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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

December 14, 1999

Robert L. McCurdy, Staff Attorney
South Carolina Court Administration
1015 Sumter Street, Suite 200
Columbia, South Carolina 29201

Re: Informal Opinion

Dear Mr. McCurdy:

Thank you for your letter of September 1, 1999, to this Office which has been referred to me for a response. You ask for an opinion on the legality of a private company contracting with a county to perform services for the magistrate's court.

By way of background, you state the following information. A private company, already operating in several counties of the State, has contracted with a county to provide services to the magistrates' courts. Pursuant to the agreement, the court may refer, upon conviction and sentencing, certain cases to the company. If, for example, a fine and restitution are ordered, the company monitors the defendant's payment as well as distribution of the money. If counseling is ordered by the court, the company makes referrals to programs and monitors attendance. The company also develops and monitors community service work sites, drug testing and electronic monitoring. If the defendant fails to comply with the provisions of the court order, the company reports the noncompliance to the court, whereupon a bench warrant may be issued by the court.

Law / Analysis

As a general matter, it is well established that a State or political subdivision may properly maintain supervision and control through the use of a contract. Any employment contract contemplates supervision and control by the employer over the employee. More specifically, a private corporation 'may be employed to carry a law into effect.' 16 C.J.S., Constitutional Law, § 137. As stated in Amer. Soc. P.C.A. v. City of N.Y., 199 N.Y.S. 728, 738 (1933),

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> [w]hile it is true that strictly governmental powers cannot be conferred upon a corporation or individual ... still it has been held by a long line of decisions that such corporations may function in a purely administrative capacity or manner.

Although, 'an administrative body cannot delegate quasi judicial functions, it can delegate the performance of administrative and ministerial duties ... .' Krug v. Lincoln Nat. Life Ins. Co., 245 F.2d 848, 853 (5th Cir. 1957); see also, 73 C.J.S., Public Adm. Law and Procedure, § 53; McQuillin, Municipal Corporations, § 29.08, n. 6. This is consistent with the law in South Carolina. See, Green v. City of Rock Hill, 149 S.C. 234, 270, 147 S.E. 346 (1929) [contract between a city and private company for the control, management and operation of waterworks plant is valid]; Op. Atty. Gen., No. 85-81 (August 8, 1985) [privately managed prison not necessarily invalid].

Typically, the inquiry does not end there, however. It is well recognized that there must first exist statutory authority for an officer to subdelegate any portion of the authority which has been delegated to that officer by statute. 73 C.J.S., Public Administrative Law and Procedure, § 56. However, if it is reasonable to imply the authority to subdelegate, such an implication may legally be made. State v. Imperatore, 92 N.J. 347, 223 A.2d 498 (1966); 73 C.J.S., Public Administrative Law and Procedure, supra. Thus, one question is whether the Legislature has, by statute, permitted the county to contract with a **private corporation** for the provision of services to magistrate courts.

The duties of the magistrate, codified at S.C. Code Ann. Sec. 22-8-20 are in pertinent part as follows:

> [m]agistrates are judicial officers, and the hours they spend in performance of their judicial duties are hours spent in the exercise of their judicial function. The exercise of the judicial function involves the examination of facts leading to findings, the application of law to those findings, and the ascertainment of the appropriate remedy. Time spent in the performance of judicial functions also includes time spent performing ministerial duties necessary for the exercise of the magistrates' judicial powers, as well as necessary travel and training time.

A magistrate's court is a part of the unified judicial system of the State. State ex rel. McLeod v. Crowe, 272 S.C. 41, 249 S.E.2d 772 (1978). As part of a magistrate's sentencing

authority, the court may require drug counseling, restitution, community service, etc. See Op. Atty. Gen., April 21, 1995 (Informal Opinion); Op. Atty. Gen. August 10, 1999 (Informal Opinion); Op. Atty. Gen., March 27, 1995 (Informal Opinion); Op. Atty. Gen., Op. No. 86-81 (July 21, 1986). Moreover, in conjunction with the magistrate's general sentencing powers, the magistrate possesses the authority to effectuate and implement such sentence.

Recognizing the need to fund and provide sufficient personnel to the magistrates' courts, the General Assembly has specifically mandated that the counties provide a support staff for magistrates. S.C. Code Ann. Sec. 22-8-30 provides in pertinent part that

> (A) Each county shall provide sufficient facilities and personnel for the necessary and proper operation of the magistrates' courts in that county.
>
> (B) Other personnel determined to be necessary by the county for magistrates in a county must be provided by the governing body of the county and must be county employees and be paid by the county.

The first issue is thus whether the foregoing statute serves as a prohibitory limitation such that a county's contract with a private entity or corporation to provide the services to the magistrates' court are unauthorized.

In a previous opinion, dated October 12, 1990, this Office construed § 22-8-30 as not necessarily prohibiting the county from employing a secretary to a magistrate through a private temporary service. Therein, we noted that "it appears that a primary focus of the provision was to make the responsibility for staffing a magistrate's office a county as opposed to a State responsibility." Thus, we found that "it is within the county's discretion as to the placement of personnel in a magistrate's office and what type employees are sufficient." See also, Wilkins v. Dan Haggerty and Associates, Inc., 672 So.2d 507 (Ala. 1995) [municipal court could contract with private party to collect delinquent court charges pursuant to statute which provides that "municipalit[ies] shall provide appropriate facilities and necessary supportive personnel for [their] municipal court[s]." Thus, based upon the foregoing authorities, it does not appear that § 22-8-30 would necessarily foreclose a county on behalf of the magistrate from making the type of arrangement which has been outlined above simply because the employees of the party contracting with the county are not "county employees."

Other legal principles must be considered, however, because the judicial power of the courts are involved in any such contracts. It is well recognized that

> ... a judge may not delegate his judicial authority to another but must exercise it in person. ... However, administrative power may be delegated.

48A C.J.S., Judges, § 62. In addition, it is also well understood that

> [t]he legislative authority may provide for court officers with power to perform ministerial duties necessary in the administration of the law; and the power to appoint such officers, within such limitations as are prescribed by statute, may be expressly or impliedly delegated to the courts.
>
> In addition, in the absence of contrary legislation, courts have inherent power to provide themselves with appropriate instruments required for the performance of their duties, including authority to appoint persons to aid the court in the performance of special administrative or judicial duties. Absent independent constitutional authorization, the power of the court to hire personnel may not be affected by any law.

Other statutes are also relevant to the inquiry. For example, § 22-1-60 provides that

> [a]ll magistrates in this State shall issue receipts for all moneys paid to or collected by them. Such receipt shall in each instance state the amount paid to or collected by the magistrate and for what purpose and the title of the cause.

And Section 22-1-70 further states:

> All fines and penalties imposed and collected by magistrates in criminal cases must be forthwith turned over by them to the county treasurers of their respective counties for county purposes; provided, that when a magistrate presides over a municipal court under contract between the municipality and the county governing body as authorized by § 14-25-25, a portion of such fines and penalties imposed and collected shall be turned

> over to the treasurer of the municipality under the provisions of the contract between the municipality and the county governing body which shall specify the portion to be turned over to the treasurer of the municipality. But when, by law any person is entitled, as informer, to any portion of such fine or penalty, such portion shall be immediately paid over to him. If any magistrate shall neglect or refuse to pay over all fines and penalties collected by him in any criminal cause or proceeding he shall, on conviction thereof, be subject to a fine of not less than one hundred nor more than one thousand dollars and imprisonment for not less than three nor more than six months and shall be dismissed from office.

Moreover, § 22-1-90 reads as follows:

> Every magistrate shall, on the first Wednesday in each month or within ten days thereafter, make to the auditor and treasurer of his county a full and accurate statement in writing of all moneys collected by him on account of fines, penalties or forfeitures during the past month together with the title of each case in which a fine has been paid. The county treasurer shall keep a record of the title of each case in which the fine has been paid, the nature of the offense for which the fine was imposed and the amount thereof. In default thereof the magistrate or treasurer, as the case may be, shall, on conviction, be liable to a fine not exceeding one hundred dollars or imprisonment in the county jail not exceeding two months or both, at the discretion of the court.

Based upon the foregoing authorities, it would appear that the distinction between a lawful and an unlawful delegation by a court inevitably would rest upon whether or not the delegation consists of duties ministerial and administrative, designed simply to assist the court in implementing its order, or instead the delegation of authority relates to judicial functions which must be performed by the court itself.

Existing case law makes this distinction in determining whether a particular delegation by the judiciary is lawful. In re Donnovan J. v. Roy L., 68 Cal. Reptr.2d 714, 58 Cal. App. 4th 1474 (1997), concluded that a judicial order unlawfully delegated judicial authority to

therapists by affording them sole discretion to decide whether a father's visitation was appropriate. Quoting at length from the Court's decision, it was stated in Donnovan that

> [o]ur Supreme Court recently considered the delegation of judicial authority to a private therapist. In In re Chantal S., supra, 13 Cal. 4th 196, 51 Cal. Reptr.2d 866, 913 P.2d 1075, a father challenged a visitation order, claiming that it gave a therapist absolute discretion in determining whether visitation should occur.... The order stated: "Visitation ... for father ... to be facilitated by [Chantal's] therapist ... . Father must attend therapy regularly and make satisfactory progress for a time before any visits as determined by his therapist." .... The Supreme Court analyzed whether the requirements that visitations be "facilitated" by Chantel's therapist and that the therapist determine when "satisfactory progress" was achieved constituted an improper delegation of judicial authority. It concluded they did not.
>
> The condition requiring facilitation of visitation by Chantel's therapist gave that person "no discretion whatsoever. The directive that Chantel's therapist 'facilitate' visitation appears designed merely to mandate that Chantal's therapist cooperate with the court's order that visitation occur once certain conditions are met." ... Since this portion of the order did not give the therapist any discretion, it was not an unlawful delegation of judicial power.
>
> Nor was the portion of the order that allowed the therapist to determine when "satisfactory progress" was achieved an unlawful delegation. The court reasoned that the juvenile court must have concluded that visitation was not appropriate until the father had made satisfactory progress .... The juvenile court thus appropriately restricted visitation to a time when the therapist determined the father had progressed satisfactorily.
>
> Although the court upheld the order in Chantel S., it implicitly recognized that an order may be improper for delegating judicial authority to a private therapist. This is

> consistent with findings of improper delegations of judicial authority to private individuals in other contexts and with the prohibition in the California Constitution against delegation of duties other than subordinate judicial duties. ...
>
> The order in our case differs significantly from the order reviewed in Chantel S. The order before us states that Father has "no visitation rights without permission of minors' therapists." It neither requires that therapists manage visitation ordered by the court, nor sets criteria (such as satisfactory progress) to inform the therapists when visitation is appropriate. **Instead, it conditions visitation on the children's therapists' sole discretion. Under this order, the therapists, not the court, have unlimited discretion to decide whether visitation is important. That is an improper delegation of judicial power. Although a court may base its determination on the appropriateness of visitation on input from therapists, it is the court's duty to make the actual determination.**

68 Cal. Rptr.2d at 714-715. (Emphasis added).

Similarly, our own Supreme Court, in Stefan v. Stefan, 320 S.C. 419, 465 S.E.2d 734 (1995), found that the Family Court abused its discretion by delegating judicial authority to a parenting specialist and the guardian, and by authorizing the guardian to recommend the time for the resumption of visitation, and modification of visitation. The Court concluded that

> [i]n the final analysis it is the family court which is charged with the authority and responsibility for protecting the interest of minors involved in litigation, not the guardian or any other person whom the court may appoint to assist it. While this court can appreciate the frustration of the family court in devising a visitation plan for the husband, it was error to delegate this responsibility to the guardian and the parenting specialist.

320 S.C. at 422.

Thus, based upon the foregoing, it is clear that a magistrate cannot by contract delegate away judicial authority. As was stated in Green v. City of Rock Hill, supra, "... [a

governmental body] .... may not contract with one member of the public to discharge a purely public duty owed to the public generally. The rationale of that rule is grounded upon the theory that such a contract would ... embarrass or control it in the exercise of governmental functions, which cannot be surrendered or abrogated." 147 S.E. at 360. On the other hand, nothing in the existing statutes precludes the court, acting through the county, from using a private company to assist it in performing purely administrative or ministerial functions. So long as the magistrate does not abdicate or relegate his or her statutory duties or judicial functions, the magistrate may utilize private personnel to assist in performing duties to insure that the court's order is carried out or implemented.

The question is where the line is drawn between a lawful and unlawful delegation in the specific context of the contracts referred to in this instance? Of course, this Office cannot make factual determinations in an opinion. Op. Atty. Gen., December 12, 1983. Thus, it would be inappropriate in a written opinion to attempt to micromanage the contracting authority such as the particular county itself or the head of the summary courts in a particular county. An opinion of the Attorney General is simply not the appropriate vehicle to determine whether a contract or any of its terms is consistent with the State Constitution. Op. Atty. Gen., Op. No. 85-132 (November 15, 1985). Such legal oversight must remain the function of a court.

A few examples may be appropriate, however to set the general guideposts. The functions of "monitoring" compliance with a magistrate's order -- be it monitoring conditions placed on convicted misdemeanants, providing staff for attending court and reporting to the magistrate, providing monthly reports to the court, reporting noncompliance by an offender -- all seem to fall within the ministerial or administrative function which may be delegated as a way of assisting the magistrate to insure compliance with his or her sentencing order.

On the other hand, a magistrate cannot properly abdicate to a private person (or any subordinate official) the development of community service work as applied to a particular defendant. The ultimate determination of community service and the sentencing of a particular defendant to a specific community service program is a judicial function. Where the contract would leave it to the sole discretion of the company the types of community service to be performed by an individual, such would come very close to delegating judicial authority, if not doing so. Likewise, leaving to a private company the sole responsibility for development of domestic violence programs without court supervision would again perhaps cross the line in terms of assigning a particular program to a defendant.

However, the sentencing judge could certainly call upon the private company to assist it in the development of programs generally. For example, the company could make

recommendations to the court about a particular program for a particular defendant so long as it is the judge himself making the judicial determination as to which program was appropriate for which defendant. This would be much the same as a sentencing judge reviewing a presentence report for a final determination. In other words, it must be the judge, not anyone else, who imposes conditions upon a defendant, including domestic violence programs or community service. Likewise, the court could receive from the company recommendations regarding what programs may be most useful so long as it is the court which is deciding to put such programs in place.

As to the fact that no statute authorizes the payment of fees by the defendant to the company for the performance of services by the company, I am presuming that the sentencing judge is requiring such fee payment as part of his or her general authority to suspend a sentence upon the performance of particular conditions. As you are aware, our Supreme Court has recognized that sentencing judges are "allowed a wide, but not unlimited, discretion in imposing conditions of suspension or probation and they cannot impose conditions which are illegal and void as against public policy." State v. Brown, 284 S.C. 407, 326 S.E.2d 410, 411 (1985). Applying this reasoning, we have opined that magistrates and municipal judges may require a defendant to make a contribution to a private entity such as Crime Stoppers or the public defender fund. Op. Atty. Gen., Op. No. 86-81 (July 21,1986). Thus, where the fee is being paid to the private company as part of the magistrate's sentencing authority, the fact that no statute specifically authorizes such payment is not necessarily fatal. Of course, this Office cannot review each and every judge's sentence to determine if a specific order of payment is consistent with the court's sentencing authority. By and large, however, I cannot necessarily say that such a payment could not be required to be made by a defendant as part of the magistrate's sentencing authority.

The actual physical collection of fines and other revenues such as restitution, etc. is a somewhat different problem. While there is no doubt that physical collection is more in the nature of a ministerial one, the statutes, referenced above, such as § 22-1-70, appear to contemplate that the magistrate and only the magistrate must collect the monies owed by a defendant. It has traditionally been the magistrate in South Carolina or his or her office or court officer which has performed the collection function.

The case of Wilkins v. Haggerty, supra does conclude that a municipality may lawfully contract with a private collection agency for the management/collection "of delinquent fines, court costs, charges and fees from persons subject to unsatisfied attachments or warrants related to traffic violations and misdemeanors." There, the Supreme Court of Alabama reasoned that Alabama law

> mandates that "municipalit[ies] shall provide appropriate facilities and necessary supportive personnel for [their] municipal court[s]." Cities fulfill this mandate to support their municipal courts in part through exacting and collecting fines for misdemeanor and traffic offenses. [The relevant Alabama statutes] ... expressly grants to cities the power to enter into contracts in furtherance of their governmental functions. The power to contract with a private firm to aid in the collection of delinquent municipal court fines can and must be "necessarily imposed" from the power granted to cities and the obligation imposed on cities in § 12-14-2(a) to adequately support their municipal courts. The trial court, therefore, correctly denied the plaintiff class a partial summary judgment, refusing to hold the contract illegal.

The question here is thus whether the reasoning of the Wilkins case can be deemed applicable in light of the specificity and apparent exclusivity of the statutes making the collections of fines and penalties imposed the clear responsibility of the magistrate. As noted, § 22-1-70 references "all fines and penalties imposed and collected by magistrates in criminal cases must be forthwith turned over by them to the county treasurers ...." (Emphasis added). This statute deems it a criminal offense for any magistrate to "neglect or refuse to pay over all fines and penalties collected by him ...." Thus, there appears to be little leeway in our existing statutes allowing the physical collection function to be delegated to others.

Typically, it has been concluded in opinions of other Attorneys General that there must exist a specific statute "which would allow for a private debt collector to collect outstanding bench warrants, parking fines and traffic tickets, and thus those types of debt can only be collected as provided by the laws which are pertinent to the particular court involved as well as the particular offense." La. Atty. Gen. Op. No. 96-71 (April 9, 1996). [Emphasis added]. See also, Ark. Op. Atty. Gen. No. 97-141 (July 9, 1997) [statute only permits use of private contractor to collect fines, not court costs and restitution]; Kan. Atty. Gen. Op. No. 95-101 (October 11, 1995) ["(I)f a district court is desirous of contracting with a collection agency, it is our opinion that the legislature must authorize such a venture."] In this case, the South Carolina governing statutes appear clearly to make it the specific function of the magistrate to collect fines, etc. Thus, while cases such as Wilkins imply authority to delegate by contract the collection of fines and parking tickets to a private corporation, the better reasoned view in South Carolina would be to require express legislative authorization by the General Assembly in order to insure that such delegation is lawful. Even though this

function is probably ministerial in nature, the statutes clearly contemplate that the magistrate (or magistrate's office) must collect the fine.

Of course, nothing would prevent the county or the magistrate from employing the private company to assist the court and the county in collecting past due fines, etc. in ways other than taking physical custody of the monies. For example, telephone calls or letters urging payment could fall into this category. However, the responsibility for actually handling and collecting these public monies must undoubtedly remain the province of the magistrate, absent additional legislative authorization.

Again, it is not the function of a legal opinion of the Attorney General to micromanage any contract between the county or the summary courts and a private corporation. Only a court could deem a particular provision of a contract unauthorized by law and we must presume that all aspects of a contract are valid. See, Jamerson v. Campbell, 217 Ga. 766, 125 S.E.2d 205 (1962).

The Fourth Circuit Court of Appeals, in U.S. v. Miller, 77 F.3d 71, 76 (4th Cir. 1996) articulated a good rule of thumb which should guide counties and magistrates courts in this type of situation. In Miller, the Fourth Circuit referenced U.S. v. Johnson, 48 F.3d 806 (4th Cir. 1995) and stated that "courts may use nonjudicial officers ... as long as a judicial officer retains and exercises ultimate responsibility." In other words, there can be no unlawful delegation of judicial power where the court continues to supervise and maintain ultimate control. See also, Op. Atty. Gen., Op. No. 85-81, supra.

Conclusion

In conclusion, many of the functions, discussed herein, such as monitoring compliance with the sentencing judge's order, are duties which are ministerial or clerical in nature, and thus a private company may assist the court in carrying out the judge's order so long as the court maintains close oversight and review of and supervision of the company's activities. It must be remembered in this regard that the judge, not the company, must make the ultimate decision with respect to matters such as in which domestic violence program a particular defendant may be placed. While the company could assist the court through recommendations providing general assistance, the sentencing judge must determine which program is appropriate for which defendant.

With respect to the physical collection and handling of public monies such as fines, restitution, etc. such should be done exclusively by the court and its officers rather than by the company, in the absence of legislative authorization therefor. If it is important and

helpful to the county and the magistrates courts to employ private companies to assist in collecting overdue fines and other monies owed, the General Assembly should expressly authorize such delegation of the collection function. Currently, the statutes make this function the province only of the magistrate, and thus we are constrained to read these statutes literally. While this Office favors any process which would assist the court and county more readily in physically collecting the fines and monies owed by defendants, the Legislature, rather than an opinion of this Office, should clearly authorize such a process.

As stated above, this Office expresses no opinion with respect to the wisdom of employing a private company to assist summary courts in the manner outlined above. Such contracts are matters to be determined by the county and the courts themselves. With regard to the legality of such contracts, as indicated, such invariably depends upon the particular duty which the company is being asked to perform as well as whether the court maintains sufficient supervision and control. I have attempted to identify herein legal areas of concern, particularly the physical collection duty, which is the most legally troublesome aspect of such contracts. As stated, since types of contracts are just coming in to being, the Legislature, as the State's policy making body should address this issue, particularly the collection of fines function.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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