



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring
Attorney General

202 North Ninth Street
Richmond, Virginia 23219
804-786-2071
Fax 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

July 22, 2016

The Honorable J. Jack Kennedy, Jr.
Clerk, Circuit Court for Wise County / City of Norton
206 East Main Street
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*.

Issues Presented

You ask several questions related to the powers and responsibilities of a clerk of circuit court with respect to reviewing requests for payment from court-appointed counsel to determine whether they have provided a “detailed accounting” of the time expended for representation, as required by § 19.2-163 of the *Code of Virginia*.

Applicable Law and Discussion

Article VII, § 4 of the Constitution of Virginia creates the office of circuit court clerk and provides that a clerk’s duties “shall be prescribed by general law or special act.”¹ “As a general rule, clerks have no inherent powers, and the scope of their powers must be determined by reference to applicable statutes.”² As constitutional officers, clerks are subject to the Dillon Rule of strict construction, which limits their powers to those that are “expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable.”³

The *Code of Virginia* provides that court-appointed counsel shall be compensated for their services on an hourly basis, subject to certain fee caps and waivers provided for in statute.⁴ Section 19.2-163 sets forth the procedures whereby court-appointed counsel may request payment for their services. Among other things, the statute requires that court-appointed counsel submit “a detailed accounting of the time expended for [the] representation” along with each request for payment.⁵ The

¹ VA. CONST. art. VII, § 4.

² 2009 Op. Va. Att’y Gen. 38, 40; 2003 Op. Va. Att’y Gen. 60, 60; *see also* 2014 Op. Va. Att’y Gen. 73, 74.

³ *See City of Richmond v. Confere Club of Richmond, Virginia, Inc.*, 239 Va. 77, 79 (1990); 2009 Op. Va. Att’y Gen. 38, 39; 2009 Op. Va. Att’y Gen. 56, 57.

⁴ VA. CODE ANN. § 19.2-163 (2015).

⁵ *Id.*

statute makes clear that the power to approve or disapprove any such request for payment lies with the presiding judge, or—in certain circumstances where an additional waiver is requested—the chief judge of the circuit.⁶ It makes no reference to the clerk approving, disapproving, or rejecting a request for payment.

For amounts that are to be paid from the State Treasury, the Supreme Court of Virginia has provided forms—primarily the DC-40 or “List of Allowances”—for counsel to use to record their time expended and to make a request for payment. In addition to a space for the judge’s signature, the DC-40 form contains a block for the clerk to sign certifying that “[s]aid account has been duly examined . . . and appears to be correct and unpaid.” Since the applicable statute gives the presiding (or the chief judge) authority to approve payment, with no co-equal power in the clerk, the clerk’s certification on the form must necessarily mean that the clerk is approving the form only as to it being fully and correctly completed as a request for payment not already made, not approval by the clerk that the amount requested is supported by adequate or sufficiently “detailed” documentation. A form promulgated by a government agency may not modify in any way powers and limitations set out by statute.⁷ Once the judge has authorized payment and the clerk has certified the form, the clerk must forward the request to the Supreme Court of Virginia for payment.⁸

Previously, this Office responded to a request for an opinion on whether a clerk was authorized to refuse to record certain survey plats that had not been approved by local planning officials. After citing the above principles, the Opinion stated:

As a general rule, a clerk is not responsible for determining if an instrument to be recorded is sufficient to meet the requirements of any particular provision of law I find no statutory provision authorizing a circuit court clerk to refuse to record boundary survey plats and physical survey plats until after the review and approval of such plats by local planning officials.⁹

The conclusion I reach herein is consistent with the principle that the duties of a clerk related to filing and lodging of court papers are ministerial.¹⁰ As in the above-referenced Opinion, there is here no statutory authority for the clerk to refuse any applications deemed deficient in the required accounting or to refuse to submit applications for payment to the court. The circuit court, rather than the clerk, is tasked with determining whether court-appointed counsel has provided “a detailed accounting of time expended for representation.”

⁶ “The [circuit] court in its discretion, and subject to the guidelines issued by the Executive Secretary of the Supreme Court, may waive the limitation of fees [up to certain limits]” *Id.*, subsection 2. For additional waivers, approval of the chief judge is required. *Id.* In addition, the circuit court is authorized to “direct the payment of such reasonable expenses incurred by such court-appointed counsel as it deems appropriate under the circumstances of the case.” *Id.*

⁷ See *Commonwealth v. Appalachian Electric Power Co.*, 193 Va. 37, 45 (1951) (the doctrine of administrative interpretation, while broad, may not override the plain meaning of a statute).

⁸ “Any statement submitted by an attorney for payments due him for indigent representation or for representation of a child pursuant to § 16.1-266 shall, after the submission of the statement, be forwarded forthwith by the clerk to the Commonwealth, county, city or town, as the case may be, responsible for payment.” VA. CODE ANN. § 19.2-163.

⁹ 2009 Op. Va. Att’y Gen. 38, 40.

¹⁰ *Harvey v. Chesapeake & Potomac Tel. Co.*, 198 Va. 213, 218 (1956).

Honorable J. Jack Kennedy, Jr.

July 22, 2016

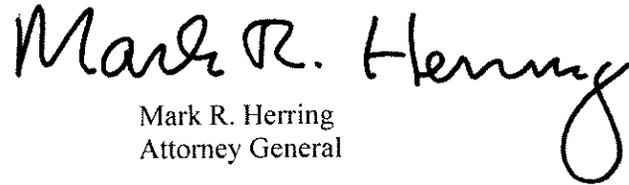
Page 3

Conclusion

Accordingly, it is my opinion that a circuit court clerk's role in the process by which court-appointed counsel may request payment for their services is limited to determining whether the form is correctly and completely filled out. The clerk must forward the applications to the Supreme Court of Virginia after they have been approved by the circuit court judge.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink that reads "Mark R. Herring". The signature is written in a cursive style with a large, looping "H" and a long, sweeping tail on the "g".

Mark R. Herring
Attorney General