ALAN WILSON
ATTORNEY GENERAL

October 6, 2011

David E. Belton, Esquire
Office of General Counsel
S.C. Department of Insurance
P.O. Box 100105
Columbia, SC 29202-3105

Dear Mr. Belton:

In a letter to this office, you inform us of an inquiry from a bail bondsman received by the South Carolina Department of Insurance (the "Department") regarding "solicitation" by bail bondsmen or runners pursuant to S.C. Code Ann. §38-53-170 (f). In particular, the question presented is whether a bail bond licensee's display of the name of the bonding company and telephone number on his vehicle when that vehicle is left on the premises of a detention center, or a bondsman wearing clothing which displays similar information, constitutes "solicitation?"

Law/Analysis

Chapter 53 of Title 38 of the South Carolina Code of Laws deals generally with the regulation of bail bondsmen and those who work for bail bondsmen (*i.e.*, "runners"). Pertinent to your question, §38-53-170 states that "[n]o bondsman or runner may: . . . (f) solicit business in any of the courts or on the premises of any of the courts of this State, in the office of any magistrate, or in or about any place where prisoners are confined." Pursuant to §38-53-340, any violation of this provision is a misdemeanor punishable by a fine of not more than five hundred dollars or imprisonment for not more than thirty days, or both. Section 38-53-150 further provides that the Insurance Commissioner may deny, suspend, revoke or refuse to renew a license for any violation of §§38-53-10 *et seq.*

In reviewing §38-53-170 (f), certain rules of statutory construction are relevant. First and foremost is the cardinal rule of statutory interpretation, which is to ascertain and effectuate the legislative intent, whenever possible. State v. Baucom, 340 S.C. 339, 531 S.E.2d 922 (2000). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and such language must be construed in light of the statute's intended purpose. Gambrell v. Travelers Ins. Co., 280 S.C. 69, 310 S.E.2d 814 (1983). Moreover, a statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. Hay v. S.C. Tax Comm., 273 S.C. 269, 255 S.E.2d 837 (1979). In construing statutes, the words used must be given their plain and ordinary meaning without resort to a subtle or forced construction for the purpose of limiting or expanding their operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991). Further, as the South Carolina Supreme Court stated in Greenville Baseball, Inc. v. Bearden, 200 S.C. 363, 20 S.E.2d 813, 816 (1942), "it is a familiar canon of construction that a thing which is within the intention of the makers of the statute is as much within the statute as if it were

within the letter. It is an old and well established rule that the words ought to be subservient to the intent and not the intent to the words." Finally, we note that when a statute is penal in nature, it will be construed strictly against the State and in favor of a defendant. Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001).

In Jackson v. Beavers, 156 Ga. 71, 118 S.E. 751, 753 (1923), the Georgia Supreme Court explained that the underlying purpose for the Georgia statute prohibiting bondsmen from either soliciting business or loitering "about or around jails, places where prisoners are confined, or the courts for purpose of engaging in or soliciting business as such bondsmen," is to regulate "[t]he business of professional bondsmen [which] affords peculiar opportunity for fraud and imposition upon the persons whom they serve."[1] The court stated:

> such business may be so conducted as to seriously interfere with the fair and proper administration of the criminal laws. The unscrupulous may devise means and methods for the escape of violators of the penal statutes. They may use improper and illegal means to secure the acquittal of their clients. For these and other reasons which could be given, this business comes within the police power of the state.

Id., 118 S.E. at 753.

We previously addressed what constitutes "solicitation" pursuant to §38-53-170 (f) in an opinion dated August 12, 1986.[2] Therein we noted that some bondsmen had defended their actions as constituting advertising practices not violating the provision. The issue then presented to us was "where does permissible advertising end and solicitation for purposes of [§38-53-170 (f)] begin?"

We advised that "[a]s to what may be considered to constitute 'solicitation' as referenced in [§38-53-170 (f)], an absolutely definitive answer is not available." We cited the Jackson case above, in which it was asserted that the Georgia provision failed to define what is meant by the language "solicit business as such bondsmen" and, as a result, the provision was so indefinite and uncertain as to be void. The court, however, found it unnecessary to describe the type activities prohibited by the provision and summarily dismissed the plaintiff's allegation. It stated:

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[1]Ga. Code Ann. §17-6-52 provides that:

> [p]rofessional bondsmen, their agents, or employees shall not solicit business as bondsmen or loiter about or around jails, places where prisoners are confined, or the courts for the purpose of engaging in or soliciting business as such bondsmen. No state or municipal law enforcement officer or keeper or employee of a penal institution may suggest to or give advice to, in any manner whatsoever, any prisoner regarding the services of a professional bondsman to write a criminal bond for the appearance of a prisoner in any court at any time.

[2]Former §38-63-180 (f), which was discussed in our 1986 opinion, was recodified as §39-53-170 (f) in 1987 Acts No. 155, §1. We also note that §39-53-170 (f) was amended into its present language by 1988 Acts No. 476.

> [t]his contention is without merit. Dictionaries, lay and legal, define the meaning of the word 'solicit' and this act itself defines the meaning of the business of such bondsmen. Thus the meaning of this language can be rendered clear. 118 S.E. at 752.

Further recognizing the absence of any South Carolina cases addressing specific situations constituting "solicitation" by bondsmen, we then cited to a number of other courts which had done so.

> In People v. Rabinowitz, 97 N.Y.S.2d 260 (1950), it was held that a statute which prohibited solicitation of bail bonds for profit by unlicensed persons was violated where an unlicensed person by advertising, business cards, or otherwise held himself out as being in the bail bond business. In People v. Smith, 97 N.Y.S.2d 896 (1950), the court determined that where an unlicensed person's name appeared in connection with a bail bond sign in an office, such was 'solicitation' within the meaning of the statute referenced in Rabinowitz.
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> The Washington Supreme Court in the case of In re Winthrop, 237 P. 3 (1925) determined that an attorney's conduct in offering to furnish prisoners in jail cash bail and to thereafter represent them at trial for a stated consideration constituted 'soliciting' in violation of the canons of ethics regulating the profession. In its decision the court defined 'solicit' as
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> > . . . to ask from with earnestness; to make petition to; to endeavor to obtain; to awake or excite to action; to appeal to; to invite. 237 P. at 4-5.
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> The precise conduct referenced by the court was as follows:
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> > . . . very promptly after one was arrested and put in the city jail, whether in the day time or at night, whether the person knew or had ever heard of the respondent or not, the respondent promptly appeared and, if unacquainted, presented his card, saying that he was a lawyer, and sometimes asking how much money the prisoner had, would say that for a stated consideration he would furnish cash bail at once and attend to the trial of the case when it came up in the police court. The offer would be accepted, the respondent would put up cash bail and the prisoner be liberated. 237 P. at 4.
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> In People v. Framer, 139 N.Y.S.2d 331 (1954) the court in considering whether certain conduct violated an ordinance prohibiting the solicitation of contributions without a license defined the word 'solicit' as
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> > . . . to approach for something, to ask for the purpose of receiving; to endeavor to obtain by asking; to importune or implore for the purpose of obtaining; to awake or incite to action by acts or conduct intended to and

> calculated to incite the giving. The only thing that is necessary is that the means employed for the asking of something, whether by oral or mute conduct, justify the person importuned or implored in treating the request as a serious request that such person be moved to action. 139 N.Y.S.2d at 337.

In addition to these cases, we note that attorneys general opinions of other states have addressed the issue of "solicitation" by bondsmen. For example, in an opinion dated August 12, 1998, the Tennessee Attorney General addressed whether idle bondsmen were prohibited from "lounging" around a jail or jail grounds. Tenn. Code Ann. §40-11-126 (6) provides that "no bondsmen or surety agent shall . . . [s]olicit business directly or indirectly, by active or passive means, or engage in any other conduct which may reasonably be construed as intended for the purpose of solicitation of business in any place where prisoners are confined or in any place immediately surrounding where prisoners are confined. . ." The opinion noted that in common parlance, to lounge around is not the same as to "solicit," which is defined in Black's Law Dictionary 1392 (6th ed. 1990) as follows:

> [t]o appeal for something; to apply to for obtaining something; to ask earnestly; to ask for the purpose of receiving; to endeavor to obtain by asking or pleading; to entreat, implore, or importune; to make petition to; to plead for; to try to obtain; and though the word implies a serious request, it requires no particular degree of importunity, entreaty, imploration, or supplication.

The opinion thus concluded the Tennessee provision did not prohibit bondsmen from lounging around a jail or jail grounds as long as they do not solicit business while there.

In an opinion dated January 24, 2007, the Texas Attorney General considered Tex. Occ. Code Ann. §1704.304 (c), which provides that "[a] bail bond surety or an agent of a bail bond surety may not solicit bonding business in a police station, jail, prison, detention facility, or other place of detainment for persons in the custody of law enforcement." Noting the absence of any Texas cases on the issue, the opinion relied on decisions of other states applying solicitation statutes to attorney conduct. The opinion noted:

> [t]he New York Court of Appeals held that, for purposes of the statutes governing attorney conduct, "'solicit' means to move to action, to endeavor to obtain by asking, and implies personal petition to a particular individual to do a particular thing . . . while 'advertising' is the calling of information to the attention of the public." Koffler v. Joint Bar Ass'n, 412 N.E.2d 927, 931 (N.Y. 1980), cert. denied, 450 U.S. 1026 (1981) (citing Black's Law Dictionary 1248-49 (5th ed. 1979)). Likewise, the Arkansas Supreme Court distinguished the two terms in stating that "soliciting is a well-known and defined action, and advertising is an equally well-known and defined action, and they are not identical." Carter v. State, 98 S.W. 704, 704 (Ark. 1906); see also Smith, Waters, Kuehn, Burnett & Hughes, Ltd. v. Burnett, 548 N.E.2d 1331, 1336 (Ill. App. 3d 1989) ("Solicitation of legal services, as opposed to advertising, connotes a private communication directed at a person or category of persons

> known by an attorney to have an immediate potential need for legal services."); Akron Pest Control v. Radar Exterminating Co., Inc., 455 S.E.2d 601, 603 (Ga. App. 1995) ("The term ['solicit'] implies personal petition and importunity addressed to a particular individual to do some particular thing.").

Based on the above-referenced authority, the Texas opinion concluded that §1704.304(c) did not prohibit a bail bond licensee's display of advertising or licensee information on a vehicle in the parking lot of a county jail.

We note, however, that Chapter 1704 of the Texas Occupations Code clearly indicates a distinction between "solicitation" and "advertisement." For example, §1704.109 (a) provides that "[a bail bond] board by rule may regulate solicitations or advertisements by or on behalf of bail bond sureties." [Emphasis added]. There is no such distinction made in the South Carolina provisions.

To ascertain the difference between soliciting and advertising, we look to the definition of both terms. "Advertise" is defined:

> [t]o advise, announce, appraise, command, give notice of, inform, make known, publish * * *. Any * * * statement made by the seller in any manner in connection with the solicitation of business * * *.

Black's Law Dictionary 50 (5th ed. 1979). As previously noted, "solicit," which may be done by writing, word of mouth, or any other method, is defined:

> [t]o appeal for something; to apply to for obtaining something; to ask earnestly; to ask for the purpose of receiving; to endeavor to obtain by asking or pleading * * *.

Black's Law Dictionary 1392 (6th ed. 1990). Advertising thus entails giving general notice in order to attract public attention. However, solicitation is addressed to a particular individual to do some particular thing. When advertising goes beyond merely giving notice to the public and is aimed at specific targets, however, such may constitute "solicitation." A court may certainly find that advertising is a method, in a broad sense, of solicitation as used in its more ordinary sense. In fact, the Koffler court, cited above, stated that "[n]ot all solicitation is advertising, though all advertising either implicity or explicitly involves solicitation." Koffler, 412 N.E.2d at 931; cf. State v. Robinson, 321 S.C. 286, 468 S.E.2d 290, 291 (1996) [finding non-attorney's advertisement constituted unlawful solicitation for legal services].

Relevant to your inquiry, we also note an opinion dated January 22, 2001, in which the Arkansas Attorney General concluded that a bail bonding company's advertising billboard, placed in close proximity to the sheriff's department where prisoners are housed so that people driving to the facility were able to view it, violated Ark. Code Ann. §17-19-105 (2), which provides that "[n]o professional bail bondsman or professional bail bond company . . . shall: [s]olicit business or advertise for business in or about any place where prisoners are confined or in or about any court[.]" The opinion further discussed the common usage meaning of the word "about" for purposes of this provision, stating that:

> [t]he Merriam-Webster Dictionary defines the word "about" to mean (among other things) "near to." In the situation as you have described it, the billboard in question could be deemed "near to" (*i.e.*, "about") the Sheriff's Department. (I reiterate, however, that this is primarily a factual determination, and I do not have the authority to undertake a factual evaluation of the placement of the sign. The conclusions that I have stated are based solely on the facts as you have described them to me.)
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> If the Sheriff's Department houses prisoners, and if a bail bonding company's billboard has been placed so that it can only be read by persons driving to the Sheriff's Department, it is conceivable that the billboard could be construed to have been placed "in or about any place where prisoners are confined."

Also instructive is the decision of the Georgia Supreme Court in Pryor Organization, Inc. v. Stewart, 274 Ga. 487, 554 S.E.2d 132 (2001), which considered whether Pryor's use of the lobby of a county sheriff's office as a backdrop for filming a television commercial constituted an improper "solicitation" of a bail bond business in violation of Ga. Code Ann. §17-6-52.[3] The court held that Pryor's activity was not improper "solicitation," since "[the] recognized justifications for imposing a limitation on the solicitation of bail bond business all relate to the potential adverse impact on the judicial system occasioned by a bondsman's actual physical presence in or around a jail facility or courthouse or his actual physical contact with incarcerated individuals." Id., 554 S.E.2d at 134. The court determined that physical contact did not result from Pryor's mere use of the lobby of the sheriff's office to film its commercial, because Pryor's presence on the premises was not for the purpose of soliciting potential clients who were currently incarcerated or who were then presently awaiting arraignment or trial. No individual prisoner was approached and only the general public was solicited when the advertisement subsequently ran on television. Thus, the court concluded Pryor did not avail itself of any "peculiar opportunity" to commit fraud or to impose upon those whom it served, and that the advertisement was directed only at those who might need the services of a bondsman at some future time. Id., 554 S.E.2d at 134-135.

Conclusion

To answer your question, §38-53-170 (f) prohibits bondsmen or runners from soliciting business in or about any place where prisoners are confined, such as detention centers. Although several state courts and administrative rulings have defined "solicitation" regarding certain activities, we must conclude as we did in our 1986 opinion that this office cannot provide an absolutely definitive answer as to what constitutes "solicitation" pursuant to this provision under the circumstances you present. We are constrained to advise that such a determination would involve a determination of specific factual questions which this office has repeatedly stated is outside the scope of an opinion of this office. See Ops. S.C. Atty. Gen., April 4, 2006; September 3, 1999; see also Op. S.C. Atty. Gen., June 27, 2006 [stating "this Office does not have the authority of a court, the Attorney General cannot investigate or determine facts"]. Any determination as to whether there has been a violation, therefore, would be a factual decision for local law enforcement and/or the local prosecutor's office. Such would have to be determined on a

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[3]See footnote 1, supra.

case by case basis. Ops. S.C. Atty. Gen., April 6, 2011; August 14, 1995. Thus, while this office has provided to you the relevant law in this area, we must defer to the prosecutor's ultimate judgment as to whether or not to prosecute an individual in question in a given case under particular circumstances. See Op. S.C. Atty. Gen., June 7, 2007 [stating that a decision as to whether an advertisement for escort services in a telephone book would constitute solicitation for prostitution would involve the resolution of a factual issue beyond the scope of an opinion of this office].

Finally, while the authority cited above may be instructive to the Department in determining what constitutes "solicitation" pursuant to §38-53-170 (f), it is a matter for the Department to enforce such provision with respect to any particular factual situation. We again note that, pursuant to §38-53-20, the Department is authorized to promulgate regulations to enforce the purposes and provisions of the referenced statutes. We were unable to find any regulations addressing this issue. Ideally, any such regulations could describe in detail what types of activity would constitute "solicitation" in the noted circumstances and, therefore, place those individuals affected on notice as to what is prohibited by the referenced provision. In this regard, it is well-recognized that courts would give great deference to an agency's interpretation of its own regulations, even in circumstances where there may be more than one interpretation, and even if such interpretation is not the one that the court would adopt in the first instance. See Ops. S.C. Atty. Gen., January 30, 2002; November 27, 1995; August 21, 1991.

If you have any further questions, please advise.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

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