



ALAN WILSON
ATTORNEY GENERAL

February 19, 2016

The Honorable James F. Hicks, III
20 McGee St.
Greenville, SC 29601

Dear Judge Hicks:

We are receipt of your opinion request concerning dual-office holding, notaries public and summary court judges. Specifically, you ask: (1) whether “notaries public [are] immune from dual office holding in all instances?” (2) whether a summary court judge can also be a notary public? and (3) whether there are any restrictions associated with being both a summary court judge and a notary public? Our responses follow.

I. Law/Analysis

As noted in your letter, Article XVII, Section 1A as well as Article VI, Section 3 of the South Carolina Constitution explain that, “no person may hold two offices of honor or profit at the same time ...,” with exceptions specified for “an officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public.” These provisions are violated when a person concurrently holds two public offices with duties involving an exercise of some portion of the sovereign power of the State. Sanders v. Belue, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907). In determining whether an office is public, and thus whether its’ occupant constitutes a public officer, South Carolina Courts have explained: “[o]ne 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. 762-63. Other relevant considerations for such a determination include: “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, 478, 266 S.E.2d 61, 62 (1980).

A. Question One: Are Notaries Public “Immune” from Dual-Office Holding?

With this in mind, we now move to your first question, whether “notaries public are immune from dual office holding in all instances?” We believe that they are. Specifically, because a notary public is exempted from the South Carolina Constitution’s dual-office holding provision, we believe a notary public, while an officer, does not “count” as an officer for purposes of the Constitutional prohibitions against dual-office holding.

As an initial matter, it seems clear that a notary public does in fact hold an office.¹ In South Carolina, this is confirmed by the terms of the Constitutional provisions that prohibit dual-office holding, both of which explain that an individual who holds another office may also be a notary public. See S.C. Const. art. VI, § 3 (“No person may hold two offices of honor or profit at the same time. This limitation does not apply to officers in the militia, notaries public, members of lawfully and regularly organized fire departments, constables, or delegates to a constitutional convention.”); S.C. Const. art. XVII, § 1A (“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.”). Moreover, these same provisions are equally clear that the prohibition on dual-office holding does not apply to notaries public. See S.C. Const. art. VI, § 3 (“No person may hold two offices of honor or profit at the same time. This limitation does not apply to officers in the militia, notaries public, members of lawfully and regularly organized fire departments, constables, or delegates to a constitutional convention.”); S.C. Const. art. XVII, § 1A (“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.”). Accordingly, we believe the office of notary public, insofar as it is a public office that does not “count” for purposes of dual-office holding, is, in your words, “immune” from the South Carolina Constitution’s prohibition on dual-office holding.²

B. Question Two: Can a Summary Court Judge be a Notary Public?

You next ask whether a summary court judge can serve as a notary public without offending the prohibition against dual-office holding. Assuming the judge holds no additional office other than that of a notary public, we believe that they can.

As explained above in Section I(A), the Constitutional prohibition on dual-office holding does not apply to the office of notary public. As a result, it follows that, so long as a summary court judge does not hold an additional, non-exempt office, the prohibition against dual-office holding is not offended by serving as both a summary court judge and a notary public.

C. Question Three: Are there Restrictions Associated with Being both a Summary Court Judge and a Notary Public?

¹ See 58 Am. Jur. 2d Notaries Public, § 2 (2015); Villanueva v. Brown, 103 F.3d 1128, 1137 (3d Cir. 1997) (applying New Jersey law); Farm Bureau Finance Co., Inc. v. Carney, 100 Idaho 745, 750, 605 P.2d 509, 514 (1980); Bell v. Department of State, Div. of Licensing Services, 34 A.D.3d 1022, 1023, 823 N.Y.S.2d 635, -- (3d Dep’t 2006); NationsBank of North Carolina, N.A. v. Parker, 140 N.C. App. 106, 109, 535 S.E.2d 597, 598 (2000); George v. General Finance Corp. of Louisiana, 414 F. Supp. 33, 34 (E.D. La. 1976); Werner v. Werner, 84 Wash. 2d 360, 366, 526 P.2d 370, 375 (1974).

² However, we note this does not mean an individual holding two non-exempt public offices would be “saved” from the restriction on dual-office holding by also being a notary public.

In your third question you ask if there are any “restrictions associated with being both a magistrate or municipal judge and a notary public?” While we are unaware of any specific restrictions placed on such concurrent service, we encourage you to seek an advisory opinion from the Advisory Committee on Standards of Judicial Conduct as “the question of whether a judge has violated the Code of Judicial Conduct is beyond the scope of an opinion of this Office.” Op. S.C. Att’y Gen., 2013 WL 5403532 (September 17, 2013).

Notably, at least one jurisdiction has found a full-time judge may concurrently serve as a notary public without violating state judicial ethical canons. Specifically, a September 4, 2014 opinion issued by the New York Advisory Committee on Judicial Ethics explains “there is nothing intrinsically unethical in a judge serving as a notary public, particularly in light of the authority otherwise given to judges to take oaths and acknowledgements.” N.Y. Jud. Adv. Op., 14-107 2014 WL 7906433 (September 4, 2014). Similar to the New York Committee’s observation of a judge and notary public’s concurrent authority within the area of oaths and acknowledgements, an opinion from the Mississippi Attorney General’s Office, citing a state statute, explained a summary court judge serves an “ex officio notary public.” Op. Miss. Att’y Gen., 1998 WL 563980 (August 10, 1998). Nevertheless, the opinion further advised that a judge serving in both roles should seek an advisory ethics opinion to determine whether such service violates judicial ethical canons. Op. Miss. Att’y Gen., 1998 WL 563980 (August 10, 1998). In light of this, we believe, consistent with a previous opinion from this Office, that it would be prudent to seek an advisory opinion from the Committee on Standards of Judicial Conduct since the application of the Code of Judicial Conduct “is beyond the scope of an opinion of this Office.” Op. S.C. Att’y Gen., 2013 WL 5403532 (September 17, 2013).

II. Conclusion

In conclusion, because a notary public is exempted from the South Carolina Constitution’s dual-office holding provisions, we believe a notary public, while an officer, does not “count” as an officer for purposes of the Constitutional prohibitions against dual-office holding. As a result, it follows that where a summary court judge does not hold an additional, non-exempt office, the prohibitions against dual-office holding are not offended by serving as both a summary court judge and a notary public. Furthermore, while we are unaware of any other potential restrictions placed on concurrent service as both a summary court judge and a magistrate, we encourage you to seek an advisory opinion from the Advisory Committee on Standards of Judicial Conduct as “the question of whether a judge has violated the Code of Judicial Conduct is beyond the scope of an opinion of this Office.” Op. S.C. Att’y Gen., 2013 WL 5403532 (September 17, 2013).

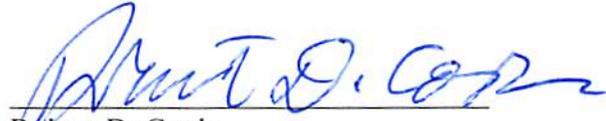
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Sincerely,



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REVIEWED AND APPROVED BY:



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