ALAN WILSON
ATTORNEY GENERAL

March 17, 2025

The Honorable George E. "Chip" Campsen III
Chairman
Fish, Game and Forestry Committee
P.O. Box 142
Columbia, SC 29202

Dear Chairman Campsen:

You seek an opinion regarding "the ability of a municipality to retain a law firm to serve as outside City attorney on a contractual basis and to clarify any dual-office holding implications." Your letter concludes that, consistent with § 5-7-230, a municipality possesses authority to retain a law firm to advise it as city attorney, so long as the firm does not prosecute criminal cases. Your view is that such retention does not create an "office" for purposes of dual office holding prohibitions. We agree with your analysis, as explained more fully below.

Specifically, your letter provides the following summary:

> A large South Carolina law firm currently represents several municipalities within my Senate District. The law firm is engaged by each municipality on a contractual basis to provide legal guidance and represent each municipality in civil matters as outside city attorney on an as needed and part-time basis. The law firm does not serve as city prosecutor, does not prosecute criminal cases, and does not supervise the prosecutor of the municipality. Each of the local municipalities that have retained the law firm as outside city attorney have also appointed a separate city prosecutor, and the prosecutor does take an oath of office, unlike the law firm. Finally, the law firm is not appointed and does not take an oath of office, but it is instead retained by the municipality pursuant to an engagement letter. The terms of the engagement letters between the law firm and municipalities state:
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> > The Firm is being engaged on a contractual basis to provide legal guidance and represent the City in civil matters as outside City Attorney on an as needed and part-time basis pursuant to the terms of this engagement letter. The Firm is not serving as City Prosecutor and will not prosecute criminal cases on behalf of the City.

Additionally, each of the local municipalities involved with the subject law firm have adopted substantially similar ordinances, which generally read as follows:

> Sec. 2-210. - Retention of City Attorney.
>
> (a) Council shall retain a City Attorney, who shall serve at the pleasure of Council, until a successor is duly retained and qualified. The City Attorney may be an individual or law firm. Any lawyer(s) rendering services as City Attorney shall be admitted to practice law in South Carolina and shall be members of the South Carolina Bar in good standing.
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> Sec. 2-211 - City Prosecutor.
>
> Council may retain separate legal counsel to serve as City Prosecutor, who shall serve at the pleasure of Council. The City Prosecutor shall be admitted to practice law in South Carolina and shall be a member of the South Carolina Bar in good standing.

As referenced, all of the local municipalities that have retained the law firm as outside city attorney have also appointed a separate city prosecutor, and the prosecutor does take an oath of office, unlike the law firm.

S.C. Code Ann. § 5-7-230 states in pertinent part that, "[t]he city council may elect or appoint a municipal attorney ... whose duties shall be as prescribed by law." Under the statute, this is an optional power that belongs solely to city council, regardless of the form of government (council form, mayor-council form, or the council-manager form). While the statue refers to a singular municipal attorney, here, a single entity (law firm) has been retained as outside city attorney, and another lawyer not affiliated with the law firm has been appointed by council to serve as the municipal prosecutor.

Your office has "consistently interpreted S.C. Code § 5-7-230 to permit altering the scope of a city attorney's duties or defining the paraments by which he is to undertake those duties so long as the ordinance is consistent with the constitution and state law." Op. Att'v Gen., 2024 WL 3566018 (S.C.A.G. July 18, 2024). Your office has also previously opined that the position of "city attorney" is not a per se constitutional officer, and it depends on "how the position is created and the duties prescribed." Op. Att'y Gen., 1998 WL 7469 25 (S.C.A.G. Sept. 14, 1998). Here, I am not aware of any applicable constitutional or state law limitations that prohibit city council from determining the duties of the city attorney and setting the terms and scope of the engagement for a law firm to provide services as outside city attorney as specified herein. See Op. Att'y Gen., 2024 WL 3566018 (S.C.A.G. July 18, 2024) ("There are no relevant constitutional limitations on what municipalities may or may not do with city attorneys."). Indeed, the city attorney has virtually no inherent rights or duties under state law. Id.

Based on the forgoing, my conclusion is that the question of whether a law firm can be retained as city attorney is determined by the terms and the scope of the engagement rather than simply the title of the position. Here, a law firm can be retained as city attorney so long as the law firm (l) is engaged on a contractual basis to provide legal guidance and represent the municipality in civil matters as outside city attorney on an as needed and part-time basis; (2) does not serve as city prosecutor, does not prosecute criminal cases, and does not supervise the separately appointed prosecutor of the municipality; and (3) is not appointed and does not take an oath of office, but it is instead retained by the municipality pursuant to an engagement letter. Stated differently, a law firm cannot be appointed to a constitutional office, but by altering the scope of a city attorney's duties and defining the paraments by which he is to undertake those duties by way of an engagement letter, council can retain a law firm to serve as outside city attorney.

The next point for consideration is a question of dual-office holding. Several lawyers within the firm provide legal services to the municipality on behalf of the firm depending on their practice area (i.e., real estate, economic development, litigation). One of the litigation attorneys employed by the law firm also serves on a local school board, which is a constitutional office, and he provides legal services to several municipalities as an employee of the law firm. The lawyer is not individually retained by any of the municipalities (the law firm is), and the lawyer is not paid directly by the municipalities. Instead, each municipality pays the law firm for services its attorneys provide to the municipality.

While I do not believe the scenario described above is dual office holding based on my analysis of prior Attorney General Opinions, a member of the public has claimed the arrangement described above constitutes dual-office holding in light of the fact that one of the lawyers within the firm serves on a local school board and provides legal services to several local municipalities as an employee of the law firm.

The Attorney General's Office has previously stated the following in prior opinions:

> Whether or not the position of city attorney is an office would depend on how the position is created and the duties prescribed. If the duties prescribed make the position an "office" rather than mere employment, it would be violative of the dual office holding prohibitions for one individual to hold the office of city attorney and another office.

Op. Att'y Gen., 1998 WL 746925 (S.C.A.G. Sept. 14 , 1998).

Here , I believe the terms of the engagement letter and scope of the law firm's representation of the City do not create an "office" and instead is representative of mere employment. Thus, dual-office holding prohibitions are not implicated despite the fact that a lawyer at the firm serves on a local school board and provides legal services to several local municipalities as an employee of the law firm. Prior opinions from your office support this conclusion. See e.g., Op. Att'y Gen., 1993 WL 720127 (S.C.A.G. June 11, 1993) (stating "we are of the opinion that the City of

> Lake City may retain by contract the individual in question (who is also an assistant solicitor) as legal counsel to advise City Council and represent the City in civil matters, on a part-time basis and concurrent with his private law practice, and further that as long as this individual is not prosecuting criminal cases on behalf of the City, he would be considered an independent contractor rather than an office holder in this instance."); Op. Att'y Gen., 1998 WL 746925 (S.C.A.G. Sept. 14, 1998) ("[t]he Greenwood city attorney is retained by contract, does not take an oath of office, does not prosecute criminal cases, and is employed on a part-time basis ... [t]hus, it appears that the Greenwood city attorney would be considered an independent contractor rather than an office-holder."); Op. Att'y Gen., 2006 WL 3199988 (S.C.A.G. Oct. 11, 2006); (opining that the position of Deputy City Attorney for the City of Spartanburg "[was] not an office for purposes of dual office holding " because the "position is part-time," the position "does not require an oath, [the attorney] does not serve for a particular term," and because the attorney did "not prosecute criminal cases and do[es] not supervise those who do, we find no evidence that [the] position exercises some portion of the sovereign power of the State.").

As noted above, and explained more fully below, we believe your analysis to be correct. The approach outlined in your letter is consistent with Home Rule, § 5-7-230, as wells our prior opinions.

Law/Analysis

Section 5-7-230 of the Code in part authorizes a city council to "elect or appoint a municipal attorney . . . whose duties shall be prescribed by law." Because § 5-7-230 uses the terms "elect or appoint," and "a" municipal attorney, our earlier opinions applying this statute, assumed that a municipal attorney was only a single individual. In those instances, we interpreted the statute literally, concluding that "[w]hile the statute is apparently quite clear in its authorization for the appointment of only a single individual as municipal attorney, therefore precluding the appointment of a law firm as city attorney, there apparently is no prohibition against additional attorneys aiding and assisting the city attorney. Such individuals may be considered either as assistants or deputies to the city attorney." Op. S.C. Att'y Gen., 1981 WL 158080 (December 21, 1981). Similarly, we concluded, early on, that "the position of municipal or city attorney is an office within the prohibition of Article XVII, § 1A." (dual office holding prohibition).

Since then, however, our earlier opinions have been modified, depending upon the circumstances by which the city attorney was retained. The essence of these later opinions is that, while a city attorney certainly may be a single individual, the city attorney also may be, under certain circumstances, a law firm retained by the municipality. In Op. S.C. Att'y Gen., 1993 WL 720127, Op. No. 93-40, (June 11, 1993), for example, we considered the question of whether an assistant solicitor could also serve as an appointed city attorney of Lake City without violating the dual office holding prohibition of the State Constitution. Our conclusion was that no such violation would be present in that instance. Our analysis was as follows:

> [o]pinions of this Office as to whether the position of city attorney would constitute an office, prior to the advent of home rule, reached different conclusions depending on how the position was created and what responsibilities were carried out. The Home Rule Act, Act No. 283 of 1975, contained a statute now codified as S.C. Code Ann. § 5–7–230 which permitted a municipal council to elect or appoint a municipal attorney whose duties shall be as prescribed by law. Based solely on this statute, an opinion dated May 4, 1977 (and others issued since that time) concluded that a municipal attorney would be considered an office-holder. The opinion failed to consider a particular instance or ordinance and did not otherwise examine other criteria which are set forth in the second paragraph of this letter. We are of the view that the opinion of May 4, 1977 and its progeny must be modified to some extent.
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> Ordinance # 1991.002 adopted by the City Council of Lake City establishes the position of City Attorney for the City. A review of the ordinance reveals much latitude in the employment of an attorney. The attorney may be elected or retained. A written contract is to be entered into, with the scope of the work and fees to be paid, described therein. No specific term is specified; no oath is required by the ordinance. The attorney will advise the mayor and council, draft ordinances and instruments, represent city officials, and appear on behalf of the City in legal proceedings. The ordinance contemplates that more than one attorney may be retained; in this instance, we understand that the attorney in question will not prosecute criminal cases on behalf of the City,[and that] another attorney may be retained for that function.
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> [ ]The ordinance contains many terms which can lead to the conclusion that a city attorney retained thereunder might well be an independent contractor, when the ordinance is considered as a whole. In a number of places, references to the attorney "retained" or "employed" appear. Where, as is apparently the case here, the municipal attorney will represent the City in civil legal matters, on a part-time basis, while continuing his private legal practice, it appears that the individual is more an independent contractor than an office-holder.
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> Based on the foregoing and in confirmation of the oral opinion provided on May 27, we are of the opinion that the City of Lake City may retain by contract the individual in question (who is also an assistant solicitor) as legal counsel to advise City Council and represent the City in civil matters, on a part-time basis and concurrent with his private law practice, and further that as long as this individual is not prosecuting criminal cases on behalf of the City, he would be considered an independent contractor rather than an office holder in this instance. To the extent today's opinion is inconsistent with prior opinions, it is noted that those opinions are distinguishable and modified to the extent necessary to be consistent with the present opinion.

We believe this opinion provides the correct legal analysis regarding the status of a city attorney: therefore, consistent with § 5-7-230, a municipality may contract with a private law firm to advise it as municipal attorney in civil matters; further, "as long as [the contractor] . . . is not prosecuting criminal cases on behalf of the City . . . ," there would be no "office" created for dual office holding purposes. We reaffirm these conclusions herein.

Our subsequent opinions are consistent with our 1993 opinion. In Op. S.C. Att'y Gen., 1998 WL746925 (September 14, 1998), we cited with approval the 1993 opinion. We noted there that "[w]hether or not the position of city attorney is an office would depend on how the position is created and the duties prescribed." We elaborated as follows:

> [b]ased on the information provided, it appears that the duties and nature of the position of Greenwood city attorney are very similar to those of the Lake City city attorney as discussed above. The Greenwood city attorney is retained by contract, does not take an oath of office, does not prosecute criminal cases, and is employed on a part-time basis. Thus, it appears that the Greenwood city attorney would be considered an independent contractor rather than an office-holder. Accordingly, if one were to simultaneously serve as Greenwood city attorney and Master-in-Equity for Abbeville County, the dual office holding prohibitions of the State Constitution would not appear to be violated. . . .

See also: Op. S.C. Att'y Gen., 2006 WL 3199988 (October 11, 2006) [position of Deputy City Attorney for the City of Spartanburg is not an office for purposes of dual office holding because the "position is part-time" and does not require an oath; no term is involved; and does not prosecute criminal cases]; Op. S.C. Att'y Gen., 2010 WL 3896166 (September 10, 2010) [quoting with approval our 1993 opinion]; Op. S.C. Att'y Gen., 2003 WL 221172242 (September 8, 2003) ["This Office has drawn a distinction between those city attorneys who are, in essence, retained attorneys and who thus are independent contractors and those whose position is created by law and who are appointed."[; Op. S.C. Att'y Gen., 2024 WL 3566018 (July 18, 2024) ["There are no relevant constitutional limitations on what municipalities may or may not do with city attorneys."].

It is true that § 5-7-230 appears to speak in terms of a city attorney being a single individual, not a law firm. It is likewise true that § 5-7-230 does not expressly authorize that a city council may contract with a law firm to advise it as city attorney. In our view, such is not dispositive, however.

First of all, a law firm is likewise a single entity, such that it meets the literal requirements of "a" city attorney. Moreover, subsequent to Home Rule, the fact that a statute does not expressly authorize a municipal council to act is not controlling. While formerly "Dillon's Rule" required local governments to possess express or implied statutory authority to take a certain action, such is no longer the case with the adoption of Home Rule.

In Williams v. Town of Hilton Head Is., 311 S.C. 417, 422, 429 S.E.2d 802, 805 (1993), our Supreme Court concluded that Home Rule essentially abolished Dillon's Rule. There, the Court reasoned:

> [t]his Court concludes that by enacting the Home Rule Act, S.C. Code Ann. § 5-7-10, et seq. (1976), the legislature intended to abolish the application of Dillon's Rule in

> South Carolina and restore autonomy to local government. We are persuaded that, taken together, Article VIII and Section 5-7-30, bestow upon municipalities the authority to enact regulations for government services deemed necessary and proper for the security, general welfare and convenience of the municipality or for preserving health, peace, order and good government, obviating the requirement for further specific statutory authorization so long as such regulations are not inconsistent with the Constitution and general law of the State.

The Court cited Art. VIII, § 17 of the Constitution which requires that all laws concerning local government be "liberally construed," as well as § 5-7-30, enabling municipalities to make all laws not inconsistent with the Constitution and general laws of the State. In our view, based upon Williams and the authorities referenced therein, a municipal council is free, pursuant to § 5-7-230, to contract with a law firm to serve as its city attorney. Such does not constitute an "office" for purposes of the dual office holding provision of the Constitution so long as the firm does not prosecute criminal cases on behalf of the municipality.

Your letter specifically references the ordinances adopted by "each of the local municipalities involved with the subject law firm. . . ." You note that these ordinances generally read as follows:

> Sec. 2-210. - Retention of City Attorney.
>
> (a) Council shall retain a City Attorney, who shall serve at the pleasure of Council, until a successor is duly retained and qualified. The City Attorney may be an individual or law firm. Any lawyer(s) rendering services as City Attorney shall be admitted to practice law in South Carolina and shall be members of the South Carolina Bar in good standing.
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> Sec. 2-211 - City Prosecutor.
>
> Council may retain separate legal counsel to serve as City Prosecutor, who shall serve at the pleasure of Council. The City Prosecutor shall be admitted to practice law in South Carolina and shall be a member of the South Carolina Bar in good standing.
>
> As referenced, all of the local municipalities that have retained the law firm as outside city attorney have also appointed a separate city prosecutor, and the prosecutor does take an oath of office, unlike the law firm.

You further indicate that the engagement letter confirms that the law firm will advise only in civil matters and will not prosecute criminal cases on behalf of the City. These limitations are in accordance with our controlling opinions.

Conclusion

For all the foregoing reasons, we agree with your analysis. Consistent with § 5-7-230, a municipality possesses authority to retain a law firm to advise it as city attorney, so long as the firm, does not prosecute criminal cases. In such event, the retention of the law firm does not create an "office" for purposes of the dual office holding provisions in the South Carolina Constitution.

A municipality has broad authority under Home Rule to create such a retention agreement and adopt ordinances in support thereof so long as the retention does not conflict with State law. In our opinion, based upon the authorities referenced in your letter, it does not.

As you note, the ordinances in question regarding the status of the City Attorney, as well as the terms of engagement letter, make it clear that the municipal councils involved are retaining the law firm only for the purpose of advice in civil matters on an as needed and part time basis. The Firm is not serving as City Prosecutor and will not prosecute criminal cases on behalf of the City. In our view, this approach is consistent with Home Rule, § 5-7-230, and our prior opinions. Based upon the information referenced in your letter, the municipalities may proceed with this approach. Our 1993 opinion and subsequent opinions, discussed herein, support such an approach as valid and legal.

Sincerely,

Robert D. Cook
Solicitor General