



COMMONWEALTH of VIRGINIA

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January 5, 2007

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The Honorable S. Lee Morris
Portsmouth General District Court
P.O. Box 129
Portsmouth, Virginia 23705-0129

Dear Judge Morris:

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 ask whether § 8.01-296 obligates a process server to ascertain independently that a residence is in fact the place of abode of the person to be served before posting service or whether he may rely solely upon the address supplied by the party requesting such service.

Response

It is my opinion that the language of § 8.01-296 imposes no specific obligation on a process server to ascertain that a residence is the place of abode of the person to be served prior to posting service; however, good faith and due diligence¹ require a process server to make reasonable inquiry when it is apparent that the residence might not be the place of abode of the person to be served. It further is my opinion that based on the good faith and due diligence standard, a process server may not always rely solely on the address supplied by the party requesting such service.

Applicable Law and Discussion

The *Code of Virginia* and the Rules of the Supreme Court of Virginia set forth the manner by which process is served upon commencement of an action.² Section 8.01-290 requires that:

Upon the commencement of every action, the plaintiff shall furnish in writing to the clerk or other issuing officer the full name and last known address of each defendant and if unable to furnish such name and address, he shall furnish such salient facts as are calculated to identify with reasonable certainty such defendant. The clerk or other official whose function it is to issue any such process shall note in the record or the papers the address or other identifying facts furnished.

¹See *infra* note 13 and accompanying text.

²See VA. CODE ANN. tit. 8.01, ch. 8, §§ 8.01-287 to 8.01-327.2 (2000 & Supp. 2006); VA. SUP. CT. R. 3:6.

A prior opinion of the Attorney General states that, to the extent possible, a full name and address of the party to be served must accompany service of process issued to the sheriff.³

For example, if only the name of a town is given, the plaintiff could be required to provide additional facts to assist in the identification of the party to be served.... A request for service of process at a post office box or general delivery address need not be considered a full address and additional information to identify the location of the party to be served could be required.⁴

Section 8.01-296 governs the manner of serving process upon natural persons. The preferred method of serving process is to “deliver[] a copy thereof in writing to the party in person.”⁵ Additionally, § 8.01-296 provides two methods of substituted service. First, under § 8.01-296(2)(a),

[i]f the party to be served is not found at his usual place of abode, by delivering a copy of such process and giving information of its purport to any person found there, who is a member of his family, other than a temporary sojourner or guest, and who is of the age of 16 years or older[.]

Second, § 8.01-296(2)(b) provides, in part, that “[i]f such service cannot be effected under subdivision 2 a, then by posting a copy of such process at the front door or at such other door as appears to be the main entrance of such place of abode.”

Rule 3:6 of the Rules of the Supreme Court of Virginia provides that “[i]t shall be the duty of all persons eligible to serve process to make service within five days after receipt.” The person serving process also must return the process to the clerk’s office within seventy-two hours of service, except when such return would be due on a Saturday, Sunday, or legal holiday.⁶ The returned process must state “the date and manner of service and the name of the party served.”⁷ If service was executed by a sheriff, the return is sufficient if it complies with “the Rules of the Supreme Court.”⁸ The Virginia Supreme Court has ruled that a sheriff’s return “may also be of the existence of such a state of facts as, without fault or negligence on his part, prevented a compliance with the mandate of the writ.”⁹ If service was executed by a qualified person other than a sheriff, that person must include an affidavit stating: (1) his qualifications; (2) the date and manner of service; (3) the name of the party served; (4) an annotation that the service was by private server; and (5) the name, address, and telephone number of the server.¹⁰

Statutes that allow substituted service when personal service fails must be strictly construed.¹¹ As such, in order to effect service, a process server must strictly comply with the terms of § 8.01-296, and he must reflect such strict compliance in the return providing proof of service.¹²

³See 1978-1979 Op. Va. Att’y Gen. 40, 40.

⁴*Id.*

⁵Section 8.01-296(1) (Supp. 2006).

⁶Section 8.01-325 (2000).

⁷*Id.*

⁸Section 8.01-325(1); *see also* VA. SUP. CT. R. 3:6 (providing form for “Proof of Service”).

⁹*Rowe v. Hardy*, 97 Va. 674, 676, 34 S.E. 625, 625 (1899).

¹⁰*See* § 8.01-325(2).

¹¹*See Washburn v. Angle Hardware Co.*, 144 Va. 508, 514, 132 S.E. 310, 312 (1926).

¹²*See id.*; *see also* § 8.01-325.

Although § 8.01-296 does not specifically impose an obligation on a process server to do so, in order to ensure effective service, it may be necessary for a process server to ascertain that a residence is, in fact, the place of abode of the person to be served before posting. Such a determination by the process server would ensure the accuracy of any subsequent proof of service or affidavit stating that service by posting was effected.

In addition, Virginia law generally requires that a sheriff execute his duty of serving civil process in good faith and with due diligence.¹³ The same standard applicable to a sheriff should apply to a private process server who also serves process pursuant to § 8.01-296. Such a standard would at a minimum require that a process server attempt to determine that a residence is the correct place of abode. For example, when the name displayed on a mailbox is different than the name of the person to be served, or the residence clearly is not inhabited or inhabitable, i.e., when it is apparent that the residence might not be the place of abode of the person to be served, good faith and due diligence would require a process server to make a reasonable inquiry.

Conclusion

Accordingly, it is my opinion that the language of § 8.01-296 imposes no specific obligation on a process server to ascertain that a residence is the place of abode of the person to be served prior to posting service; however, good faith and due diligence¹⁴ require a process server to make reasonable inquiry when it is apparent that the residence might not be the place of abode of the person to be served. It further is my opinion that based on the good faith and due diligence standard, a process server may not always rely solely on the address supplied by the party requesting such service.

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

2:1285/1:1055; 1:941/06-073

¹³See *Narrows Grocery Co. v. Bailey*, 161 Va. 278, 170 S.E.730 (1933); 1978-1979 Op. Va. Att'y Gen., *supra* note 3, at 40.

¹⁴See *id.* and accompanying text.