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# SUPREME COURT OF VIRGINIA



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October 31, 2017

The Honorable Mark D. Obenshain  
Chairman, Courts of Justice Committee  
Senate of Virginia  
P.O. Box 555  
Harrisonburg, Virginia 22803

The Honorable David B. Albo  
Chairman, Courts of Justice Committee  
Virginia House of Delegates  
6367 Rolling Mill Place, Suite 102  
Springfield, VA 22152

Re: Report on Withdrawal of Retained Counsel in Civil Cases

Dear Chairmen Obenshain and Albo:

Chapter 774, Virginia Acts of Assembly, 2017 Reconvened Session (House Bill 1411) directed the Judicial Council to review (i) the current process by which privately retained counsel may withdraw from a civil case with leave of court and (ii) the possible impact on the courts, litigants, and attorneys of amending such process to allow withdrawal of counsel without leave of court.

Please find enclosed the report on the withdrawal of retained counsel in civil cases, submitted to the Judicial Council by the HB 1411 Advisory Group, and approved and adopted by the Judicial Council at its October 19, 2017 meeting.

If you have any questions regarding this report, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,

Karl R. Hade

KRH:jrp  
Enclosures

October 2, 2017

To: The Judicial Council of Virginia

From: House Bill 1411/Chapter 774 Advisory Group  
The Honorable Lisa B. Kemler, Chair

Re: Report on Withdrawal of Retained Counsel in Civil Cases

House Bill 1411 (Chapter 774), which was enacted by the General Assembly during the 2017 Regular Session, creates a procedure by which retained counsel may withdraw from representation of the defendant during a criminal proceeding, without leave of court. A second enactment clause directs the Judicial Council to review the current process for the withdrawal of counsel in civil proceedings and to consider the prospect of permitting withdrawal without leave of court. The Judicial Council is also directed to submit a report on this issue to the Chairmen of the House and Senate Committees for Courts of Justice by November 1, 2017.

In response to this legislation, Chief Justice Donald W. Lemons, Chair of the Judicial Council, appointed a group of legislators, judges, and attorneys to study the issues described in the second enactment clause and report its conclusions to the Judicial Council at its meeting on October 19, 2017.<sup>1</sup> The Advisory Group met in person on August 18, 2017, and by conference call on October 2, 2017.

The Advisory Group reviewed the legislative history of House Bill 1411 leading to the second enactment clause, the evolution of Supreme Court Rule 1:5, which is implicated by this inquiry, a detailed explanation from Delegate David Albo describing the situation in a civil case which led him to introduce the legislation, as well as a report from Judge Lisa Kemler on how neighboring states address withdrawal requests. Of the neighboring states that address the issue, all do so through their respective Rules of Court rather than by statute. The Advisory Group also considered the impact of any legislative or rules changes on the Virginia Rules of Professional Conduct.

The Advisory Group considered the results of a survey conducted by staff of the Office of the Executive Secretary of the Supreme Court (OES) in June, in preparation for the work of the Advisory Group. OES polled circuit court judges for their experiences with counsel requesting leave to withdraw from civil cases. Of the 66 judges (representing 40% of the sitting circuit court judges) that participated in the survey, the vast majority indicated that they received fewer than five such requests a month (~90%), with a majority of that majority indicating they often grant such requests when received (75%). When asked whether a uniform statewide

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<sup>1</sup> The Advisory Group consisted of Delegate David Albo, Doris H. Causey, Esq., Frank Friedman, Esq., Delegate Gregory D. Habeeb, Judge Cheryl V. Higgins, Judge Stephen Hudgins, Judge Lisa B. Kemler, James McCauley, Esq., Senator Mark D. Obenshain, Jeffrey Palmore, Esq., Ronald Tweel, Esq. Legal staff from the Office of the Executive Secretary of the Supreme Court assisted the Advisory Group.

statutory procedure setting out specific timeframes would be beneficial, 35 judges responded “Yes” while 30 judges responded “No.” This latter question was posed in the abstract, untethered to any specific proposal. The Advisory Group interpreted the results of the survey as indicating that withdrawal of counsel in civil matters is an issue which does not arise frequently or consistently in circuit court, does not significantly impede court dockets, and is typically resolved with existing legal tools. Necessarily, the survey was conducted quickly and with the level of detail time permitted. It surveyed only circuit judges; the Bar was not surveyed.

While a generalized concern for the circumstances which could prompt legislation such as House Bill 1411 was expressed, the Advisory Group concluded that it had not been demonstrated that there was a perceived need to change the long-standing principle that withdrawal of counsel in the midst of representation in a civil proceeding requires leave of court. As striking as was the anecdotal evidence about certain problematic situations, the Advisory Group was unconvinced that an attorney’s inability to withdraw without leave of court was a frequent or serious problem.

The consensus among the participating, active practitioners on the Advisory Group was also that the problem of mid-proceeding withdrawal is relatively infrequent, and that a dilemma as acute as the situation precipitating the legislation is extremely rare. There was a discussion of the tools, both procedural and in terms of client management, that can be used to avoid this situation. The practitioners had not observed any appreciable difficulty terminating representation under the current “leave of court” standard in the few instances they had experienced, as long as the motion was not made near the eve of trial and was not made for tactical, rather than practical, reasons.

In summary, the Advisory Group did not conclude that there was a widespread problem with the current process for withdrawal of counsel in civil cases. Therefore, the Advisory Group does not recommend that the Judicial Council undertake any efforts to create or revise the authoritative procedures for such withdrawal of counsel, whether by recommending revision to the current Rules of Court or by recommending legislative action.