



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

April 13, 2000

Christopher E. A. Barton, Senior City Solicitor
City of Rock Hill Municipal Court
120 East Black Street
Rock Hill, South Carolina 29730

Dear Mr. Barton,

Thank you for your letter of February 18, 2000 to this Office, which has been referred to me for a response. You ask for an opinion on the propriety of the solicitor's office sending out a questionnaire to potential jurors for use in jury selection. The questionnaire would be accompanied by a cover letter from the solicitor's office, which would explain the purpose of the questions, the confidentiality of the information, and the juror's right to refuse to answer any of the questions. You also ask whether, in the alternative, the questionnaire may be sent from the Municipal Court, accompanied by a cover letter from the clerk of court containing similar information. The questionnaire sent from the clerk of court could be used by both the prosecution or the defense in jury selection.

Case law in South Carolina is undeveloped in this area. The South Carolina Supreme Court has held that the defense is not entitled to information on potential jurors collected by the prosecution, such as prior jury service, criminal and arrest records, backgrounds and attitudes. See State v. Childs, 299 S.C. 471, 385 S.E.2d (1989); State v. Matthews, 296 S.C. 379, 373 S.E.2d 587 (1988). The Court did not, however, address the source of the information, nor the propriety of a communication with jurors initiated by the prosecution.

Indeed, in the circumstances you describe, it is the communication directly from the Solicitor's office that causes the issue to arise. Rule 3.5 of the Rules of Professional Conduct reads, in part:

A lawyer shall not:

- (a) Seek to influence a judge, juror, member of the jury venire or other official by means prohibited by law;
- (b) Communicate ex parte with such a person except as permitted by law;

Solicitor Barton
April 13, 2000
Page 2 of 2

S.C. Appellate Court Rule 407. While no South Carolina case appears to have addressed the question, at least one jurisdiction has applied a similar disciplinary rule to the prosecution's pre-trial questionnaire. In State v. Bates, 508 So.2d 1346 (1987), the Louisiana Supreme Court reversed a defendant's conviction for forcible rape because of the improper communication of the District Attorney with potential jurors before the trial. The District Attorney mailed a questionnaire to each of the 100 veniremen for the defendant's trial for his exclusive use in their jury selection. The questions were accompanied by a letter from the District Attorney on his official letterhead, which included his seal of office, his name, his signature, and his business address and telephone, and concluded by thanking the juror "for your cooperation." Id. at 1346. Relying primarily on an ABA informal opinion, the court stated that "unilateral ex parte juror contacts can only result in a skewing of the otherwise impartial administration of justice." Id. at 1350.

In light of South Carolina's Rules of Professional Conduct and the Louisiana court's decision in Bates, we advise an erring on the side of caution with respect to pre-trial juror questionnaires. Clearly, a prosecutor must refrain from any ex parte communications with potential jurors. Therefore, if the questionnaires are to be used, the preferred method of communication to the jurors is under judicial auspices, with full knowledge of all parties and equal accessibility. To avoid even an appearance of an ex parte communication by a prosecutor, it would, in my opinion, be best for the court rather than the prosecutor to issue the pre-trial questionnaires and allow their use by both parties in jury selection. That way, a prosecutor could avoid challenge. Again, I stress that no court in South Carolina has so ruled and that my advice herein is principally cautionary.

This letter is an informal opinion only. It has been written by a designated Senior 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 not officially published in the manner of a formal opinion.

With kind regards, I remain

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General