

99-056

CIVIL REMEDIES AND PROCEDURE: PROCESS.

CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST PROPERTY – TRESPASS TO REALTY — CRIMES AGAINST PEACE AND ORDER — CRIMES AGAINST THE ADMINISTRATION OF JUSTICE.

CONSTITUTION OF THE UNITED STATES: FOURTH AMENDMENT.

Private process server is considered officer or sheriff for purpose of serving process; enters public area of business to serve process under authority of law. Entry into private offices of business area where there is justifiable expectation of privacy to serve process may constitute unreasonable search or seizure. In such case, process server would not be acting under authority of law and would be liable for trespass. Extent to which portion of business establishment constitutes private area is question of fact. Person acting jointly or in combination with other person(s) to resist or obstruct lawful service of process is guilty of misdemeanor violation. Private process server is not law-enforcement officer against whom any attempt to interfere with execution of service of process would constitute misdemeanor.

The Honorable Richard H. Black
Member, House of Delegates
November 22, 1999

You ask several questions regarding the authority of private process servers acting pursuant to § 8.01-293(A) of the *Code of Virginia*.

Section 8.01-293(A)(2) provides that, in addition to the sheriff, "[a]ny person of age eighteen years or older and who is not a party or otherwise interested in the subject matter in controversy" is eligible to serve process. Section 8.01-293(A) further provides:

Whenever in this Code the term "officer" or "sheriff" is used to refer to persons authorized to make, return or do any other act relating to service of process, such term shall be deemed to refer to any person authorized by this section to serve process.

Prior opinions of the Attorney General recognize that, under the plain language of the statute, service by a sheriff and service by a private process server are of equal force and legitimacy.¹

Your first question concerns the application of § 18.2-119 to a private process server. Section 18.2-119 provides that "[i]f any person *without authority of law* goes upon or remains upon the lands, buildings or premises of another" after having been prohibited by the owner or other person lawfully in charge from doing so, the person is guilty of a Class 1 misdemeanor. (Emphasis added.) You ask whether, because § 18.2-119 provides that a person must be acting "without authority of law," a private process server would be subject to prosecution for trespass under the statute. You ask specifically whether a private process server has authority under the law to enter a suite of offices and look in individual offices for the person named on the process.

It is my opinion that since a private process server is considered an "officer" or "sheriff" for purposes of serving process, a private process server who enters the public area of a business does so under "authority of law" for purposes of § 18.2-119.² Whether a process server would have the authority to enter private offices, however, will depend on whether the entry would

constitute an unreasonable search or seizure in violation of the Fourth Amendment of the Constitution of the United States.³ If so, the process server would not be acting under "authority of law" and would be liable for trespass under § 18.2-119.⁴

The basic purpose of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."⁵ A governing principle of the Fourth Amendment is that, subject to a few limited exceptions, a warrantless search of a private home is presumptively unreasonable, notwithstanding the fact that the government official may be acting pursuant to statutory authority.⁶ The United States Supreme Court has extended this principle to include a business as well as a home. In *See v. City of Seattle*, the Court recognized an expectation of privacy in an office, stating that "[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property."⁷

These cases involve situations in which statutes authorize governmental entry into residential or business property for the purpose of conducting health and safety inspections. Neither the Supreme Court of the United States nor the Supreme Court of Virginia has expressly held that the entry into private offices merely to serve process constitutes an unreasonable search of the premises under the Fourth Amendment. It is my view that, because the intrusion of the entry is sufficient to trigger Fourth Amendment protections,⁸ regardless of the nature of the search, entering a business area where there is a justifiable expectation of privacy in order to serve process would be unreasonable under the Fourth Amendment. The Supreme Court of South Dakota has so held, concluding that a sheriff may serve process in the public areas of a business but may not enter the private areas for such purpose.⁹ The court considered the particular arrangement of the business's public and work areas and the company's policies on restricted entry to determine whether there existed a justifiable expectation of privacy in the area.¹⁰ Thus, the extent to which a portion of a business establishment constitutes a private area will be a question of fact.¹¹ Should it be determined that there is a justifiable expectation of privacy in the area, it is my opinion that entry to serve process would not be under "authority of law" for purposes of § 18.2-119.

You next ask whether ordering a process server to leave property would constitute a violation of § 18.2-409. Section 18.2-409 provides:

Every person acting jointly or in combination with any other person to resist or obstruct the execution of any legal process shall be guilty of a Class 1 misdemeanor.

Assuming that the attempted service of process is consistent with Fourth Amendment restrictions, it is my opinion that an attempt to resist or obstruct the service by ordering the process server to leave the property would constitute a violation of § 18.2-409. I note, however, that § 18.2-409 applies only when persons are "acting jointly or in combination."

Your final question is whether ordering a private process server to leave property would constitute a violation of § 18.2-460. Section 18.2-460 makes it a misdemeanor for a person to knowingly obstruct "any law-enforcement officer in the performance of his duties"¹² or, by threats or force, attempt to impede or intimidate "any law-enforcement officer, lawfully engaged in his duties."¹³ Section 18.2-460 is limited to attempts to interfere with a "law-enforcement officer."¹⁴ Although § 8.01-293 equates private process servers with "officers" and "sheriffs," it does not classify private process servers as "law-enforcement officers." Numerous sections of the Virginia Code contain definitions of "law-enforcement officers" for different purposes,¹⁵ with the term generally referring to government employees "responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of this Commonwealth."¹⁶ Under none of the statutory definitions would a private process server be deemed a law-enforcement officer.¹⁷ Accordingly, it is my opinion that a private process server is not a law-enforcement officer for

purposes of § 18.2-460 and that attempting to interfere with a private process server's execution of service would not constitute a violation of § 18.2-460.

¹See Op. Va. Att'y Gen.: 1997 at 29, 29; 1992 at 26, 27.

²See *Reed v. Commonwealth*, 6 Va. App. 65, 70-71, 366 S.E.2d 274, 278 (1988) (as penal statute, § 18.2-119 requires criminal intent or willful trespass; no violation of statute if person has good faith belief that he has legal right or authorization to be on premises); see also 1996 Op. Va. Att'y Gen. 86, 87 (whether person has good faith belief that he has right to be on premises is factual issue).

³The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

⁴See 1987-1988 Op. Va. Att'y Gen. 446, 447 (citing *Raven Red Ash Coal Co. v. Ball*, 185 Va. 534, 39 S.E.2d 231 (1946) and *McClannan v. Chaplain*, 136 Va. 1, 116 S.E. 495 (1923), for established principle that person lawfully entering property who exceeds authority for which entry was granted is liable for trespass).

⁵*Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

⁶See *id.* at 528-29. The Court in *Camara* held that "[t]he Fourth Amendment bars prosecution of a person who has refused to permit a warrantless code-enforcement inspection of his personal residence." *Id.* at 523.

⁷387 U.S. 541, 543 (1967). The Supreme Court recognizes an exception to the warrant requirement for administrative searches of closely regulated businesses and industries. See *United States v. Biswell*, 406 U.S. 311 (1972) (gun dealers); *Colonnade Corp. v. United States*, 397 U.S. 72 (1970) (liquor licensees).

⁸The question presented in *See v. City of Seattle* was whether a person could be prosecuted under a city ordinance for refusing to permit a fire inspector to inspect his locked warehouse without a warrant. The Court concluded that "administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure." 387 U.S. at 545. In *Camara v. Municipal Court*, the companion case to *See v. City of Seattle*, the Court considered the dual aspects of the Fourth Amendment protections—the right to be secure from intrusions into personal privacy and the right to be protected from searches for evidence of criminal action. The Court rejected the argument that the Fourth Amendment does not protect entry unless entry is followed by a search for criminal evidence. See 387 U.S. at 530-31.

⁹See *Gateway 2000, Inc. v. Limoges*, 552 N.W.2d 591 (S.D. 1996).

¹⁰See *id.* at 594.

¹¹See *Johnson v. Com.*, 26 Va. App. 674, 496 S.E.2d 143 (1998) (court determines whether person has exhibited subjective expectation of privacy and whether expectation is objectively reasonable); see also *Gateway 2000, Inc. v. Limoges*, 552 N.W.2d at 593-94.

¹²Section 18.2-460(A).

¹³Section 18.2-460(B).

¹⁴Section 18.2-460 applies also to judges, magistrates, justices, jurors, Commonwealth's attorneys, and witnesses.

¹⁵See, e.g., §§ 2.1-2.2, 2.1-116.1(1), 3.1-796.66, 9-169(9), 16.1-253.4(H), 18.2-57(E), 18.2-433.1, 19.2-81.3(G), 32.1-45.1(G), 46.2-100, 65.2-102(B).

¹⁶Section 9-169(9).

¹⁷See *Gateway 200, Inc. v. Limoges*, 552 N.W.2d at 595 (when sheriff is operating in civil matters in same capacity as private process server, sheriff has only authority of private process server; sheriff has no authority to threaten management or employees with charge of obstruction of justice).