

The State of South Carolina

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Office of the Attorney General

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The Honorable Daniel Pieper
Berkeley County Magistrate
Post Office Box 60965
North Charleston, South Carolina 29419

Dear Judge Pieper:

In a letter to this Office you raised several questions regarding the prosecution of cases in a magistrate's court by a private citizen. You asked:

a. What authority does a magistrate or the affiant have to ask that the solicitor's office prosecute the case?

b. If the solicitor's office refuses or declines to handle the case, does the affiant have the sole authority to nolle prosequere the case as would the solicitor if he had elected to handle the case? If the solicitor's office initially refuses to handle the case, can it assume control of the case later over the objection of the prosecuting witness (affiant)?

c. Assuming the affiant must prosecute the case on behalf of the State of South Carolina, has the Attorney General or his agents delegated the prosecutorial function to the affiant?

1. In addition, since the case is prosecuted in the name of the State, and assuming the solicitor reserves the right to step in at any time, is the affiant engaging in the unauthorized practice of law by representing the interests of the State in court, as well as by assuming the prosecutorial role by acting as the agent of the Attorney General, who is the chief prosecutorial officer of the State? Most municipalities do not have this problem

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since the city prosecutor is usually an attorney; however, many counties do not have attorney prosecutors for magistrate court offenses and proceedings. I am aware of the law enforcement exception carved out by the Supreme Court for the prosecution of traffic cases by the Highway Patrol.

d. If the solicitor's office does not agree to prosecute the case, may the affiant retain a private attorney to prosecute the case?

Pursuant to Section 17-1-10 of the Code, "(a) criminal action is prosecuted by the State, as a party, against a person charged with a public offense, for the punishment thereof." In State v. Addis, 257 S.C. 482 at 487, 186 S.E.2d 415 (1972) the State Supreme Court indicated

(i)n every criminal prosecution the responsibility for the conduct of the trial is upon the solicitor and he must and does have full control of the State's case. 1/

1/ Of course, pursuant to Article V, Section 24 of the State Constitution, the Attorney General is designated the chief prosecuting officer in this State "with authority to supervise the prosecution of all criminal cases in courts of record." Also, pursuant to Section 1-7-100 of the Code the Attorney General is authorized to

Be present at the trial of any cause in which the State is a party or interested and, when so present, shall have the direction and management of such prosecution or suit.

However in State ex rel. McLeod v. Snipes, 266 S.C. 415 at 420, 223 S.E.2d 853 (1976) the State Supreme Court noted that while the Attorney General "... has the authority to supervise the prosecution of all criminal cases, it is a fact of common knowledge that the duty to actually prosecute criminal cases is performed primarily and almost exclusively by the solicitors in their respective circuits except in unusual cases or when the solicitors call upon the Attorney General for assistance." Furthermore, referencing the provisions of Article V, Section 24 as they relate to the Attorney General, magistrates' and municipal courts are not courts of records. See: Opin. of the Atty. Gen. dated September 24, 1981; State v. Duncan, 269 S.C. 510, 238 S.E.2d 205 (1977).

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In State v. Addison, 2 S.C. 356 at 363-364 (1870) the State Supreme Court noted

The State is the party to the record charging an offence committed against "its peace and dignity." As it represents the whole people within its territorial limits, in point of fact, each one of them is more or less, as citizens, interested in the issue. In every department of the Government, however, proper persons are by law delegated to represent it. Solicitors are elected and assigned to the several Circuits, whose duty it is to prosecute for violation of the public law, with a general supervision over all matters appertaining to this branch of the judicial department. The whole control of the management of all criminal cases is given to them, and especially the prosecution for crimes and misdemeanors. If every citizen of the State (for he who lives in the County where the offence is charged has no greater interest involved than all others living beyond it,) can assume to interfere with the prosecution in the hands of the Solicitor, it would be impossible to preserve and secure that adherence to form and regularity so necessary and proper in all legal proceedings. Suppose that even the prosecutor by whom the charge is made should apply for the removal of the trial against the opinion and judgment of the Solicitor, is he to be heard, and thereby, in effect, substituted as the Solicitor? or, is it likely that the interest of the State would be promoted by a conflict of opinion between them, in which the Solicitor is to be made to yield to the prosecutor? But, how is any one citizen, in a legal point of view, to be considered more interested for the State in a prosecution for murder than another? Save for the just and proper vindication of the law, no one has an interest in the conviction of the prisoner. The prosecuting officer speaks for the State, and, if the motion is to be made for the removal of the trial on behalf of the State, it should be by him, and induced by his judgment. He is responsible for all errors in the official discharge of his duty, and he must be uncontrolled in the exercise of it.

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In State v. Mattoon, 287 S.C. 493, 339 S.E.2d 867 (1986) the Supreme Court dealt with the prosecution of cases by a private attorney who had entered into an agreement with the solicitor to handle such prosecutions. The Court had earlier indicated that private counsel may participate in a trial to assist a solicitor. See: State v. Addis, supra. In its decision the Court cited Section 1-7-405 of the Code which authorizes solicitors to appoint assistant solicitors and vest them with "such responsibility as he directs." The Court stated however

The statute does not permit a solicitor to relinquish prosecutorial control to a private attorney, but it removes any limitations upon his actual trial participation arguably imposed by our prior decisions. It was not error ... (for the private attorney appointed as special assistant solicitor) ... to try the case without the solicitor being present.

339 S.E.2d at 868. Therefore, while a solicitor may not relinquish control of a case, he is not required to be in attendance when the case is being tried. The Court in Mattoon however added further

... we express our disapproval of the practice of appointing private counsel to prosecute criminal cases ... (W)e believe the practice should be discouraged.

339 S.E.2d at 869.

A prior opinion of this Office dated February 8, 1989 referenced the situation where the solicitor had appointed a special assistant solicitor for a particular county. The opinion, citing Mattoon, stated that the Supreme Court "... has recognized the authority of the solicitor to designate assistants and special assistants to carry out his responsibilities."

An opinion of this Office dated April 22, 1974 dealt with the question of whether an assistant solicitor would be entitled to charge the State for services in trials in a magistrate's court. The opinion commented that the assistant solicitor's statement that his position did not entail the trial of cases at the magistrate's level was "erroneous". The opinion concluded that compensation additional to that received as assistant solicitor for services in the magistrate's court was impermissible.

In another opinion of this Office dated July 5, 1990 it was stated that it is our understanding that where a solicitor has indicated that he or his staff could not personally prosecute cases in a magistrate's court, a private attorney would be authorized to prosecute such cases if specifically appointed or authorized to handle

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such prosecutions by the solicitor. In such circumstances, the solicitor would maintain prosecutorial control but would not be obligated to be in attendance during a trial. However, the opinion noted, as referenced above, that the Supreme Court disapproves generally of such practice and discourages appointments of private attorneys.

Referencing the above, it appears that a solicitor should be considered as having control of any criminal case brought in magistrate's court. Therefore, requests may be made for the solicitor to prosecute any such cases. Of course the degree of the solicitor's involvement in particular magistrate's court cases is a matter within his discretion. As to your question regarding the authority of an affiant on a warrant to nol pros a case and a solicitor's authority to assume control of a case after initially refusing to prosecute the matter, as referenced above, the State Supreme Court in Addis affirmed a solicitor's control of every criminal prosecution. This would include situations such as that where the solicitor initially refuses to prosecute the matter. I am unaware of any authority for an affiant to nol pros a case. Moreover, nothing should be construed to indicate that the Attorney General or any of his representatives has affirmatively delegated the prosecutorial function to an affiant on a warrant.

You also asked whether an affiant on an arrest warrant is engaging in the unauthorized practice of law where a prosecution is undertaken in instances where a solicitor or an attorney-prosecutor does not take part.

Sections 40-5-10 et seq. of the Code provide for the regulation of the practice of law in this State. In 1978 the State Supreme Court issued an opinion in the case of State ex rel. McLeod v. Seaborn, 270 S.C. 696, 244 S.E.2d 317 (1978) which held that the prosecution of a misdemeanor traffic case in a magistrate's court by either the arresting officer or a supervisory officer assisting the arresting officer did not constitute the unlawful practice of law in violation of Section 40-5-310 of the 1976 Code of Laws, which basically prohibits the practice of law by persons who are not attorneys, or Rule IV of the Supreme Court Rules governing the State Bar. Therefore, pursuant to such, the prosecution of the young man by a state trooper who was not the arresting officer was authorized. 2/

2/ In State v. Sossamon, 298 S.C. 72, 378 S.E.2d 259 (1989) the Supreme Court refused to extend its holding in Seaborn to authorize a state trooper to act as a prosecutor in magistrate's court where the trooper was not the arresting officer or the supervisor of the deputy sheriff who made the arrest.

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Pursuant to Section 40-5-80 of the Code:

(t)his chapter shall not be construed so as to prevent a citizen from prosecuting or defending his own cause, if he so desires, or the cause of another, with leave of the court first had and obtained; provided, that he declare on oath, if required, that he neither has accepted nor will accept or take any fee, gratuity or reward on account of such prosecution or defense or for any other matter relating to the cause.

Therefore, there is authorization for the prosecution or defense by an individual of his own cause or the cause of another upon leave of the court where the conditions noted by such statute are met. An affiant's involvement in his own case under such circumstances would not constitute the unauthorized practice of law. However, as to the situation you addressed, the private individual who was the affiant on a warrant who appears in court should not be considered to have assumed the role of "prosecutor". Instead, the individual's role is that of a witness. Such circumstances would not appear to constitute the unauthorized practice of law. Of course, the Supreme Court retains the ultimate authority to determine what constitutes the unauthorized practice of law. See: Section 40-5-10.

As to your question regarding whether an affiant may retain a private attorney to prosecute his case where the solicitor's office does not agree to handle the prosecution, as stated above, a private attorney would be authorized to prosecute such a case if specifically appointed or authorized by the solicitor to handle the prosecution. The solicitor, however, would still retain ultimate prosecutorial control. Again, it should be noted that as stated in Mattoon, the Supreme Court disapproves of such practice.

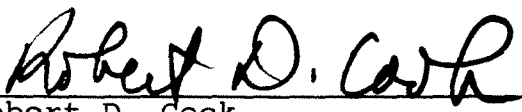
With best wishes, I am

Very truly yours,


Charles H. Richardson
Assistant Attorney General

CHR/an

REVIEWED AND APPROVED BY:


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