



ALAN WILSON  
ATTORNEY GENERAL

December 22, 2014

Trent M. Kernodle, Esquire  
Kernodle, Root & Coleman  
P.O. Box 13897  
Charleston, SC 29422-3897

Dear Mr. Kernodle:

Attorney General Alan Wilson has referred your letter dated November 19, 2014 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

**Issue:**

Whether it is a conflict for a law firm to continue as general counsel to a statutorily-created special purpose district providing fire and sewer services when the spouse of the main attorney who represents the district has been elected a commissioner on the board of the special purpose district.<sup>1</sup>

**Law/Analysis:**

If this Office were to review your question as a dual office holding question, legal counsel working pursuant to contract would not likely be an office for honor or profit under the Crenshaw test. See State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980). Applying the Crenshaw test to the legal counsel to the Commission not to the Commission itself, its counsel would have no sovereign powers of the State (taxing, police, or eminent domain) by himself, his position was not created by the legislature and this Office has not been made aware of any bond, oath or specific duties. Id. Conversely, this Office has previously and consistently concluded commissioners of special purpose and public service districts would be considered office holders for dual office holding purposes. See, e.g., Ops. S.C. Atty. Gen., 2003 WL 2103505 (April 3, 2003); 1991 WL 634924 (January 7, 1991); 1990 WL 599332 (October 19, 1990); 1990 WL 599321 (October 12, 1990), et al. As we stated concerning that determination, "[i]n determining that members of public service districts are officers, we found that the following duties involve an exercise of a portion of the sovereign power of the state: prescribing regulations with respect to use of property or facilities owned by the District; building or acquiring facilities; imposing rates; exercising eminent domain; employing personnel; entering into contracts; incurring indebtedness; levying taxes; and the like." Op. S.C. Atty. Gen., 2003 WL 21043505 (April 3, 2003).

However, we urge caution in three potential areas for your consideration, though there may be other cautions not herein addressed.<sup>2</sup> The first caution is to make sure there is no master-servant relationship or

---

<sup>1</sup> You note you and/or your firm has represented the special purpose district since 1990 and that the District Manager, not the commissioners, has determined the retention, terms, and compensation of legal counsel.

principle thereof. This Office has issued many opinions discussing master and servant conflicts that do not violate any specific law but nevertheless, create a conflict of interest under the common law. See, e.g., Ops. S.C. Atty. Gen., 2014 WL 212887 (April 25, 2014); 2013 WL 5291571 (September 9, 2013); 2010 WL 4391634 (October 14, 2010), et al. This Office has consistently described such a principle where “one office is subordinate to the other, and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power of appointment as to the other office, or has the power to remove the incumbent of the other or to punish the other.” Op. S.C. Atty. Gen., 2006 WL 2382449 (July 19, 2006). This also can include the power to determine the compensation or other supervisory authority. Id. The court outlined this principle in McMahan v. Jones, stating “[n]o man in the public service should be permitted to occupy the dual position of master and servant; for, as master, he would be under the temptation of exacting too little of himself, as servant; and, as servant, he would be inclined to demand too much of himself, as master. There would be constant conflict between self-interest and integrity.” Id. (quoting McMahan v. Jones, 94 S.C. 362, 365, 77 S.E. 1022, 1022 (1913)). One concern this Office has is would the spouse have the power to hire, fire, and set the compensation of the counsel to the Commission. While we are aware commissioners of such special purpose districts have to act pursuant to statutory authority and must act as a board, not on an individual basis, the spouse would need to notify the board and refrain from voting on any decisions concerning her spouse (or his firm as legal counsel) including pay, employment, terms of the contract, etc. S.C. Code §§ 6-11-100; 8-13-700(B); 8-13-750, et al. (1976 Code, as amended).

The second concern is in regards to the State Ethics Act and common law violations by the relationship. Please note it is the view of this Office that the passage of the South Carolina Ethics, Government Accountability, and Campaign Reform Act of 1991 (hereinafter “Ethics Act”) does not eliminate common law rule. As we stated in a 2011 opinion:

While the Ethics Act proscribes misconduct of particular kinds, it is the opinion of this Office that the Ethics Act was not intended to be an exhaustive list of the official acts that are prohibited by law. Accord Raynovich, 299 A.2d at 304 (Eagen, J., dissenting) (“[I]t does not follow that everything may be done by a public officer that is not forbidden in advance by some act of assembly.” (quoting Goodyear v. Brown, 26 A. 665 (Pa. 1893))); cf. In re Anonymous Member of the South Carolina Bar, 389 S.C. 462, 699 S.E.2d 693 (2010) (“Sexual involvement with the spouse of a current client, while not expressly proscribed by the language of our Rules of Professional Conduct, unquestionably has the propensity to compromise the most sacred of professional relationships . . .” (emphasis added)); 67 C.J.S. Officers and Public Employees § 240 (“Public officers and employees owe a duty of loyalty to the public.”). Thus, this Office would not construe compliance with the Ethics Act as a “safe harbor” for official behavior that violates long-standing principles of governance. On the contrary, absent a conflicting statutory provision, this Office would take the position that the common law principle recognized in Bradley remains in force. [FN5]

[FN5]. See S.C. Code Ann. § 14-1-50 (1976) (“All, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the

---

<sup>2</sup> This is only an overview of some of the potential conflicts and areas in which we would urge caution, though there are others not specifically addressed within this opinion (e.g., the buying and selling of public offices is specifically made illegal in S.C. Code § 8-5-20, et al.).

Constitution or laws of this State, is hereby continued in full force and effect in the same manner as before the adoption of this section.”); Singleton v. State, 313 S.C. 75, 83, 437 S.E.2d 53, 58 (1993) (“The common law remains in full force and effect in South Carolina unless changed by clear and unambiguous legislative enactment.” (emphasis added)); see also Raynovich, 299 A.2d at 309 (Eagen, J., dissenting) (“Far from being persuasive of [a board member’s] right to vote himself the increased salary, the failure of the Code specifically either to authorize or to forbid the practice is conclusive against him. It necessitates an explicit direction on the part of the legislature to overthrow such a wholesome and salutary rule of the common law . . . .” (emphasis added) (quoting Reckner v. School District of German Township, 19 A.2d 402, 403 (Pa. 1941))).

Op. S.C. Atty. Gen., 2011 WL 4592368 (September 12, 2011). Therefore, we will list some statutes within the Ethics Act and some opinions from the South Carolina Ethics Commission, but we also recommend you make sure there is no common law violation by the relationship.<sup>3</sup> However, any ethical questions would need to be addressed by the State Ethics Commission. S.C. Code § 8-13-320 (1976 Code, as amended). Some statutes within the Ethics Act we recommend making sure the counsel and commissioner are in compliance with are: S.C. Code §§ 8-13-700 (prohibiting the use of an official position or office for financial gain & disclosure of potential conflicts of interests); 8-13-705 (prohibiting offering, giving or promising anything of value to a public official or public employee); 8-13-720 (prohibiting a public official, public member or public employee from soliciting or receiving money for advice or assistance within the course of employment); 8-13-725 (prohibiting a public official, public member or public employee from using or disclosing confidential information); 8-13-735 (prohibiting participation in any decision affecting personal economic interests by one employed by and serving on governing body of governmental entity); 8-13-750 (prohibiting the employment, promotion, advancement, or discipline of a family member of a public official, member, or employee); 8-13-775 (no public official, member, or employee with official function related to contracts is permitted to have economic interest in contracts); etc. Moreover, in addition to requesting an opinion from the Ethics Commission, some prior opinions that may be helpful to answering your question are: Ops. S.C. St. Ethics Comm., SEC A092-209, May 27 1992 (opining that a family member of a Public Works Board member may continue as an employee without violating the Ethics Act, subject to the Board member not participating in action involving salary and discipline actions for the family member); SEC A092-213, October 21, 1992 (opining that the spouse of a special purpose district commissioner would not be prohibited from being hired as long as the commissioner does not participate in the hiring and exercises no authority over the spouse); et al. We have included a copy of both Ethics Opinions with this letter. We would suggest reviewing other relevant Ethics Advisory Opinions and seeking a new opinion from the South Carolina Ethics Commission, if necessary. The Ethics Advisory Opinions are available at the South Carolina Ethics Commission’s website at [www.ethics.sc.gov](http://www.ethics.sc.gov).

The third area in which we caution you is to make sure the positions pose no violation of the South Carolina Rules of Professional Conduct for lawyers. For example, Rule 1.7 states that even if there is or could be a concurrent conflict of interest, a lawyer may represent the client as long as “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; the representation is not prohibited by law; the representation does not involve the assertion of a claim by one client against another client...; and each affected client gives informed

---

<sup>3</sup> Please note, SC’s nepotism statute (S.C. Code 8-5-10 et seq.) was repealed effective January 1, 1992.

Trent M. Kernodle, Esquire  
Page 4  
December 22, 2014

consent, confirmed in writing.” Rules of Professional Conduct, Rule 1.7, RPC, Rule 407 SCACR. Any such representation by counsel would need to comply with the Rules of Professional Conduct. A United States Federal District Court for South Carolina has chosen to reject a hardline rule that lawyers for an insurance company are always disqualified from representing the insured whenever the insurer reserves its right. Twin City Fire Insur. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., LP, 336 F.Supp.2d 610 (2004). Under that same reasoning, we think it likely a court would again not determine automatic disqualification, but instead would analyze this question, as most others, on a case-by-case analysis.

Moreover, this Office has issued a previous opinion on a similar question concerning a public service commissioner whose brother and husband both worked for the public service district. See Op. S.C. Atty. Gen., 1981 WL 158252 (April 27, 1981). In that opinion, we referenced a statute that has since been repealed but opined that the commissioner should not participate in any discussion concerning or vote on any part of the budget directly affecting her spouse. Id.

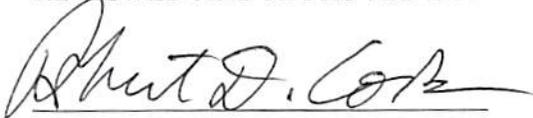
**Conclusion:** This Office urges caution in regards to potential conflicts such as a master-servant relationship, the Ethics Act, and the South Carolina Rules of Professional Conduct. Moreover, this Office recommends you check with the State Ethics Commission if you have any questions or concerns related to ethics or the Ethics Act, as they offer formal and informal opinions and handle inquiries, investigations and complaints regarding the Ethics Act. S.C. Code § 8-13-320. However, this Office is only issuing a legal opinion based on the current law at this time. Until a court or the Legislature specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would analyze your question. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,



Anita S. Fair  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Solicitor General