ALAN WILSON
ATTORNEY GENERAL

July 9, 2013

The Honorable C. Ryan Johnson
Magistrate, Greenwood County
Greenwood County Courthouse, Suite 100
528 Monument Street
Greenwood, South Carolina 29646

Dear Judge Johnson,

You seek an opinion of this Office as to who may properly prosecute a courtesy summons charge issued pursuant to S.C. Code § 22-5-115[1] in summary court. Specifically, you ask "can a private party (not a law enforcement officer, solicitor, or attorney general), prosecute a criminal case in magistrate's court?" By way of background, you provide the following information:

> I understand that the Supreme Court and the Court alone determines the unauthorized practice of law, but your opinion on the matter will be of great assistance. In way of example, consider the following scenario:
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> > Person X, a private citizen, swears before a magistrate that Person Y struck him in the face. Probable cause is found for Assault and Battery 3rd Degree and a courtesy summons is issued. The summons is served on Person Y. Both Person X and Y appear on the court date.
>
> In the above scenario, who is the proper prosecutor? Can Person X present evidence and prosecute the case?

Law/Analysis

As you indicate, State law vests our Supreme Court with the sole authority to regulate the practice of law. See S.C. Const. art. V, § 4 ("The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted"); S.C. Code § 40-5-10 ("The inherent power of the

[1] § 22-5-115(A) states:

> (A) Notwithstanding any other provision of law, a summary court or municipal judge may issue a summons to appear for trial instead of an arrest warrant, based upon a sworn statement of an affiant who is not a law enforcement officer investigating the case, if the sworn statement establishes probable cause that the alleged crime was committed. The summons must express adequately the charges against the defendant. If the defendant fails to appear before the court, he may be tried in his absence or a bench warrant may be issued for his arrest. The summons must be served personally upon the defendant.

Supreme Court with respect to regulating the practice of law, determining the qualifications for admission to the bar and disciplining, suspending and disbarring attorneys at law is hereby recognized and declared"); In re Unauthorized Practice of Law, 309 S.C. 304, 305, 422 S.E.2d 123, 124 (1992) ("The Constitution commits to this Court the duty to regulate the practice of law in South Carolina").

Consistent with such authority, the Court has specifically held that "a non-lawyer's representation of a business entity in criminal magistrate's court runs afoul of South Carolina law, is repugnant to our system of justice and constitutes the unauthorized practice of law." In re Richland County Magistrate's Court, 389 S.C. 408, 414, 699 S.E.2d 161, 165 (2010). In support of its holding, the majority opinion stated the purpose of a criminal court "is to vindicate the *public interest* in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant." Id. at 411, 699 S.E.2d at 163 (quoting Standefer v. U.S., 447 U.S. 10, 25, 100 S.Ct. 1999, 2008 (1980) (emphasis added)). Noting that a prosecutor represents the interests of the community, the Court stated that "allowing prosecution decisions to be made by, or even influenced by, private interests would do irreparable harm to our criminal justice system." Id. at 412, 699 S.E.2d at 163.

Although the Court in In re Richland County Magistrate's Court acknowledged it had previously issued decisions permitting non-lawyer law enforcement officers to prosecute certain types of criminal cases in summary court, it found these holdings did not extend to permit a private, non-lawyer to do so:

> [T]his Court has previously permitted persons other than solicitors to prosecute criminal cases in magistrate's court. See, e.g., State v. Messervy, 258 S.C. 110, 187 S.E.2d 524 (1972); City of Easley v. Cartee, 309 S.C. 420, 424 S.E.2d 491 (1992). Though this Court sanctioned the practices of allowing the arresting South Carolina Highway Patrol officer to prosecute traffic-related offenses and licensed security officers to prosecute misdemeanor cases in magistrate's court, such non-attorneys are law enforcement officers acting in the capacity of public officials and are sworn to uphold the law. See Messervy, 258 S.C. at 112, 187 S.E.2d at 525; Cartee, 309 S.C. at 422, 424 S.E.2d at 491; S.C.Code Ann. § 8-11-20 (2009). Consequently, they act on behalf of the State. See State v. Bridgers, 329 S.C. 11, 14, 495 S.E.2d 196, 198 (1997) ("[A]s law enforcement officers, they are charged with the discretionary exercise of the sovereign power. Specifically, they must enforce the 'traffic and other related laws.' "). This classification was essential to the Court's holding in Cartee. Cartee, 309 S.C. at 422, 424 S.E.2d at 491 ("Therefore, *in light of the legislature's extension of law enforcement authority to licensed security officers,* we hold that licensed security officers may prosecute misdemeanor cases in magistrate's or municipal court.") (emphasis added). As a non-lawyer representing a corporation is not a law enforcement officer, we cannot assume that he will act in the interests of the community. Moreover, as a non-lawyer, the representative of the corporation is not bound by professional ethical restraints. Consequently, the non-lawyer prosecutor not only acts on interests other than those of the community but is also not bound by ethical rules, yet his prosecution may result in the imprisonment of the defendant. See S.C.Code Ann. § 22-3-550 (2007).

Id. at 413-14, 699 S.E.2d at 164. Similar conclusions have since been acknowledged in subsequent decisions of the Court and opinions of this Office.[2]

On the other hand, the dissent in In re Richland County Magistrate's Court, written by Justice Hearn with the concurrence of Chief Justice Toal, disagreed with the majority's decision generally on the basis it did not employ "a practical and realistic approach to the analysis of whether or not questionable conduct qualifies as the unauthorized practice of law ...." Id. at 415, 699 S.E.2d at 165 (Hearn, J., dissenting). The dissent noted the representation of a business entity's interests in criminal magistrate's court is "a practice which has gone on, unchallenged, and apparently without incident, for years." Id. at 416, 699 S.E.2d at 165. Among the various other reasons given as to why such a practice should be sanctioned by the Court, the dissent found the majority's decision to the contrary would have the following impractical consequences:

> This decision will place an additional burden on the South Carolina business community, as well as on the already budget-strained and time-challenged prosecutorial arm of the State. Without the ability to make a cost/benefit analysis of whether to pursue their own claims, corporations may be more willing to pursue prosecution, secure in the knowledge that the burden of prosecuting the claims rests squarely on the shoulders of the solicitor's office. On the other hand, overburdened solicitor's offices may exercise prosecutorial discretion to *not* prosecute these minor cases, which might very well have the end result of businesses refusing to accept checks in payment for merchandise. As discussed by then acting circuit judge, John Kittredge in Lexington County Transfer Court, limited resources and budgetary constraints can serve as a valuable consideration in determining whether practices should qualify as an exception to the prohibition against the unauthorized practice of law. 334 S.C. at 53-54, 512 S.E.2d at 794. As a state, we certainly want these and all crimes to be prosecuted; nonetheless, a process that becomes too cumbersome and costly for the State to pursue does not successfully address the problem. Permitting a process whereby business entities can pursue these claims through an agent, in a manner which is cost-effective for both the State and the corporations, yet checked by the integrity of our judicial system, is, in my opinion, a practice which should be sanctioned by this Court.

Id. at 421, 699 S.E.2d at 168.

We note concerns similar to that stated by the dissent in In re Richland County Magistrate's Court have been expressed to us by Court Administration with regards to the prosecution of courtesy summons cases in magistrate's court. It is our understanding that due to limited resources only a few jurisdictions in this State have been able to employ a prosecutorial officer responsible for prosecuting such cases. Thus,

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[2] See Rainey v. Haley, 2012-211048, 2013 WL 261144, *6 (2013) (Beatty, J., concurring) (stating appellant, as private citizen, lacked authority to prosecute a criminal action) (citing In re Richland County Magistrate's Court, supra)); Op. S.C. Att'y Gen., 2013 WL 1695517 (March 26, 2013) (concluding a county auditor's prosecution of certain criminal cases in magistrate's court "would likely be found by the Court to constitute the unauthorized practice of law").

the practice of allowing the affiant on a courtesy summons to present the case against the defendant before a magistrate persists in many jurisdictions throughout the State.

We recognize that many of the solicitor's offices across this State lack the time, staff, money, or other resources necessary to adequately handle the prosecution of courtesy summons cases in the magistrate's court within their jurisdiction. However, in light of the majority's holding in In re Richland County Magistrate's Court, we are constrained to find that a court would likely hold a non-lawyer, private citizen is prohibited from prosecuting a courtesy summons case in magistrate's court. Furthermore, the Court has generally only sanctioned the practice of allowing non-lawyers to prosecute misdemeanor cases in magistrate's court in certain situations where the role of prosecutor is served by the arresting law enforcement officer.[3] Because a courtesy summons is simply served by a law enforcement officer upon a defendant notifying him or her to appear for trial to answer for the charges against them, we cannot conclude that a law enforcement officer is the proper party to prosecute such cases. As we reiterated in a 2005 opinion, "a solicitor is deemed to maintain control of any criminal case brought in magistrate's court." Op. S.C. Att'y Gen., 2005 WL 3352851 (Nov. 28, 2005). Unless and until the Court issues a decision overruling or modifying In re Richland County Magistrate's Court in a manner which allows either the affiant on a courtesy summons or a non-lawyer law enforcement officer to present such cases in magistrate's court, we must advise that such practices are not permitted under the law.

Sincerely,

Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General

[3] The Court has also sanctioned the practice of permitting supervisory officers to assist new or inexperienced arresting officers in prosecuting misdemeanor traffic violations in magistrate's court, State ex rel. McLeod v. Seaborn, 270 S.C. 696, 244 S.E.2d 317 (1978), as well as the practice of non-lawyer probation agents presenting the State's case in probation revocation hearings, State v. Barlow, 372 S.C. 534, 643 S.E.2d 682 (2007).