ALAN WILSON
ATTORNEY GENERAL

March 26, 2013

The Honorable Linda Mock
Georgetown County Auditor
P.O. Drawer 421270
Georgetown, SC 29442-1270

Dear Ms. Mock:

We received your letter requesting an opinion of this Office regarding the unauthorized practice of law. By way of background, you explain that:

> . . . [you are] being prohibited from representing the office in magistrate's court on prosecutions of vehicular violations of Title 56-57, failure to pay the personal property taxes, register and secure a South Carolina license plate. I am also referencing South Carolina Code of Laws Ann. §40-5-310, practicing law without being a member of the state's bar. I am also referencing South Carolina Code of Laws Ann. §12-39-340 mandating the auditor ("shall have the responsibility") to discover and list all personal property subject to the Constitution or general law and that it is valued according to the documentation provided by the South Carolina department of Revenue. In past years, the auditor or auditor's staff has successfully represented the office in magistrate's court according to what we believed to be the appropriate process. . . .
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> Recently, I was informed by the Chief Magistrate that only law enforcement officers or the solicitor or the solicitor's office could present such cases before [the] court. While we cooperate in every effort possible to work within the and among the sheriff's office, the rate of prosecution has not materialized. Therefore, I am not able to discharge those legally mandated directives under the South Carolina Code of Laws and the Constitution. This interpretation of South Carolina Code of Laws Ann. §40-5-310 is preventing a duly-authorized state and county official from performing required duties. I trust that was not the intent of the law. . . . [Emphasis in original].

You have asked whether you, as the elected auditor of Georgetown County, may present a case before the magistrate's court as a representative of the county so that you may perform your duties?

Law/Analysis

Georgetown County operates under the council-administrator form of government. Georgetown County Code of Ordinances, §2-1. Under this form of government, the Georgetown County Auditor is an elected official. Id., §2-8; see S.C. Code Ann. §4-9-60. The powers and duties of a county auditor are set forth, in part, in §§12-39-10 to -350.

In responding to your question, it must be recognized that as stated in Doe v. Condon, 351 S.C. 158, 568 S.E.2d 356 (2002), Article V, §4 of the South Carolina Constitution declares that it is the duty and the right of the South Carolina Supreme Court to regulate the practice of law in this State. See also In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 309 S.C. 304, 422 S.E.2d 123 (1992); §§40-5-10 *et seq*. The Court, and that Court alone, determines what is the unauthorized practice of law in this State. Op. S.C. Atty. Gen., December 5, 1995 (1995 WL 810368).

As to what constitutes the practice of law, the Doe Court stated:

> [t]he generally understood definition of the practice of law "embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts... [citing State v. Despain, 319 S.C. 317, 460 S.E.2d 576, 577 (1995)] ...The practice of law, however, "is not confined to litigation, but extends to activities in other fields which entail specialized legal knowledge and ability"... [citing State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15, 17 (1987)].

Doe, 568 S.E.2d at 358. However, as further noted by the Court:

> "it is neither practical nor wise" to formulate a comprehensive definition of what the practice of law is. Instead, the definition of what constitutes the practice of law turns on the facts of each specific case.

Id. [citing In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 422 S.E.2d at 124]. Therefore, as explained in Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773 (2002), the Court has refused to adopt a specific rule defining the practice of law.

We note the Court in State *ex rel.* Daniel v. Wells, 191 S.C. 468, 5 S.E.2d 181 (1930) explained that:

> ...[t]he policy of prohibiting laymen from practicing law is not for the purpose of creating a monopoly in the legal profession, nor for its protection, but to assure the public adequate protection in the pursuit of justice, by preventing the intrusion of incompetent and unlearned persons in the practice of law.

Id., 5 S.E.2d at 186. The Court in In re Lexington County Transfer Court, 334 S.C. 47, 512 S.E.2d 791, 792-93 (1999) further stated that:

> South Carolina, like other jurisdictions, limits the practice of law to licensed attorneys. S.C. Code Ann. §40-5-310 (1976).[1] The protection of the public so demands. Beyond the compelling public policy considerations, courts have been historically hesitant in defining broadly what constitutes the practice of law. The 'practice of law' cases tend to be fact-intensive. Indeed, our Supreme Court exercises restraint in defining the practice of law, electing to judge each case in accordance with its own facts and circumstances. Recognizing the "unclear" line between proper and improper conduct of non-attorneys, the Supreme Court noted:
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> > We are convinced, however, that it is neither practicable nor wise to attempt a comprehensive definition by way of a set of rules. Instead, we are convinced that the better course is to decide what is and what is not the unauthorized practice of law in the context of an actual case or controversy. [In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 422 S.E.2d at 124].
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> There are, nevertheless, some general and fundamental principles which give guidance in determining whether certain conduct constitutes the unauthorized practice of law.
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> > It is too obvious for discussion that the practice of law is not limited to the conduct of cases in courts ... [I]t embraces ... the management of such actions and proceedings on behalf of clients before judges and courts ... An attorney at law is one who engages in any of these branches in the practice of law. The following is the concise definition given by the Supreme Court of the United States: 'Persons acting professionally in legal formalities, negotiations, or proceedings by the warrant or authority of their clients may be regarded as attorneys at law within the meaning of that designation as employed in this country.' In re Duncan, 83 S.C. 186, 65 S.E. 210, 211 (S.C. 1909); see also [Wells, 5 S.E.2d at 183].
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> "It is the character of the services rendered, not where they are rendered, which determines whether the acts constitute the practice of law." Matter of Peeples, 297 S.C. 36, 374 S.E.2d 674, 677 (S.C. 1988) [Emphasis in original].

Referencing such, we advise you that the response below is only for our best understanding as to how the Court may likely resolve your question. Of course, final determination is beyond the scope of an

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[1]Pursuant to §40-5-310:

> [n]o person may either practice law or solicit the legal cause of another person or entity in this State unless he is enrolled as a member of the South Carolina Bar pursuant to applicable court rules, or otherwise authorized to perform prescribed legal activities by action of the Supreme Court of South Carolina. The type of conduct that is the subject of any charge filed pursuant to this section must have been defined as the unauthorized practice of law by the Supreme Court of South Carolina prior to any charge being filed.

opinion of this Office, because the Court has the ultimate authority to make a finding on what activity constitutes the unauthorized practice of law in this State. See Ops. S.C. Atty. Gen., May 22, 2007 (2007 WL 1651334); March 12, 1999 (1999 WL 397929). Accordingly, if this letter does not satisfy your concerns regarding your ability to appear in magistrate's court, we would encourage you to seek a declaratory judgment in the original jurisdiction of the Court. In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 422 S.E.2d at 125; see Rule 245, SCACR.

With this caveat in mind, we note that the Court has provided a few limited exceptions to the rule regarding the unauthorized practice of law. In In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, the Court spoke to the issue, ruling as follows:

> . . . [w]e take this opportunity to clarify certain practices which we hold do not constitute the unauthorized practice of law.
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> First, we recognize the validity of the principle found in S.C. Code Ann. Sec. 40-5-80: any individual may represent another individual before any tribunal, if (1) the tribunal approves of the representation and (2) the representative is not compensated for his services. We have refused, however, to allow an individual to represent a business entity under the statute. . . . We modify Wells today to allow a business to be represented by a non-lawyer officer, agent or employee, ... in civil magistrate's court proceedings. Such representation may be compensated and shall be undertaken at the business's option, and with the understanding that the business assumes the risk of any problems incurred as the result of such representation. The magistrate shall require a written authorization from the entity's president, chairperson, general partner, owner or chief executive officer, or in the case of a person possessing a Limited Certificate, a copy of that Certificate, before permitting such representation.
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> Second, we hold that State Agencies may, by regulation authorize persons not licensed to practice law in South Carolina, including laypersons, Certified Public Accountants (CPAs), attorneys licensed in other jurisdictions and persons possessing Limited Certificates of Admission, to appear and represent clients before the agency. These regulations are presumptively valid and acts done in compliance with the regulations are presumptively not the unauthorized practice of law. We recognize, however, that such an agency practice could be abused, and reserve the authority to declare unenforceable any regulation which results in injury to the public.
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> Third, our respect for the rigorous professional training, certification and licensing procedures, continuing education requirements, and ethical code required of Certified Public Accountants (CPAs) convinces us that they are entitled to recognition of their unique status. We hold that CPAs do not engage in the unauthorized practice of law when they render professional assistance, including compensated representation before agencies and the Probate Court, that is within their professional expertise and qualifications. We are confident that allowing CPAs to practice in their areas of expertise, subject to their own

> professional regulation, will best serve to both protect and promote the public interest ....
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> Finally, we recognize that other situations will arise which will require this Court to determine whether the conduct at issue involves the unauthorized practice of law. We urge any interested individual who becomes aware of such conduct to bring a declaratory judgment action in this Court's original jurisdiction to determine the validity of the conduct. We hope by this provision to strike a proper balance between the legal profession and other professionals which will ensure the public's protection from the harms caused by the unauthorized practice of law.

Id., 422 S.E.2d 124-25.

Accordingly, in the March 12, 1999, opinion, we addressed whether an elected county treasurer, as a non-attorney, may present a case before a magistrate. Giving great deference to the regulatory authority of the Court in this area, we advised that because the Court had determined the representation by a non-lawyer agent of a business entity in magistrate's court is no longer the unauthorized practice of law, under certain conditions such as those involving the unique status of CPAs, there was support for concluding that a non-attorney county treasurer or deputy appearing in magistrate's court would not be engaged in the unauthorized practice of law.

The Court has provided further guidance and also limited the prosecution of traffic cases in magistrate's and municipal court by non-attorneys. For example, in State v. Messervy, 258 S.C. 110, 187 S.E.2d 524 (1972), the defendant appealed his DUI conviction on the grounds that it was improper as a matter of law for a state trooper to act as his own prosecutor in his own case, because the trooper would have an opportunity to both testify as a witness and to argue the inferences from that testimony in his closing argument. The defendant claimed that a jury would be likely to confuse the facts of the witness' testimony with the arguments of the closing. The Court noted that, ideally, "the State's case would be presented by a prosecuting attorney, but... such is not practicable because of the large number of traffic court violations." Id., 187 S.E.2d at 525. The Court upheld the conviction and gave its stamp of approval to the practice of allowing officers to act as prosecutors at the summary court level. The Court declared that it was not particularly concerned with the defendant's objections, because adequate safeguards existed in the form of magistrates who would be vigilant to prevent such impermissible blending of argument and testimony. Id. In its decision in State *ex rel.* McLeod v. Seaborn, 270 S.C. 696, 244 S.E.2d 317, 319 (1978), the Court upheld the practice of supervisory officers assisting arresting officers in the prosecution of misdemeanor traffic cases determining that ". . . the prosecution of misdemeanor traffic violations in the magistrates' courts by either the arresting officer or a supervisory officer assisting the arresting officer does not constitute the unlawful practice of law. . ." In fact, the Court found that this practice "renders an important service to the public by promoting the prompt and efficient administration of justice." Id., 244 S.E.2d at 318. In State v. Sossamon, 298 S.C. 72, 378 S.E.2d 259 (1989), a defendant was stopped and arrested by deputy sheriffs for an open container violation. A state trooper appeared at the scene of arrest and later prosecuted the case on behalf of the deputies, securing a conviction. On appeal, the Court reversed the conviction. Although the Court recognized the necessity and value of allowing officers to act as prosecutors in summary courts, the Court declined to extend its previous holdings in Messervy and Seaborn to include the practice of allowing a police officer who was neither the

arresting officer nor a supervisor of the arresting officer to act as a prosecutor. Sossamon, 378 S.E.2d at 260. The Court recently explained its Sossamon decision in State v. Rainwater, 376 S.C. 256, 657 S.E.2d 449 (2008). In Rainwater, a magistrate determined that a state trooper could not prosecute a defendant's DUI case after the officer transferred to another law enforcement agency. The magistrate's ruling was reversed by the circuit court. The Court affirmed the circuit court, noting that Sossamon did not distinguish between the agencies, but instead focused on the fact that the state trooper prosecuting the case was neither an arresting officer nor a supervisor of the arresting officer. By contrast, the Rainwater Court noted that the trooper was the arresting officer "and the person able to testify regarding the events surrounding the arrest." Rainwater, 657 S.E.2d at 450; see also City of Easley v. Cartee, 309 S.C. 420, 424 S.E.2d 491 (1992) [because licensed security officers are extended law enforcement authority, they may prosecute misdemeanor cases in magistrate's or municipal court]. In its decision in In Re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, the Court clearly ". . . reaffirmed the rule that police officers may prosecute traffic offenses in magistrate's court and in municipal court. Only the arresting officer may prosecute the case, although if the officer is new or inexperienced, he may be assisted at trial by one of his supervisors." Id., 422 S.E.2d at 125.

In State v. Barlow, 372 S.C. 534, 643 S.E.2d 682 (2007), the Court again explained its limited exception in the aforementioned cases. In Barlow, the appellants argued the trial court erred because it allowed the State to present the probation revocation case through a non-lawyer, *i.e.*, a probation agent. The Court concluded that, because a probation revocation proceeding is not a criminal prosecution, a probation could present the State's case without violating the prohibition against the unauthorized practice of law. Id., 643 S.E.2d at 684. The Court explained:

> the underlying rationale for allowing a patrolman to act as prosecutor in limited circumstances lends support to why it is also permissible for a probation agent to participate in the probation revocation hearing. In . . .[Seaborn] . . ., we stated as follows:
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> > When the officers of the Highway Patrol present misdemeanor traffic violations in the magistrates' courts ..., they do so in their official capacities as law enforcement officers and employees of the State. These officers do not hold themselves out to the public as attorneys, and their activity in the magistrates' courts does not jeopardize the public by placing "incompetent and unlearned individuals in the practice of law." ... To the contrary, this activity renders an important service to the public by promoting the prompt and efficient administration of justice.
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> Id. at 698-99, 244 S.E.2d at 319 (citation omitted). Similarly, when a probation agent presents a probation revocation case, the agent is acting in his official capacity and is not holding himself out to the public as an attorney. See S.C. Code Ann. §24-21-280(B). Clearly, the agent "renders an important service to the public by promoting the prompt and efficient administration of justice." Seaborn, 270 S.C. at 699, 244 S.E.2d at 319.

Barlow, 643 S.E.2d at 684-85.

The recent decision of the Court in In re Richland County Magistrate's Court, 389 S.C. 408, 699 S.E.2d 161 (2010) only reaffirmed the Court's concerns regarding the unauthorized practice of law by non-attorneys in magistrate's court.[2] Although the Court addressed a prosecution for the recovery of worthless checks by a non-lawyer field agent from a local business acting as the prosecutor, its analysis is relevant to your question. Here, the Solicitor brought an action in the original jurisdiction of the Court. The Court explained the danger in allowing private prosecutions in this situation by considering the unique nature of criminal law and the corresponding unique role of the prosecutor to vindicate the public interests. The Court recognized that:

> [i]n carrying out his duty, the prosecutor independently decides whether to prosecute, decides what evidence to submit to the court, and negotiates the State's position in plea bargaining. . . . The South Carolina Constitution, South Carolina statutes and case law place the unfettered discretion to prosecute solely in the prosecutor's hands. . . . "The importance to the public as well as to individuals suspected or accused of crimes, that these discretionary functions be exercised 'with the highest degree of integrity and impartiality, and with the appearance thereof' cannot easily be overstated." [Citations omitted].

Id., 699 S.E.2d at 163.

Significantly, the Court discussed its previous decisions permitting non-solicitors to prosecute criminal cases in magistrate's court. The Court noted:

> [The Solicitor] correctly notes that this 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. . . . 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

[2]We note that the decision in In re Richland County Magistrate's Court was 3 to 2. Justice Hearn wrote a strong dissent, in which Chief Justice Toal joined. Id., 699 S.E.2d at 165-68. However, the majority opinion remains the law of the case.

> 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).

In re Richland County Magistrate's Court, 699 S.E.2d at 164-65. The Court concluded:

> [t]he dignity and might of the State are brought to bear in decisions to prosecute. These decisions must not be made by interested parties. We therefore find 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.

Id., 699 S.E.2d at 165.[3]

Although the Court here was concerned with businesses and/or non-attorneys as interested parties prosecuting cases in magistrate's court, its limited exception of such to law enforcement officers exercising their sovereign authority to enforce the criminal laws of this State to us remains perfectly clear. See, *e.g.*, §§22-5-110, -115 [a courtesy summons is issued by a summary court judge based upon the

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[3]We note that in her dissent in In re Richland County Magistrate's Court, Justice Hearn would find the practice of allowing non-lawyer representation of business entities' interests in criminal magistrate's court should be authorized, citing the other instances when the Court has allowed persons other than solicitors to prosecute criminal cases in magistrate's court. Id., 699 S.E.2d at 166 [citing Messervy, Seaborn, and Sossamon]. Justice Hearn stated "the majority's strong emphasis on the criminal nature of the proceedings involved misses the mark." Id. She emphasized that while there may be "pitfalls that could potentially accompany the decision to allow representation by non-lawyers," the magistrate court judge retains complete control over the pursuit of justice in the courtroom and that such would be "subject to the same level of scrutiny by the magistrate that has heretofore adequately overseen this critical level of our court system." Id., 699 S.E.2d at 166-67. Interestingly, Justice Hearn observed that:

> [o]ne of the purposes of magistrate's court is to dispense with the formalities required of a court of general sessions, allowing for a more expedient and layperson-friendly disposition of certain select grievances and offenses. The fact that the General Assembly has not required magistrates to be attorneys is further indication of its intention to retain the citizen focus of the court. See S.C. Code Ann. §22-1-10 (2007). In short, magistrate's court was created by the General Assembly to be the "peoples' court," a distinction that seems to have been overlooked by the majority in its analysis.

Id., 699 S.E.2d at 168 [also noting the use of the courtesy summons by "non-law enforcement personnel" to commence proceedings in magistrate's court]. Finally, Justice Hearn expressed concerns that the majority's decision placed an additional burden on businesses, as well as "on the already budget-strained and time-challenged prosecutorial arm of the State" which, already overburdened, "may exercise prosecutorial discretion to not prosecute these minor cases." Id. Justice Hearn concluded that, "[p]ermitting 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.

sworn statement of an affiant "who is not a law enforcement officer" or is issued to "nonlaw enforcement personnel"].

Conclusion

The South Carolina Constitution authorizes the South Carolina Supreme Court to regulate the practice of law in this State. Consistent with the above, in the opinion of this Office, as to the situation you addressed involving your prosecution of vehicular violations, the failure to pay personal property taxes, and register and secure a South Carolina license plate, while we understand that your office renders an important service to the citizens of Georgetown County and such activity that you suggest would tend to promote the administration of justice, we believe your prosecution of these cases in magistrate's court would likely be found by the Court to constitute the unauthorized practice of law. The Court has recognized only limited exceptions to the practice of law by non-attorneys in magistrate's court. However, as explained earlier, a final determination of your question is beyond the scope of an opinion of this Office, because only the Court can determine what activities constitute the unauthorized practice of law, which it has done on a case-by-case basis. We would therefore encourage you to seek a declaratory judgment in the original jurisdiction of the Court to address this matter.

If you have any further questions, please advise. Please note that I have also included copies of the decisions referenced in this Opinion for your review.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General