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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

May 27, 1999

The Honorable Miriam E. Patterson
Mayor, Town of McCormick
117 West Augusta Street
Post Office Box 306
McCormick, SC 29835

RE: Informal Opinion

Dear Mayor Patterson:

By your letter of May 18, 1999, you have requested an Attorney General's Opinion addressing whether the McCormick Town Attorney may simultaneously serve as the Tri-County Public Defender for Edgefield, Saluda and McCormick Counties. Attorney General Condon has asked me to respond.

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 ...," with exceptions specified for an officer in the militia, a member of a lawfully and regularly organized fire department, constable, or a notary public. As concluded by Attorney General Daniel McLeod in an opinion dated April 26, 1977, "[t]o determine whether a position is an office or not depends upon a number of circumstances and is not subject to any precise formula." The South Carolina Supreme Court, though, has held that for this provision to be contravened, a person concurrently must hold two 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., 78 S.C. at 174. Other relevant considerations, as identified by the Court, are whether statutes, or other authority, establish the position, prescribe its tenure, duties or salary, or

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require qualifications or an oath for the position. State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980).

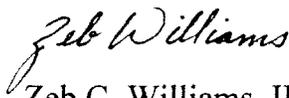
This Office has opined previously that one who serves as a public defender is not deemed to be an officeholder. See, for example, Ops. Atty. Gen. dated January 7, 1991 and June 1, 1987, copies of which are enclosed. Having so determined, it is unnecessary to evaluate whether the McCormick Town Attorney might hold an office.

Apart from the dual office holding question, however, certain ethical issues must be considered. For example, as town attorney he could be called upon to prosecute or advise law enforcement officials about a criminal case that could result in an individual being arrested, charged or indicted who would then require the services of the public defender. It was for this reason that this Office concluded in an earlier opinion that **"it is doubtful that a county attorney could hold the additional positions of ... public defender due to the apparent possibilities of conflict of interest."** (Emphasis added). Op. Atty. Gen. dated August 28, 1974 (enclosed). Since the positions of county attorney and town attorney are quite similar, the likelihood of an actual conflict developing seems no less remote. Accordingly, you may also wish to consult with the South Carolina Bar's Ethics Advisory Committee concerning any possible ramifications related to the Rules of Professional Conduct. You may forward your inquiry to the Ethics Advisory Committee, SC Bar, P.O. Box 608, Columbia, SC 29202.

I trust this information is responsive to your inquiry and that you will not hesitate to contact me if I can be of additional assistance. This letter is an informal opinion only. It has been written by a designated Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kindest regards, I am

Very truly yours,



Zeb C. Williams, III
Deputy Attorney General

ZCW, III/ph
Enclosures