

Herb Kirsh



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

September 17, 2002

The Honorable Herb Kirsh
Member, House of Representatives
Box 31
Clover, South Carolina 29710

**Re: Your Letter of August 7, 2002
S.C. Code Ann. §33-1-103 (H.3032)**

Dear Representative Kirsh:

In your above-referenced letter, you raise questions concerning the ability of non-lawyers to represent corporations and partnerships in civil and criminal matters in magistrate's court. By way of background, you indicate that

[You were] the primary sponsor for H.3032, which became law without the signature of the Governor on April 11, 2002. The bill added Section 33-1-103 to the Code so as to provide that a corporation or partnership may designate an employee or principal to represent that entity in magistrate's court, with such representation not constituting the unauthorized practice of law. By Order of the Supreme Court dated September 21, 1992, businesses may be represented in civil magistrate court proceedings by a non-lawyer officer, agent, or employee, with such representation not constituting the unauthorized practice of law.

[Your] intent, when introducing this legislation, was not to limit the authority granted by the Supreme Court in the above referenced Order, but to simply codify that authority. However, since we inadvertently omitted the word "agent" from Section 33-1-103, numerous magistrates have concluded that the later enacted statute limits the non-lawyer representation to employees and principals. As a result, many magistrates are refusing to allow collection companies from acting as "agents" for businesses and pursuing actions on their behalf in magistrate's court.

Given this background, you ask specifically for this Office's "opinion of the effect of Section 33-1-103 on the Order of the Supreme Court dated September 21, 1992, as it relates to non-lawyer representation in civil magistrate court proceedings" You also ask if Section 33-1-103 "... would

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restrict collection companies from acting as agents and initiating criminal fraudulent check warrants in magistrate's court?"

LAW/ANALYSIS

I. Generally

Added to the South Carolina Code of Laws by Act 201 of 2002 (H.3032), Section 33-1-103 provides in pertinent part as follows:

A corporation or partnership, as defined in this section, may designate an employee or principal of the corporation or partnership to represent it in magistrates' court. ... Notwithstanding the provisions of Chapter 5 of Title 40 or any other provision of law, the person so designated, while representing the corporation or partnership in magistrates' court, is not engaging in the unauthorized practice of law.

Through Section 33-1-103, the General Assembly is, in essence, regulating the practice of law in magistrate's court. Generally, however, the practice of law is regulated by the State Supreme Court. In fact, Section 4 of Article V of the South Carolina Constitution gives the Supreme Court the authority to make rules and regulations governing the administration, practice and procedure in all courts of this State. Moreover, the separation of power provisions contained in Articles I and V of the South Carolina Constitution have been found to provide the Court with the inherent power to regulate the practice of law.

Pursuant to Section 4 of Article V, and in reference to the representation of businesses in civil matters in magistrate's court by non-lawyers, the Supreme Court issued the Order dated September 21, 1992, which you mentioned in your request. That order, in part, allows "... a business to be represented by a non-lawyer officer, agent or employee ... in civil magistrate's court proceedings." There are apparent differences in the terms of Section 33-1-103 and the Supreme Court's September 21, 1992 Order as to who is allowed to represent a business entity in magistrate's court. Section 33-1-103 allows a corporation or partnership to designate an employee or principal of the corporation or partnership to represent them. The Supreme Court's Order, on the other hand, provides for representation of a business by an officer, agent or employee.

To provide an opinion as to the effect of Section 33-1-103 on the Supreme Court's order, it seems that two issues must be addressed: 1) is Section 33-1-103 an unconstitutional infringement on the Supreme Court's authority to regulate the courts of this State and/or the separation of powers doctrine; and, 2) are there material differences in the terms of Section 33-1-103 and the Supreme Court's Order.

A. Constitutional Concerns

Initially, it must be noted that Section 33-1-103 carries with it a presumption of constitutionality. As this Office previously opined "... in considering the constitutionality of legislation which is enacted by the General Assembly, we must presume that the act is constitutional in all respects. Moreover, such an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act of the General Assembly unconstitutional." Atty. Gen. Op. (September 25, 1998) (citations omitted)

Section 4 of Article V of the South Carolina Constitution provides in pertinent part that "[t]he Supreme Court shall make rules governing the administration of all the courts of the State. *Subject to the statutory law*, the Supreme Court shall make rules governing the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted. (Emphasis added)." In Stokes v. Denmark Emergency Medical Services, 315 S.C. 263, 433 S.E.2d 850 (1993), the South Carolina Supreme Court held that "[t]he clause 'subject to the statutory law' establishes the intent to subordinate to the General Assembly the Court's rulemaking power in regard to practice and procedure." As the September 21, 1992 Order specifically references the Court's "duty to regulate the practice of law ..." pursuant to Article V, §4, it would appear that the holding in Stokes would be applicable to the issue raised in your request. That is, it would appear that the passage of Section 33-1-103 does not infringe on the Supreme Court's constitutional authority to regulate the procedure and practice in the courts of this state and that Section 33-1-103 would thus be controlling.

Our analysis, however, cannot end at this point. Additional constitutional provisions may be applicable. The separation of powers doctrine is found in Section 8 of Article I of the South Carolina Constitution. That section states that "[i]n the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." Also, Section 1 of Article V provides that "[t]he judicial power shall be vested in a unified judicial system, which shall include a Supreme Court, a Court of Appeals, a Circuit Court, and such other courts of uniform jurisdiction as may be provided for by general law."

In Renaissance Enterprises, Inc. v. Summit Teleservices, Inc., 515 S.E.2d 257, 334 S.C. 649 (1999), the Supreme Court was faced with the question of "[w]hether a non-lawyer can represent a corporation in circuit and appellate courts?" The Court noted that in In re Unauthorized Practice of Law, 309 S.C. 304, 422 S.E.2d 123 (1992) (citation for the September 21, 1992 Order), they had allowed businesses to be represented by certain non-lawyers in magistrate's court, but that they had not extended this allowance to circuit and appellate courts. 515 S.E.2d at 258. The petitioner in Renaissance Enterprises submitted that his authority to represent the corporation in circuit and appellate courts came from S.C. Code Ann. §40-5-320(A)(1) which provides: "(A) It is unlawful for

a corporation or voluntary association to: (1) practice or appear as an attorney at law for a person *other than itself* in a court in this State or before a judicial body ..." (emphasis added). The Court rejected the petitioner's arguments based on separation of power concerns and stated that a statute which attempts to exercise ultimate authority over the inherent power of the Court violates the separation of powers doctrine. Id. The Court also stated that "[a]s pointed out in In re Unauthorized Practice of Law, supra, '[t]he Constitution commits to this Court the duty to regulate the practice of law in South Carolina.' ... [and] [a]ny interpretation which would expand our decisions regarding the practice of law would violate the separation of powers provision which is set forth in article V, section 1 of our State Constitution." Id.

Applying the logic of the holding in Renaissance Enterprises to the issue at hand, it is apparent that, as statutory provisions which attempt to expand Supreme Court decisions regarding the practice of law violate the principals of separation of power, so too would statutes which attempt to narrow those decisions. Therefore, it would appear that, to the extent that it is inconsistent with or narrows the application of the Court's September 21, 1992 Order, Section 33-1-103 would be found by a reviewing court to be in violation of the separation of powers doctrine.

The conclusions reached when applying the provisions of Section 4 of Article V and the separation of powers provisions of Section 8 of Article I and Section 1 of Article V are in conflict. As all of the provisions carry the weight of constitutional authority and such has been recognized by our Supreme Court in the above decisions, it is impossible for this Office to conclusively opine as to the constitutionality of Section 33-1-103. Having said that, it seems that the holding in Renaissance Enterprises is closer to being on point than that of Stokes v. Denmark Emergency Medical Services. In Renaissance Enterprises the Court addressed specifically the issue of whether Section 40-5-320(A)(1) can be interpreted to in some way alter the provisions of their September 21, 1992 Order. In Stokes, the issue involved an alleged conflict between a statutory provision and a Rule of Civil Procedure (SCRCP Rule 59) promulgated by the Court. Section 4A of Article V of the South Carolina Constitution requires such rules to be submitted to the General Assembly prior to becoming effective. It is not totally illogical to recognize a distinction between the General Assembly's authority to pass legislation subordinating a rule which is required by the constitution to be submitted for their approval and a their authority with respect to a "decision" by the Supreme Court such as that reflected in the September 21, 1992 Order. Judicial clarification, however, is necessary for a conclusive determination.

B. Interpretation of Section 33-1-103

Your main concern with the scope of S.C. Code Ann. §33-1-103 relates to the class of persons (non-lawyers) which are made eligible to represent a corporation or partnership in magistrate's court. Section 33-1-103 allows for only an employee or principal to provide representation. By contrast, the Supreme Court's Order of September 21, 1992, allows "... a business to be represented by a non-lawyer officer, agent or employee" You indicate that your intention was merely to codify the Court's Order, not limit its authority. The exclusion of the word "agent"

form Section 33-1-103, however, has lead some magistrates to interpret the statute as applying strictly to principal's and employees.

The primary goal of statutory interpretation is to ascertain the intent of the general assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). The statute's words must be given their plain and ordinary meaning without resort to a forced or subtle construction which would work to limit or to expand the statutes operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991). However, our Supreme Court has cautioned against an overly literal interpretation of a statute where such may not be consistent with legislative intent. In Greenville Baseball, Inc. v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942), the Court recognized that

[i]t is a familiar canon of construction that a thing which is in the intention of the makers of a statute is as much within the statute as if it were within the letter. It is an old and well-established rule that words ought to be subservient to the intent, and not the intent to the words.

Id. at 368-369. Further, in interpreting statutes, "[t]he duty of the Court is to so construe Acts of the Legislature as to uphold their constitutionality and validity if it can reasonably be done, and if their construction is doubtful the doubt will be resolved in favor of the law." Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). Where there are two possible constructions, one rendering the statute unconstitutional and the other constitutional, it is the duty of the court to adopt that construction which will uphold the validity of the statute, "for it is always presumed that the Legislature intends a statute to have meaning and effect consistent with the constitution." Ex Parte Tillman, 84 S.C. 552, 563, 66 S.E. 1049 (1910); see also OP. ATTY. GEN DATED JUNE 9, 1970.

It has been indicated that the intent in drafting Section 33-1-103 was "... to simply codify..." the terms of the Supreme Court's Order of September 21, 1992. This indication of legislative intent is consistent with the presumption expressed in Ex Parte Tillman, supra. Given the Supreme Court's holding in Renaissance Enterprises, Inc. v. Summit Teleservices, Inc., 515 S.E.2d 257, 334 S.C. 649 (1999), it must be presumed that the Legislature did not intend to expand or narrow the Court's decision in the September 21, 1992 Order. Further, it would be the duty of a reviewing court to construe Section 33-1-103 in such a way to uphold its constitutionality if at all possible. It does not appear to be wholly unreasonable to interpret Section 33-1-103 and the September 21, 1992 Order as being consistent. Should it be ultimately determined, however, that the two are irreconcilable, deference should be given to the ruling of the Supreme Court.

II. Initiation of Warrants

This Office has previously addressed the question of whether or not a collection company can serve as the affiant on fraudulent check warrants. See OP. ATTY. GEN. DATED OCTOBER 12, 1987, DECEMBER 18, 1990 & MAY 27, 1998. In the May 27 1998 opinion (copy enclosed), we reaffirmed the conclusions reached in the 1987 and 1990 opinions and stated:

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If the check collection agency or a representative thereof is an endorsee of a check which has been dishonored, such endorsee may not seek a warrant pursuant to the Bad Check Law because the "fraudulent check provisions are not applicable where the payee '... knows, has been expressly notified or has reason to believe that the drawer did not have an account or have on deposit with the drawee sufficient funds to insure payment thereof ...". However, if the magistrate determines that the check collection agency or a representative thereof is seeking to procure the warrant not as endorsee, but simply as an agent of the merchant or payee, such representative of the check collection agency could, in accord with the 1990 Opinion, do so upon a proper showing to the magistrate.

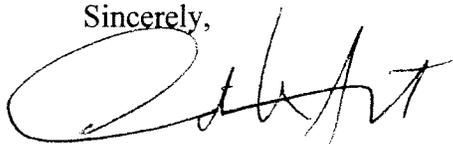
As is apparent from the dates on the 1987 and 1990 opinions (pre-date September 21, 1992 Order), the determination as to a collection agency's ability to act as an affiant on an arrest warrant does not depend on the authorization to represent a business in court proceedings. Rather, it is based on the ability of the individual employed by the collection company to provide the magistrate with probable cause to believe that a violation has occurred. Accordingly, it does not appear that Section 33-1-103 alters our previous opinions in this regard.

CONCLUSION

While not free from doubt, it is my opinion that a reviewing court would likely hold that an interpretation of Section 33-1-103 which alters the Supreme Court's decision in the September 21, 1992 Order violates the separation of power provisions of the South Carolina Constitution. Renaissance Enterprises, Inc. v. Summit Teleservices, Inc., 515 S.E.2d 257, 334 S.C. 649 (1999). It is further my opinion that it is not unreasonable to construe Section 33-1-103 as consistent with the Order, thereby upholding the validity of the statute. Should, however, it be determined that the provisions of the statute and the order are irreconcilable, the Order of the Court must control. Finally, it is my opinion that Section 33-1-103 does not effect our previous opinions concerning the ability of a collection agency representative to serve as the affiant on a fraudulent check warrant.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,



David K. Avant
Assistant Attorney General