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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

April 5, 2005

The Honorable Jane Pittman Modla
Rock Hill Municipal Court Judge
City of Rock Hill Municipal Court
120 East Black Street
Rock Hill, South Carolina 29730

Dear Judge Modla:

In a letter to this office you referenced a prior opinion of this office which held that summary courts in this State do not have the authority to issue a subpoena duces tecum. That opinion, dated February 25, 1981, determined that in the absence of specific authority which could be construed as permitting a magistrate to issue a subpoena duces tecum, a magistrate would not be authorized to issue such a writ. Reference was made to S.C. Code Ann. § 22-3-930, citing such provision as the statutory authority permitting a magistrate to compel testimony. At the time the opinion was issued, the statute read:

Any magistrate, on the application of any party to a cause pending before him, shall issue a summons citing any person whose testimony may be required in such cause to appear before him at a certain time and place, not more than twenty miles from the residence of such witness, to give evidence....

Referencing such statute, the opinion stated as to the issuance of a subpoena duces tecum:

...in the opinion of this office, a magistrate is not so authorized. I have found no authority which may be construed as permitting a magistrate to issue such a writ. The only statutory authority permitting a magistrate to compel testimony is Section 22-3-930...As is evident, statutorily, magistrates do not have wide authority to compel testimony. Furthermore, it would appear to be little basis for construing a magistrate's court as having inherent authority to issue such a writ.

Section 22-3-930 was amended in 1998 to read:

Any magistrate, on the application of a party to a cause pending before the magistrate, must issue a summons citing any person whose testimony may be required in the cause and who resides in the county to appear before the magistrate

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at a certain time and place to give evidence. This summons must be served in a manner such that it is received by the witness at least one day before his attendance is required. If the witness fails or refuses to attend, the magistrate may issue a rule to show cause commanding the witness to be brought before the magistrate or, if any witness attending refuses to give evidence without good cause shown, the magistrate may punish the witness for contempt by imposition of a sentence up to the limits imposed on magistrates' courts in Section 22-3-550.

(emphasis added). While such provision authorizes the issuance of a subpoena to a witness to give testimony, no reference is made to a subpoena duces tecum.

As stated in a prior opinion of this office dated December 10, 2002, it is well established that the General Assembly is presumptively aware of opinions of the Attorney General and, absent changes in the law following the issuance thereof, the legislature is deemed to have acquiesced in the Attorney General's interpretation. See also: Op. Atty. Gen. dated April 22, 1998. As stated in State v. Son, 432 A.2d 947, 949 (N.J. 1981), "[t]he absence of any amendment to a statute following an Attorney General's formal opinion strongly suggests that the views expressed therein were consistent with legislative intent." Consistent with such, it does not appear that Section 22-3-930 should be construed as authorizing a magistrate to issue a subpoena duces tecum in the absence of express authorization by the legislature.

Further support for such a construction is found in comparing Section 22-3-930 with other statutes and court rules relevant to court officials with jurisdiction similar to that of a magistrate. S.C. Code Ann. § 5-7-90 (2004) states that a mayor or municipal judge "...shall have the same power as a magistrate to compel the attendance of witnesses and require them to give evidence upon the trial before them of any person for the violation of ordinances of the municipality or the laws of the State..." S.C. Code Ann. § 14-25-115 (Supp. 2004) provides that "(m)inisterial recorders shall have the power to set and accept bonds and recognizances and to issue summonses, subpoenas, arrest warrants, and search warrants in all cases arising under the ordinances of the municipality, and in criminal cases as are now conferred by law upon magistrates." In both statutes no reference is made to the issuance of a subpoena duces tecum by such judicial officers. S.C. Code Ann. §§ 8-21-1010 and 1060 (Supp. 2004) set forth the fees and costs to be collected by magistrates. While Section 8-21-1060 does provide a fee of three dollars plus mileage for summoning a witness to a magistrate's court in a civil action, no reference is made to any fee or cost for the issuance of a subpoena duces tecum.

The authority to issue a subpoena duces tecum is specifically recognized as to a General Sessions court proceeding. Rule 13, Rules of Criminal Procedure states:

(a) Issuance of Subpoenas. Upon the request of any party, the clerk of court shall issue subpoenas or subpoenas duces tecum for any person or persons to attend as witnesses in any cause or matter in the General Sessions Court....

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There is no similar rule with which I familiar pertaining to magistrate's court. Pursuant to S.C. Code Ann. § 17-7-175 (2003),

In addition to the authority contained in Section 17-7-70...(to issue warrants and summon witnesses)...a coroner also may issue subpoenas duces tecum to compel individuals to produce copies of documents or other materials which are relevant to a death investigation.

S.C. Code Ann. § 14-7-1680 (Supp. 2004) provides that

The clerk of the state grand jury, upon the request of the Attorney General or his designee, shall issue subpoenas or subpoenas duces tecum to compel individuals, documents or other materials to be brought from anywhere in this State to a state grand jury....

The granting of specific authority for the issuance of a subpoena duces tecum in the referenced situations contrasts with the specific lack of authority for such as to a magistrate's court proceeding.

One further indication regarding the lack of authority for a magistrate to issue a subpoena duces tecum is found in the Administrative and Procedural Rules for Magistrate's Court. Pursuant to Rule 11(d), "...witnesses may be called and the court shall have the power to issue subpoenas to compel their attendance." The term "subpoena" is defined by Rule 1 of the referenced Rules as "...an order of the court requiring a witness to attend and testify at a trial." Rule 19 of these same Rules sets forth several forms for use in magistrate's court. Among the forms is a form for subpoena of a witness. None of the Rules reference the issuance of a subpoena duces tecum.

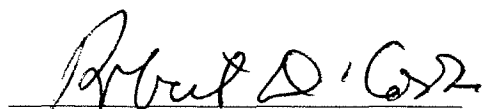
Consistent with the above, it is my opinion that absent specific statutory authority or court rule authorizing such, a magistrate in this State is not authorized to issue a subpoena duces tecum.

Sincerely,



Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General