



# COMMONWEALTH of VIRGINIA

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The Honorable John T. Frey  
Clerk, Circuit Court of Fairfax County  
4110 Chain Bridge Road  
Fairfax, Virginia 22030-4048

Dear Mr. Frey:

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 several questions concerning service of a confessed judgment on a nonresident debtor under § 8.01-438 of the *Code of Virginia*. First, you ask whether service is sufficient if the officer serving process in the foreign jurisdiction returns the service as “Posted.” You also ask whether a return of service marked by the officer as “Not Found” is sufficient.

Finally, you ask whether service is sufficient if the clerk mails a copy of the order by registered or certified mail to a nonresident judgment debtor at his last known post-office address and then files a certificate with the case papers showing that such has been done, but the registered or certified mail receipt is not returned to the clerk by the post office, or is returned stating “not accepted” or “not at this address.”

## Applicable Law and Discussion

Section 8.01-432 authorizes the practice of judgment by confession. The statute provides that a debtor or his attorney-in-fact may confess a judgment, regardless of whether a suit has been brought on the debt:

Any person being indebted to another person, or any attorney-in-fact pursuant to a power of attorney, may at any time confess judgment in the clerk’s office of any circuit court in this Commonwealth, whether a suit, motion or action be pending therefor or not, for only such principal and interest as his creditor may be willing to accept a judgment for, which judgment, when so confessed, shall be forthwith entered of record by the clerk in whose office it is confessed, in the proper order book of his court. Such judgment shall be as final and as binding as though confessed in open court or rendered by the court, subject to the control of the court in the clerk’s office of which the same shall have been confessed.<sup>[1]</sup>

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<sup>1</sup> VA. CODE ANN. § 8.01-432 (2015). *See also* § 8.01-431 (2015) (authorizing confession of judgment by debtor in a pending suit). The *Code of Virginia* regulates how lenders may incorporate confessed judgment provisions in

When a judgment is confessed by an attorney-in-fact, § 8.01-438 provides that the debtor must be served with a copy of the order. The statute establishes procedures for serving a debtor, including detailed instructions for service if the debtor is a nonresident:

If a judgment is confessed by an attorney-in-fact, it shall be the duty of the clerk within ten days from the entry thereof to cause to be served upon the judgment debtor a certified copy of the order so entered in the common-law order book, to which order shall be appended a notice setting forth the provisions of § 8.01-433. The officer who serves the order shall make return thereof within ten days after service to the clerk. The clerk shall promptly file the order with the papers in the case. The failure to serve a copy of the order within sixty days from the date of entry thereof shall render the judgment void as to any debtor not so served.

Service of a copy of the order on a *nonresident* judgment debtor by an officer of the county or city of his residence, authorized by law to serve processes therein, or by the clerk of the court sending a copy of the order by registered or certified mail to such nonresident judgment debtor at his last known post-office address and the filing of a certificate with the papers in the case showing that such has been done or of a receipt showing the receipt of such letter by such nonresident judgment debtor, shall be deemed sufficient service thereof for the purposes of this section.<sup>[2]</sup>

You inquire regarding the sufficiency of service on nonresident debtors under § 8.01-438 in certain scenarios.<sup>3</sup> I will answer each of your questions in turn.

### **I. Sufficiency of Service on Nonresident if Returned as “Posted”**

Section 8.01-438 states that an “officer of the county or city of [debtor’s] residence, authorized by law to serve processes therein,” may serve a copy of the judgment upon a nonresident debtor. This clause differs from the Commonwealth’s more general statute establishing requirements for serving process on nonresidents, in that it limits the class of individuals who may execute service to officers who are authorized by the law of the foreign jurisdiction to serve process therein.<sup>4</sup> This distinction suggests that the procedures of the foreign jurisdiction, rather than those of the Commonwealth, should apply with respect to methods of service.<sup>5</sup>

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notes, bonds, and other evidence of debt. The *Code* also regulates who is authorized to serve as a debtor’s attorney-in-fact. See §§ 8.01-433.1 (2015); 8.01-435 (2015).

<sup>2</sup> Section 8.01-438 (2015) (emphasis added). I note that, in accord with procedures established in § 8.01-433, a debtor may make a motion to set aside or reduce the judgment within twenty-one (21) days after receiving notice of the judgment. Furthermore, under § 8.01-438, a confessed judgment is void if sufficient service is not made within sixty (60) days from date of entry. These provisions apply to resident and nonresident debtors alike.

<sup>3</sup> I assume, for purposes of this opinion, that personal jurisdiction exists under the Virginia Long Arm Statute. See § 8.01-328.1 (2015).

<sup>4</sup> Compare § 8.01-438 with § 8.01-320.

<sup>5</sup> “We ‘assume that the legislature chose, with care, the words it used when it enacted the relevant statute.’” *Alger v. Commonwealth*, 267 Va. 255, 261 (2004) (quoting *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295 (1990)). See generally RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 585 (1934); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 126 (1971) (stating broadly that matters of procedure, including methods of serving process, are governed by the law of the forum state).

Based on the foregoing, I conclude that service under § 8.01-438 is sufficient if a foreign officer executes the same in accord with the law of the foreign jurisdiction. In particular, service by posting is sufficient if authorized under the law of the foreign jurisdiction.<sup>6</sup>

## II. Sufficiency of Service on Nonresident if Process is Returned “Not Found”

It is well-established that a return marked “Not Found” is not an effectuation of service. The Virginia Supreme Court has recognized that the notation “Not Found” indicates that the individual tasked with executing service could not accomplish it under the methods prescribed by law.<sup>7</sup> Accordingly, it is my opinion that a return marked as “Not Found” is not sufficient service on a nonresident under § 8.01-438.

## III. Sufficiency of Service on Nonresident if the Clerk Mails a Copy of the Order as Prescribed in § 8.01-438 and Files a Certificate Verifying Mailing

Although a clerk may arrange for service through an officer of the foreign jurisdiction, § 8.01-438 also provides he may satisfy the service requirement by mailing a copy of the order to the nonresident debtor:

Service of a copy of the order on a nonresident judgment debtor . . . by the clerk of the court sending a copy of the order by registered or certified mail to such nonresident judgment debtor at his last known post-office address and the filing of a certificate with the papers in the case showing that such has been done or of a receipt showing the receipt of such letter by such nonresident judgment debtor, shall be deemed sufficient service thereof for the purposes of this section.<sup>8</sup>

You ask whether this method is sufficient in the event the registered or certified mail receipt is not returned to the clerk by the post office, or is returned stating “not accepted” or “not at this address.”

The statute provides that a clerk may file a certificate verifying mailing “or” a receipt showing delivery was made to the debtor. Generally, the term “or” is used in the disjunctive to indicate alternative choices,<sup>9</sup> “implying an election to do one of two things.”<sup>10</sup> Indeed, courts will interpret the term “or” as a disjunctive unless it is clear the legislature intended it to be used as a conjunctive.<sup>11</sup> Here, there is no clear indication that the legislature intended the term to be used as a conjunctive. Therefore, it is my opinion that service is sufficient under § 8.01-438 if the clerk files a certificate of mailing with the case

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<sup>6</sup> I note, however, that posting must be executed in a manner reasonably calculated to apprise the party of the judgment. *See* *Greene v. Lindsey*, 456 U.S. 444, 449-450 (1982). So long as it is executed in this fashion, posting satisfies constitutional procedural due process requirements as a “singularly appropriate and effective way of ensuring that a person who cannot conveniently be served personally is actually apprised of proceedings against him.” *Id.* at 452-53.

<sup>7</sup> *See, e.g., Berry v. F&S Fin. Marketing, Inc.*, 271 Va. 329, 331 n.3 (2006); *McVeigh v. Bank of Old Dominion*, 67 Va. (26 Gratt.) 785, 826 (1875); *Goolsby v. St. John*, 66 Va. (25 Gratt.) 146, 157 (1874); *see also Holt v. Nedry*, 64 Va. Cir. 373, 374-375 (Fairfax Cnty. 2004) (return of service marked “not found” in a confessed judgment case did not constitute successful service).

<sup>8</sup> Section 8.01-438.

<sup>9</sup> *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-339 (1979); *Smoot v. Commonwealth*, 37 Va. App. 495, 501 (2002); 2008 Op. Va. Att’y Gen. 41, 42.

<sup>10</sup> *In re J. C. W., et al., Children*, 318 Ga. App. 772, 782 (2012).

<sup>11</sup> *Patterson v. Commonwealth*, 216 Va. 306, 307 (1975); *S. E. Public Serv. Corp. v. Commonwealth*, 165 Va. 116, 122 (1935).

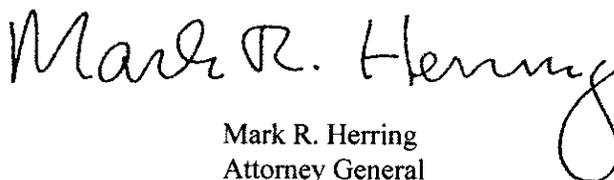
papers, even if the registered or certified mail receipt is not returned by the post office, or it is returned stating “not accepted” or “not at this address.”<sup>12</sup>

### Conclusion

Accordingly, it is my opinion that service of a confessed judgment on a nonresident by “posting” is sufficient if authorized under the law of the foreign jurisdiction. Service is not sufficient, however, if the return is marked by the officer as “Not Found.” If service is attempted by mailing, it is sufficient if the clerk sends a copy of the order by registered or certified mail to the nonresident debtor’s last known address and files a certificate showing that such has been done. This is so regardless of whether the registered or certified mail receipt is not returned to the clerk by the post office, or is returned stating “not accepted” or “not at this address.”

With kindest regards, I am

Very truly yours,



Mark R. Herring  
Attorney General

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<sup>12</sup> In such scenarios, actual notice is not necessary to satisfy procedural due process requirements, as mailing is reasonably calculated to apprise the debtor of the judgment. *Cf. Equip. Fin. Grp., Inc. v. Traverse Computer Brokers*, 973 F.2d 345, 347 (4th Cir. 1992) (holding that service through the Secretary of the Commonwealth was complete, even though notice was returned by the post office as “undeliverable”); *Banks v. Leon*, 975 F. Supp. 815, 818 (W.D. Va. 1997); *Va. Polytechnic Inst. & State Univ. v. Prosper Fin., Inc.*, 284 Va. 474, 482 (2012); *Basile v. Am. Filter Serv., Inc.*, 231 Va. 34, 38 (1986) (holding service through the Secretary of the Commonwealth was complete, even though notice to defendant was returned “unclaimed” by post office).