S.E.2d 17, 20 (1991).

<sup>15</sup>See *Tate v. Ogg*, 170 Va. 95, 195 S.E. 496 (1938); 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.23 (5<sup>th</sup> ed. 1992 & Supp. 1999).

<sup>16</sup>Jamborsky v. Baskins, 247 Va. at 511, 442 S.E.2d at 638; see also Commonwealth v. Rafferty, 241 Va. at 324-25, 402 S.E.2d at 20; Fox v. Custis, 236 Va. 69, 372 S.E.2d 373 (1988); Moore v. Commonwealth, 218 Va. 388, 237 S.E.2d 187 (1977); Huffman v. Kite, 198 Va. 196, 93 S.E.2d 328 (1956); Nelms v. Vaughan, 84 Va. at 696, 5 S.E. at 704.

<sup>17</sup>See 1998 Op. Va. Att'y Gen. 87, 88.

<sup>18</sup>City of Richmond v. Sutherland, 114 Va. 688, 693, 77 S.E. 470, 472 (1913).

<sup>19</sup>Cape Henry v. Natl. Gypsum, 229 Va. 596, 331 S.E.2d 476 (1985); Wisniewski v. Johnson, 223 Va. 141, 144, 286 S.E.2d 223, 224-25 (1982).

<sup>20</sup>See 2A Norman J. Singer, *supra* note 15, § 46.06; 1995 Op. Va. Att'y Gen. 118, 120.

<sup>21</sup>See § 55-248.25(a)(1)-(2).

<sup>22</sup>Barr v. Town & Country Properties, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting Anderson v. Commonwealth, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944)).