Reg 5140

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

December 5, 1995

The Honorable Herbert Kirsh
Member, House of Representatives
Box 31
Clover, SC 29710

In Re: Informal Opinion

Dear Representative Kirsh:

You have stated that one of your constituents wishes to perform a service for garage men, offering to help them "obtain a title for any car that he is holding for non-payment of a bill." Your question to us is as follows:

> . . . is it legal for my constituent to be an agent for the garage man (for payment of a fee) to help obtain a title to the car that the garage man is holding for the non-payment of a bill? My constituent is not an attorney, and he wants to make sure that he will not be in any conflict with the law by working in this type of business.

S. C. Code Ann. Section 29-15-10 provides a statutory lien for a garage man for repair or storage. Such provision reads as follows:

> . . . it is lawful for any proprietor, owner, or operator of any storage place, garage, or repair shop of whatever kind or repairman who makes repairs upon any article under contract or furnishes any material for the repairs to sell the property as provided in this section. When property has been left at his shop for repairs or storage, and after the completion of these repairs or the expiration of the storage contract, and the article

has been continuously retained in his possession, the property may be sold at public auction to the highest bidder upon the expiration of thirty days after written notice has been given to the owner of the property and to any lienholder with a perfected security interest in the property that the repairs have been completed or storage charges are due. The property must be sold by any magistrate of the county in which the work was done or the vehicle or thing was stored. However, only those storage charges which accrued after the day on which written notice was mailed to the lienholder constitutes a lien against the vehicle or property to be sold. The magistrate shall, before selling the property, insure that any lienholder of record has been notified of the pending sale, and the magistrate shall advertise the property for at least fifteen days by posting a notice in three public places in his township. He shall, after deducting all proper costs and commissions, pay to the claimant the money due to him, taking his receipt for it, after which he shall deposit the receipt, as well as the items of costs and commissions with the remainder of the money or proceeds of the sale in the office of the clerk of court subject to the order of the owner of the article and any lienholders having perfected security interest in the article or any legal representative of the owner or the lienholder. The magistrate who sells the property is entitled to receive the same commissions as allowed by law for the sale of personal property by constables. When the value of the property repaired or stored does not exceed ten dollars, the storage owner, operator, or repairman may sell the property at public auction to the highest bidder upon the expiration of thirty days after written notice has been given to the owner of the property that the repairs have been completed or storage charges are due and if a description of the article to be offered for sale and the cost of it has been from the time of the written notice advertised, together with the time and place of the proposed sale, in a prominent place in the shop or garage, on the county bulletin board at the courthouse, and in some other public place. The sale must be made for cash to the highest bidder at the shop or garage at which the repairs were made or storage incurred at ten a.m. on the first Monday of the first month after the thirty days' notice has been given and the true result of the

> sale must be immediately made known to the original owner of the article sold by notice addressed to the last-known address of the owner.

Nothing in this statute appears to preclude a garage man from having an agent to assist him in recovering the amount due him for storage and/or repair. Moreover, I know of no specific statute which regulates the activity of such agents.

The problem, however, as you suggest in your letter is whether such activities of the agent constitute the unauthorized practice of law. The practice of law is regulated in South Carolina solely by the Supreme Court. See, Section 40-5-10 et seq. The Court, and the Court alone, determines what is the unauthorized practice of law in this State. Recently, the Court spoke on this issue In Re Unauthorized Practice of Law, 309 S.C. 304, 422 S.E.2d 123 (1992) with respect to the background, limitations and procedures in this area:

> In June 1991 the South Carolina Bar through a special subcommittee of the Unauthorized Practice of Law Committee (Committee) submitted to the Supreme Court a set of proposed rules governing the unauthorized practice of law (Proposed Rules). This comprehensive set of Proposed Rules represents the Committee's collective wisdom accumulated during its thirteen years of existence, as well as the efforts of the special subcommittee which spent over a year drafting these rules. The Proposed Rules attempt to define and delineate the practice of law, and to establish clear guidelines so that professionals other than attorneys can ensure they do not inadvertently engage in the practice of law.
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> It is impossible for anyone not familiar with the scope of the issues embraced by the Proposed Rules to truly appreciate the enormity of the task undertaken by the special subcommittee. After careful review of the Proposed Rules, the documentation in support of these rules, and the tremendous amount of memoranda in opposition to their adoption, we conclude that the Proposed Rules should not be adopted. We commend the subcommittee for its Herculean efforts to define the practice of law. 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. (emphasis added).

The Court went on to say the following:

> The Constitution commits to this Court the duty to regulate the practice of law in South Carolina. S.C. Const. art. V, Sec. 4; see also S.C.Code Ann. Sec. 40-5-10 (1986). We 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 (1986): 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. See State ex rel. Daniel v. Wells, 191 S.C. 468, 5 S.E.2d 181 (1939). We modify Wells today to allow a business to be represented by a non-lawyer officer, agent or employee, including attorneys licensed in other jurisdictions and those possessing Limited Certificates of Admission pursuant to Rule 405, SCACR, 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 . . . .
>
> 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. (emphasis added).

Thus, the Court has determined that 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. The Court has also authorized non-attorneys to appear and represent clients before state agencies if permitted to do so by agency regulations.

The Court again dealt with the issue of unauthorized practice recently in State v. Despain, Op. No. 24297 (August 7, 1995). In Despain, the defendant operated a business allowing customers who pay a fee to access a computer program for the preparation of

documents to be used in legal proceedings. Specifically, the Court described the business as follows:

> [i]n the course of operating a business known as Professional Document Services, defendant gives legal advice to individuals, for a fee, about divorce, custody, separation and child support. By utilizing a computer software program she purchased, defendant also prepares legal documents for others to present in family court.

The Court further noted that

> [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." In re Duncan, 83 S.C. 186, 189, 65 S.E. 210, 211 (1909). Applying this definition, we have held that the preparation of a deed for another individual, having the deed executed, and filing the deed, without the approval of a licensed attorney, constitutes the unauthorized practice of law. In re Easler, 275 S.C. 400, 272 S.E.2d 32 (1980). We have also held that the preparation of deeds, mortgages, notes, and other legal instruments related to mortgage loans and transfers of real property by a commercial title company constitutes the unauthorized practice of law. State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987).

Therefore concluded the Court,

> [b]y giving legal advice to individuals about divorce, custody, separation, and child support, and by preparing and processing legal documents for others, defendant has engaged in the unauthorized practice of law. Therefore, we enjoin defendant from engaging in any further conduct of this nature.

In The Florida Bar v. Carmel, 287 So.2d 305 (1973), the Florida Supreme Court concluded that many of the kinds of activities described in your letter would constitute the unauthorized practice of law under Florida law. In the Carmel case, the defendant, for a

fee, was advertising to the general public to perform services of preparing, filing and releasing mechanics and materialmen's liens on property, providing a "kit" to customers with information on legal rights with advice on when, how and where to file and legal effect thereof; advising as to the time for notice and other procedural law relating to mechanic's liens and preparing and signing as agent notices of commitment, claims of lien and releases; upon failure by builders to pay his customers threatening to file liens and signing as agent of the customer; preparing, signing and filing claims of liens on behalf of customers and searching public records to obtain information of claims and liens, ascertaining whether legal description matched street address and other information on property and advising customers on how to best protect their rights under Florida's Mechanics' Lien Law.

Obviously, I cannot advise you as to whether our Supreme Court would deem any of the activities in which your constituent proposes to engage would constitute the unauthorized practice of law. Only the Court itself may make such determination. Clearly, the Florida case referenced above indicates that some of the activities possibly involved could constitute the unauthorized practice of law. Moreover, our Supreme Court has previously held that the participation in settlement agreements on behalf of a client is unauthorized practice of law. S. C. Med. Malpractice Assoc. v. Froelich, 297 S.C. 400, 377 S.E.2d 306 (1989).

The Court has encouraged individuals to seek a declaratory judgement in the original jurisdiction of the Court to determine whether specific activities constitute the unauthorized practice of law where there is a case of controversy involved. See, In re Unauthorized Practice of Law, supra. Moreover, since the unauthorized practice of law is a criminal offense, your constituent may want to confer with the local solicitor. See, Act No. 7 of 1995. Finally, your constituent may wish to contact the Unauthorized Practice of Law Committee of the South Carolina Bar. My understanding is that Mr. Edward G. Menzie is the appropriate person to contact. His address is P. O. Drawer 2426, Columbia, South Carolina 29202 and the Bar's telephone number is (803) 799-6653. It is my understanding that this Committee could provide guidance to your constituent.

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

RDC/ph