



ALAN WILSON
ATTORNEY GENERAL

October 17, 2017

The Hon. Margie Bright Matthews, Member
South Carolina Senate
PO Box 142
Columbia, SC 29202

Dear Senator Matthews:

We received your opinion request regarding the legal consequence of a county magistrate serving as the county attorney for the same county. The following opinion sets out our understanding of your question and our response.

Issue (as quoted from your letter):

I have been approached by a member of Hampton County Council to seek an opinion on whether its local magistrate can also serve as the Hampton County Attorney. Please provide me an opinion on whether this poses a Conflict of Interest or violates any ethics rules.

Law/Analysis:

For the reasons set out below, we advise that a Hampton County magistrate should not also serve as the Hampton County Attorney. *See Op. S.C. Att'y Gen.*, 1974 WL 27460 (June 24, 1974). It is the opinion of this Office that a court most likely would hold that a county magistrate cannot simultaneously serve as a county attorney for the same county and still maintain the judicial detachment that the U.S. Constitution requires. *See id.* Indeed, an otherwise meritorious prosecution may be frustrated where the detachment of the magistrate issuing a warrant is not "neutral and detached." *State v. Dunbar*, 361 S.C. 240, 603 S.E.2d 615 (2004) (citing, inter alia, *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). A previous opinion of this Office considered whether a city attorney could simultaneously serve as a city recorder, and noted that the duties of the city attorney could be such that it constituted "mere employment" and not an office for dual-office holding purposes. *Op. S.C. Att'y Gen.*, 1974 WL 27460 (June 24, 1974). That 1974 opinion nevertheless advised against the arrangement on constitutional grounds, and opined:

[e]ven if not prohibited by dual office holding provisions, it is doubtful that a city attorney, who is, at least, legal advisor to the police and other personnel of the executive branch of municipal government, could establish the necessary 'judicial detachment' as a matter of law to meet requirements set forth by recent decisions of the United States Supreme Court.

Id. This reasoning logically extends to a county attorney serving as a magistrate for the same county. *See id.* For that reason, we opine that just as "it would not be proper for a city attorney to act in the dual capacity of city trial judge," so too it would not be proper for a county attorney to act as in the dual capacity of a county magistrate. *See id.*

While we believe that the law set out above regarding judicial detachment is dispositive of the contemplated arrangement, we note also that the contemplated arrangement raises dual office holding questions. *See Op. S.C. Att'y Gen.*, 2009 WL 3208462 (September 1, 2009). The South Carolina Constitution prohibits any persons from holding two offices of honor or profit simultaneously. S.C. Const. art XVII, § 1A. As this Office set out in a 2009 opinion,

Article XVII, Section 1A of the South Carolina Constitution provides that "No person may hold two offices of honor or profit at the same time, but any person holding another office may at the same time be an officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public." For this provision to be contravened, a person concurrently must hold two public offices which have duties involving an exercise of some portion of the sovereign power of the State. *Sanders v. Belue*, 78 S.C. 171, 58 S.E. 762 (1907). "One who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent, is a public officer." *Id.*, 58 S.E. 762, 763. Other relevant considerations are whether statutes, or other such authority, establish the position, prescribe its tenure, duties or salary, or require qualifications or an oath for the position. *State v. Crenshaw*, 274 S.C. 475, 266 S.E.2d 61 (1980).

Op. S.C. Att'y Gen., 2009 WL 3208462 (September 1, 2009). That same prior opinion notes that

[i]n numerous prior opinions, we have concluded that a magistrate holds an office for purposes of dual office holding." *See, e.g., Ops. S.C. Atty. Gen.*, September 18, 1997; July 8, 1991; September 23, 1980. We have further opined that the dual office holding prohibition applies to part-time magistrates. *Ops. S.C. Atty. Gen.*, January 25, 2006; June 19, 1987.

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Id. Accordingly, a county magistrate may not hold another office of honor or profit without violating the dual office holding prohibition of the South Carolina Constitution. *See id.*

The position of county attorney may constitute an office of honor or profit, depending on the circumstances of the position. *See Op. S.C. Att'y Gen.*, 1981 WL 157862 (July 13, 1981). As this office has previously opined,

[w]hether or not a county attorney is an office would depend upon how the office itself is created. If the position is created by state statute or county ordinance and the duties of the position make it an 'office' rather than mere employment, it would be violative of the dual office prohibitions of the State Constitution for one individual to hold the office of county attorney and another office."

Id. Our Office has not reviewed any ordinance related to the Hampton County Attorney, nor are we familiar with the specific duties of this particular position. For that reason, we cannot opine as to whether the Hampton County Attorney specifically holds an "office" for the purposes of Article XVII, Section 1A of the South Carolina Constitution. *Cf. Op. S.C. Att'y Gen.*, 2014 WL 4953187 (September 19, 2014) (discussing the specific duties of a particular county attorney to conclude it "[was] not an office for dual office holding purposes"). We reiterate, however, that we believe that the law set out above regarding judicial detachment is dispositive in this case. *See Op. S.C. Att'y Gen.*, 1974 WL 27460 (June 24, 1974). Furthermore, to the extent that the county attorney advises the county on matters of, e.g., judicial funding or other powers or responsibilities of the county in relation to the office of the magistrate, that relationship could violate common-law master / servant principles or other principles of law. *See, e.g., Op. S.C. Att'y Gen.*, 2007 WL 1302776 (April 5, 2007).

Finally, we note that your question requests an opinion on both the legal and ethical implications of the contemplated arrangement. We have set out the law in this opinion, but please be aware that our Office generally does not opine on ethics rules, in part because those questions typically involve fact-specific evaluations on a case-by-case basis. *Op. S.C. Att'y Gen.*, 2014 WL 2120886 (May 5, 2014). We defer to the Ethics Commission, the South Carolina Judicial Department, and the South Carolina Bar on ethics questions in cases such as the one presented here, and we encourage the magistrate to direct these questions to those authorities. *See, e.g., S.C. Code Ann. § 8-13-320 (Supp. 2016)* (establishing the duties and powers of the State Ethics Commission). That said, it appears that the Judicial Department has issued advisory opinions which would be relevant to this inquiry, and we would encourage the magistrate in this case to review them carefully. *See, e.g., Op. SC Adv. Comm. Std. Jud. Cond.*, 2005 WL 6734572 (April 2005) (concluding that "[a] part-time magistrate court judge may not simultaneously serve

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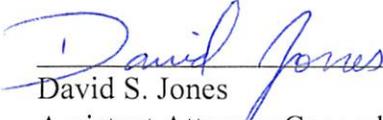
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as a part-time contract public defender in the same county," even where the judge would not be involved in any county or magistrate cases).

Conclusion:

For these reasons, we advise that a Hampton County magistrate should not also serve as the Hampton County Attorney. *See Op. S.C. Att'y Gen.*, 1974 WL 27460 (June 24, 1974). This opinion should not be construed as a conclusion that a magistrate who also has advised the county in any capacity cannot ever meet the constitutional requirements of detachment, nor should it be construed as a statement regarding any specific criminal proceeding. But where this arrangement is contemplated prospectively, we strongly advise against it. *See id.*

Sincerely,

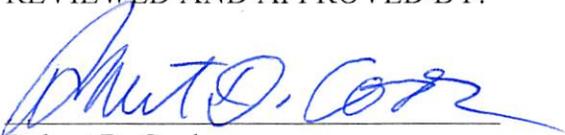


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