

# The State of South Carolina



## Office of the Attorney General

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April 29, 1991

The Honorable Michael T. Rose  
Senator, District No. 38  
606 Gressette Senate Office Building  
Columbia, South Carolina 29202

Dear Senator Rose:

In a letter to this Office you raised the following questions:

1. If Berkeley County is allowed by law a maximum of six full time equivalent positions for magistrates and Berkeley County's Council votes that Berkeley County will have five full time magistrates and only one part time magistrate serving for ten hours per week, may the Governor and/or the Senators appoint more magistrates than this number of magistrates set by Berkeley County Council? Or, must the Governor and/or the Senators appoint only these five full time magistrates and this one part time magistrate as set by County Council?

2. If, given the maximum FTE positions stated above, Berkeley County Council votes that Berkeley County will have five full time magistrates and four part time magistrates of ten hours each, may the Governor and/or the Senators appoint less than five full time and four part time ten hour magistrates?

You referenced that in responding to these questions

... assume that none of the above described scenarios cause interference with the administration of the judiciary to the point that the

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South Carolina Supreme Court would object, and that no special act has been passed by the legislature modifying the existing magistrate statute.

In a memorandum to you dated April 12, 1991 it was stated

... it appears that the overall intent of the General Assembly by Act No. 678 was to shift authority regarding the determination of the number of magistrates to be appointed in individual counties to the local county governing body.

The memorandum also stated:

... while Section 22-8-40 may be construed to indicate that the General Assembly authorized counties to determine, consistent with the provisions regarding the ratio formula, the number of magistrates actually needed by a county, counties in making such determination should be cognizant of the referenced State Constitutional provisions requiring that the magistrates' court system in this State be maintained in a manner consistent with the requirements of the State unified judicial system. In fulfilling its responsibility of funding the county magisterial system, a county must therefore balance its need to spend tax money wisely with the requirement to maintain and support an adequate magisterial system in that county. Therefore, while Section 22-8-40 suggests that a county may designate fewer than the maximum number of magistrates authorized by the ratio formula, we urge that the county be mindful of its responsibilities regarding the magisterial system and that it work closely with the Governor and the local legislative delegation in determining the number to be appointed.

Such statement is consistent with the assumptions prefaced by you which are set forth above.

To avoid any question of ambiguity and to clarify the matter, it is the opinion of this Office that a county governing body has the ultimate authority to determine the number of magistrates to be appointed in a county. Of course, this response should in no manner be construed as indicating any responsibility by the county in determining who is to be appointed. Pursuant to Article V, Section 26 of

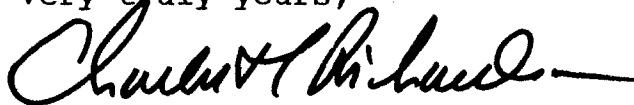
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the State Constitution and Section 22-1-10 of the Code, the Governor is given the authority to appoint magistrates with the advice and consent of the Senate. The State Supreme court in State ex rel. Riley v. Pechilis, 273 S.C. 628, 258 S.E.2d 433 (1979) recognized the paramount authority of the Governor to make magisterial appointments in striking down procedures which were construed as "chilling" the Governor's discretionary authority to appoint magistrates.

Therefore, in response to your questions, if Berkeley County Council votes that the County will have five full-time magistrates and one part-time magistrate, even though pursuant to Section 22-8-40, the County would be allowed a maximum of six full-time magistrates, the Governor with the input from the Senators would not be allowed to appoint more than the number designated by the County Council. As stated above, it is our opinion that it was the intent of the General Assembly to shift authority to a county governing body to determine the number of magistrates to be appointed. As to your question regarding whether the Governor, with input from the Senators, may appoint less than five full-time and four part-time magistrates if the County Council votes that Berkeley County will have that number, it is our opinion that the Governor with input from the Senators could not appoint less than nine magistrates. However, in making the appointments, the Governor would be appointing nine individuals as magistrates. Consistent with Section 22-8-40(A) of the Code, the County Council would designate the individuals appointed as full-time or part-time magistrates.

With best wishes, I am

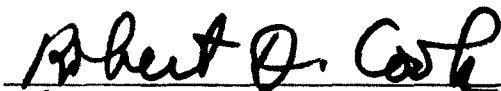
Very truly yours,



Charles H. Richardson  
Assistant Attorney General

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REVIEWED AND APPROVED BY:



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