



COMMONWEALTH OF VIRGINIA

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February 16, 2010

The Honorable James E. Plowman
Loudoun County Commonwealth's Attorney
20 East Market Street
Leesburg, Virginia 20176-2809

Dear Mr. Plowman:

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 a Commonwealth's attorney has the authority to represent a toll facility operator in actions brought against vehicle operators or registered owners pursuant to § 46.2-819.1 or § 46.2-819.3 for unpaid tolls, administrative fees, and civil penalties.

Response

It is my opinion that a Commonwealth's attorney has no authority to provide representation for a toll facility operator in actions brought under § 46.2-819.1 or § 46.2-819.3 for unpaid tolls, administrative fees, and civil penalties.

Applicable Law and Discussion

A Commonwealth's attorney is a constitutional officer whose duties are prescribed by law.¹ The primary responsibility of a Commonwealth's attorney is to enforce the criminal laws within his jurisdiction.² Specifically, a Commonwealth's attorney shall prosecute felonies and "may in his discretion, prosecute Class 1, 2, and 3 misdemeanors, or any other violation, the conviction of which carries a penalty of confinement in jail, or a fine of \$500 or more, or both such confinement and fine."³ Commonwealth's attorneys also "may perform such other duties, not inconsistent with [the] office, as the governing body may request."⁴ In cities or counties of a certain population, Commonwealth's attorneys may not engage in the private practice of law.⁵

¹ See VA. CONST. art. VII, § 4.

² VA. CODE ANN. §§ 15.2-528, 15.2-1626, 15.2-1627 (2008).

³ Section 15.2-1627(B).

⁴ Section 15.2-1626.

⁵ Section 15.2-1628 (2008).

Section 46.2-819 provides, in pertinent part, that “[e]xcept for those permitted free use of toll facilities under § 33.1-252, it shall be unlawful for the driver of a motor vehicle to use a toll facility without payment of the specified toll.” In § 46.2-819.1(A), the General Assembly has authorized toll facility operators to install photo-monitoring systems to ensure that tolls are paid. Section 46.2-819.1(B) authorizes such operators to collect administrative fees to cover the expenses of collecting unpaid tolls. If a collection matter proceeds to court, the owner or operator of the vehicle is liable for an additional civil penalty.⁶ The civil penalty “shall not be deemed a conviction as an operator and shall not be made part of the driving record of the person upon whom such civil penalty is imposed.”⁷

Section 46.2-819.3 contains many provisions similar to § 46.2-819.1, but applies to enforcement of tolls where there is no photo-monitoring or automatic vehicle identification system, as described in § 46.2-819.1, or an actual stop by a law enforcement officer at the time of the offense, as covered under § 46.2-819.⁸ Violations of §§ 46.2-819.1 and 46.2-819.3 are traffic infractions that carry no possibility of jail time.⁹

First, you relate that the Dulles Greenway is a private entity. Generally, § 15.2-1628 prohibits Commonwealth’s attorneys from engaging in the private practice of law. Second, where the General Assembly intends to permit or require that Commonwealth’s attorneys provide representation for offenses that do not result in jail time or in civil matters, it knows how to express that intention.¹⁰ For example, § 46.2-1133(7), of the vehicle weight laws, provides that:

An alleged weight violation which is contested shall be tried as a civil case. *The attorney for the Commonwealth shall represent the interests of the Commonwealth.* The disposition of the case shall be recorded in an appropriate order, a copy of which shall be sent to the Department [of Motor Vehicles] in lieu of any record which may be otherwise required by § 46.2-383. If judgment is for the Commonwealth, payment shall be made to the Department. [Emphasis added.]^[11]

⁶See VA. CODE ANN. § 46.2-819.1(C) (Supp. 2009).

⁷Section 46.2-819.1(J).

⁸Since § 46.2-819.3 is similar § 46.2-819.1, I have not set out the pertinent portions of § 46.2-819.3 in this opinion.

⁹See § 46.2-100 (Supp. 2009) (defining “traffic infraction” as “violation of law punishable as provided in § 46.2-113, which is neither a felony nor a misdemeanor”); § 46.2-113 (2008) (providing that violations of Title 46.2 “constitute traffic infractions” that “[u]nless otherwise stated” are “punishable by a fine of not more than that provided for a Class 4 misdemeanor”).

¹⁰See 2004 Op. Va. Att’y Gen. 68, 71 n.16 and opinions cited therein (noting that when General Assembly intends statute to impose requirements, it knows how to express its intention).

¹¹See also, e.g., VA. CODE ANN. § 18.2-371.2(D) (2009) (authorizing Commonwealth’s attorneys to recover civil penalty for violations of, among other things, prohibition on sale of tobacco to minors); VA. CODE ANN. § 32.1-36.1(B) (2009) (providing that Commonwealth’s attorney may recover civil penalty for violation of confidentiality of tests to determine infection with human immunodeficiency virus); VA. CODE ANN. § 59.1-206(C) (Supp. 2009) (authorizing Commonwealth’s attorneys to recover civil penalties for violations of Virginia Consumer Protection Act).

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I find no similar provision in either § 46.2-819.1 or § 46.2-819.3; thus, the General Assembly has not expressed such an intention. Further, I find no other provision of law that authorizes such representation.

Conclusion

Accordingly, it is my opinion that a Commonwealth's attorney has no authority to provide representation for the toll facility operator in actions brought under § 46.2-819.1 or § 46.2-819.3 for unpaid tolls, administrative fees, and civil penalties.

With kindest regards, I am

Very truly yours,

A handwritten signature in cursive script, appearing to read "Ken Cuccinelli", with a horizontal line underneath the name.

Kenneth T. Cuccinelli
Attorney General