# Legal Aspects of Serving as Municipal Clerk

SC Municipal Clerks and Treasurers Institute
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## Historical Context

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## Appointment of Clerk

- "The council under the council and mayor-council forms of government or city manager under the council-manager form shall appoint an officer of the municipality who shall have the title of municipal clerk." S.C. Code 5-7-220.
- Note that there are only a few municipal offices that are specifically addressed by state law – managers / administrators, judges, attorneys, clerks.

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## Is Serving as Municipal Clerk an "Office"?

- "No person may hold two offices of honor or profit at the same time...." S.C. Const. art. XVII, § 1A.
- "The determining factor in the conclusion that a municipal clerk of court is an office holder appears to be based rather in the fact that the General Assembly has created and authorized such an office. Section 5-7-220 ... This Office has held on numerous occasions that a position that is statutorily authorized by the General Assembly is an office for dual office holding purposes." 2014 WL 3752136, at *1 (S.C.A.G. July 15, 2014)

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# Oath of Office

- Article VI, Section 4. Officers to take and subscribe oath. The Governor, Lieutenant Governor, and all other officers of the State and its political subdivisions, before entering upon the duties of their respective offices, shall take and subscribe the oath of office as prescribed in Section 5 of this article.
- Article VI, Section 5. Form of oath. Members of the General Assembly, and all officers, before they enter upon the duties of their respective offices, and all members of the bar, before they enter upon the practice of their profession, shall take and subscribe the following oath: "I do solemnly swear (or affirm) that I am duly qualified, according to the Constitution of this State, to exercise the duties of the office to which I have been elected, (or appointed), and that I will, to the best of my ability, discharge the duties thereof, and preserve, protect, and defend the Constitution of this State and of the United States. So help me God."

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# Municipal Clerk / Clerk of Court

- Note that these are different positions. The municipal clerk is the position specifically referred to in S.C. Code 5-7-220, with statutory duties with respect to the council.
- The clerk of the municipal court is a position within the municipal court, see S.C. Code 14-25-5: "The council of each municipality in this State may, by ordinance, establish a municipal court ... The ordinance shall provide for the appointment of one or more full-time or part-time judges and the appointment of a clerk."
- But, you can probably serve as both: "We believe that a court would conclude that this is not dual office holding. As either a municipal clerk or a municipal employee, you can serve as clerk of court. Additionally, our understanding of your situation is that it involves one position performing the additional duties of a clerk of court, so a second office would not be implicated." 2018 WL 4182316, at *2 (S.C.A.G. Aug. 17, 2018)

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# Municipal Clerk / Treasurer

- In many municipalities, the municipal clerk is referred to as a clerk–treasurer which denotes that the clerk handles both the traditional role of the clerk, as well as the responsibilities associated with the financial management of the municipality.
- State law allows this function without violating dual office holding.

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# Who Do You Work For?

- "The council under the council and mayor-council forms of government or city manager under the council-manager form shall appoint an officer of the municipality who shall have the title of municipal clerk." S.C. Code 5-7-220.
- AG Opinion: In a Mayor-Council form of government, "[s]ince a municipal clerk would be appointed by the municipal council ... the power to hire is the power to fire, or put in this context, the power to appoint is the power to remove." 2013 WL 1695514, at *6 (S.C.A.G. Mar. 28, 2013).
- So in Mayor-Council and Council forms of government, the municipal clerk works for the Council, while in the Council-Manager form of government the clerk works for the Manager.

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## What Are the Duties of the Clerk?

- "The municipal clerk shall give notice of council meetings to its members and the public, keep the minutes of its proceedings and perform such other duties as are assigned by council." S.C. Code 5-7-220.
- Additional duties may be assigned.
- But those duties may not infringe on duties committed to other officers. For example, in the Mayor-Council form, S.C. Code 5-9-30 lists the powers of the Mayor, and "[a] municipal clerk may not be assigned duties that infringe upon the statutory powers or duties of the mayor. A court might find that a municipal clerk exercising the duties you have described is infringing upon the powers or duties of the mayor." 2012 WL 440544, at *3 (S.C.A.G. Jan. 13, 2012).

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## First Duty: Notice of Council Meetings

- The Freedom of Information Act (and other state laws) provide required notice of council meetings and other matters. By law, the clerk is the person to provide those notices.
- Note that S.C. Code 5-7-220 provides that the clerk will provide this notice "to its members and the public." The public notice is generally under FOIA, but the clerk also needs to maintain communication with individual members of council.

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# Second Duty: Requirement of Minutes

- S.C. Code 5-7-250(b): "The council shall determine its own rules and order of business and shall provide for keeping minutes of its proceedings which shall be a public record."
- What needs to be in the minutes? Local practice varies from a nearly verbatim transcript to a simple listing of actions taken with votes.

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# Second Duty: Content of Minutes

**S.C. Code 30-4-90. Minutes of meetings of public bodies**.

(a) All public bodies shall keep written minutes of all of their public meetings. Such minutes shall include but need not be limited to:

(1) The date, time and place of the meeting.

(2) The members of the public body recorded as either present or absent.

(3) The substance of all matters proposed, discussed or decided and, at the request of any member, a record, by an individual member, of any votes taken.

(4) Any other information that any member of the public body requests be included or reflected in the minutes.

(b) The minutes shall be public records and shall be available within a reasonable time after the meeting except where such disclosures would be inconsistent with Section 30-4-70 of this chapter.

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# Recommended Contents of Minutes

- At a minimum, those things listed in S.C. Code 30-4-90, as previously discussed.
- Also, it is wise to include: (a) the type of meeting (regular, special, emergency); (b) a statement that the media and the public were notified of the meeting; (c) a statement that a quorum was present; (d) all formal motions, points of order, and other votes, together with the motion, second, and vote; (e) time of adjournment; and (f) clerk's attestation and date.

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# Minutes: "Any Other Information"

- AG Opinion: "[T]he Board seeks an opinion regarding the proper meaning and application of Section 30-4-90(a)(4) of the FOIA concerning the ability of one member of a public body – in this case, a member of the school board – to have included in the body's meeting minutes, without Board majority consensus, information and/or documents that the individual member insists be included in the minutes." 2022 WL 119688, at *1 (S.C.A.G. Jan. 4, 2022).
- Information in question was a negative employee evaluation by a member of the board.
- "It is this Office's opinion that the S.C. FOIA ... does not permit a public body to preempt a member of the body from including information in the written minutes of its public meetings by majority vote or through adoption of policy. However, these minutes are public records from which a public body may exempt certain enumerated categories of information from disclosure." 2022 WL 119688, at *4 (S.C.A.G. Jan. 4, 2022).

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# Second Duty: Legal Effect of Minutes

- See *Berkeley Elec. Co-op., Inc. v. Town of Mount Pleasant*, 308 S.C. 205, 417 S.E.2d 579 (1992), in which the Co-Op claimed that the Town had granted a franchise in 1982 despite there being no formal ordinance. The question involved reading the minutes from the meetings to see what exactly happened.
- The minutes themselves did not say that the Town had approved the franchise by ordinance. But the Co-Op tried to introduce additional evidence ("parol evidence") to prove that it had.
- The court rejected the Co-Op's argument: "A town council has the express duty to keep minutes of its proceedings which shall be a public record. Municipal records properly authenticated or verified are the only competent evidence of the proceedings of the transactions of the governing body. Parol evidence cannot be admitted to explain, enlarge, or contradict minutes of the proceeding of a town council unless the minutes are incomplete or ambiguous. Otherwise, parol evidence could render official minutes uncertain and unreliable so that the minutes would fail to afford dependable evidence of the proceedings of the municipal body."

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# Second Duty: Legal Effect of Minutes

- See also *Davis v. Orangeburg-Calhoun Law Enf't Comm'n*, 344 S.C. 240, 542 S.E.2d 755 (Ct. App. 2001), in which a former law enforcement officer sued the commission for wrongful discharge. He argued that the commission adopted policies that provided rules to be followed before he could be discharged. The question was whether the commission had adopted these policies.
- The commission said that it had never formally adopted the policies.
- The court sided with the commission: "The [commission] minutes do not reflect that the policies Davis relies upon were ever adopted by the [commission]. The minutes are silent on the issue. At trial, the [commission] objected to the introduction of the manual into evidence, which was overruled. On appeal, the [commission] argues this was error. We agree. Parol evidence may not be admitted to explain, enlarge or contradict minutes which are complete and unambiguous on their face."

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## Preparation and Distribution of Minutes

- Minutes are not "official" until they have been approved by council – usually at its next meeting. Once approved, the minutes should not be rewritten. In special cases, council can correct the minutes after they are adopted.
- The municipal clerk usually takes notes during the meeting and then prepares (often with recordings) draft minutes for council following the meeting.
- Recordings of council meetings, draft minutes, and approved minutes are public records under the Freedom of Information Act and must be released immediately upon request.

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## Preparation and Distribution of Minutes

- Local rules of procedure should establish how and when the council receives the draft minutes.
- There are generally three ways in which councilmembers receive the meeting's minutes: (a) issued to all members soon after the meeting; (b) issued to all members with the agenda for the next meeting; or (c) read aloud at the beginning of the next meeting.

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# Additional Required Duty: Agent for Filings

- Many state statutes require or allow certain official filings to be made with the clerk.
- For example, under Rule 4 of the South Carolina Rules of Civil Procedure, a lawsuit may be served on a local government "by delivering a copy of the summons and complaint to the chief executive officer or clerk thereof ...."
- Likewise, in the annexation context, "[w]hen the limits of a municipality are ordered extended, no contest thereabout shall be allowed unless the person interested therein files, within sixty days after the result has been published or declared, with both the clerk of the municipality and the clerk of court of the county in which the municipality is located, a notice of his intention to contest the extension."
- We will not summarize all of these laws. But as a rule of thumb, the clerk should promptly notify the appropriate officials whenever an official filing is made.

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# Additional Required Duty: Codification of Ordinances

- S.C. Code 5-7-290: "Each municipal council shall provide by ordinance for the codification and indexing of all ordinances, either typewritten or printed, and the maintenance of ordinances in a current form reflecting all amendments and repeals. All ordinances as codified shall be available for public inspection at reasonable times."
- This statute does not explicitly name the clerk, but by tradition the clerk manages this process.

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## Additional Required Duty: Records Retention

- The South Carolina Public Records Act, S.C. Code Sections 30-1-10 through 30-1-180, requires local governments to retain public records. FOIA has certain additional retention requirements.
- The South Carolina Department of Archives and History publishes general records retention schedules, including for municipal records.
- Neither the Public Records Act nor the general records retention schedules specifically mention the clerk. But by tradition the clerk manages this process.

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## Additional Required Duty: Making Available Public Copies

The clerk must make available to the public copies of:

- All ordinances for public inspection, S.C. Code Section 5-7-290, and
- Any adopted code or technical regulation for distribution or purchase at a reasonable price, which is set by council, S.C. Code Section 5-7-280.

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## Additional Required Duty: Attestation

- The general practice is for the clerk to attest the official signed acts of council, including ordinances and resolutions.
- In many cases the attestation requirement is contained in the local code of ordinances.
- By attesting an ordinance, the clerk is in effect acknowledging that the signed copy is the official version that was presented to and approved by council.

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## Additional Required Duty: Planning Records

- Planning officials (members of the Planning Commission, Board of Zoning Appeals and Architectural Review Board) are required to complete certain training.
- S.C. Code 6-29-1370(B): "The clerk must keep in the official public records originals of: (1) all filed forms and documentation that certify compliance with educational requirements for three years after the calendar year in which each form is filed; and (2) all filed forms and documentation that certify an exemption for the tenure of the appointed official or professional employee."

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# Additional Optional Duties

- S.C. Code 5-7-220 commits to the clerk "such other duties as are assigned by council."
- "[U]nder this language, the council is authorized to prescribe clerical duties for the municipal clerk which are directly related to the council's activities, i.e., to the making of policy, including the enactment of ordinances, for the municipality. This provision does not authorize the council to prescribe duties which relate primarily to the daily functioning and operation of the municipality, i.e., to those activities which are specifically vested in the mayor as its chief administrative officer, or in those employees and officers who are under his supervision and subject to his control." 1979 WL 43108, at *1 (S.C.A.G. Oct. 12, 1979).

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# Additional Optional Duty: Setting the Agenda

- Agenda: Plural of the Latin word "agendum," which means a list or program of things to be done or considered. A written agenda is an invaluable tool for the orderly conduct of public meetings.
- An agenda offers a prearranged outline for the meeting, is a basic method for assigning priorities to the various items of business, and should have a consistent format from meeting to meeting.

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# Additional Optional Duty: Setting the Agenda

- Most agenda items fall into two basic groups: routine or procedural items and items that vary from meeting to meeting.
- Procedural items may include call to order, roll call, Pledge of Allegiance, invocation, and approval of minutes from previous meeting(s).
- The items that vary from meeting to meeting are normally grouped into “old business” and “new business.”


# Additional Optional Duty: Setting the Agenda

- The Home Rule Act does not specify who has responsibility for making an agenda or what it must contain.
- The question of who decides what goes on the agenda is often debated. Clear rules of procedure can avoid this debate. The rules should specify who oversees preparation of the agenda, the process for selecting agenda items, and how the agenda is amended.
- In smaller municipalities, the clerk customarily holds the major responsibility for compiling the agenda.

# Rules of Procedure

- Under S.C. Code 5-7-250(b), the council must determine its own rules and order of business.
- Rules of procedure will generally establish the order council receives certain items, establishment and jurisdiction of council committees, the procedure for introducing and enacting ordinances and resolutions, and adoption of a parliamentary guide (e.g., Robert's Rules of Order).
- They have the force of law when established by ordinance.
- They cannot be repealed, suspended or waived except by ordinance.
- They serve as a guide and are an indispensable tool for expediting business.
- They provide a fair and open method for council deliberations.

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# Rules of Procedure

- Many cities and towns use Robert's Rules of Order. These are complicated but time-tested. Smaller cities and towns might consider alternative rules of procedure – there is no requirement that you use Robert's Rules. The Association has developed sample rules of procedure, which have been formatted for easy modification to meet the specific needs of your council. They allow the council to reference a secondary set of rules of procedure, such as Robert's Rules.
- The parliamentarian is the person who ensures compliance with the meeting's rules of procedure. The parliamentarian may be, but does not have to be, the presiding officer. Larger and more complex bodies usually have a separate parliamentarian.

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# Presiding Officer

- Who presides? In the mayor-council form, the mayor, by statute, presides at meetings. S.C. Code 5-9-30(3). In the council and the council-manager forms, the mayor, by custom, acts as the presiding officer – but the council may name someone else. New Attorney General opinion on point.
- In the mayor's absence or disability, the mayor pro tempore assumes the presiding officer's role. S.C. Code 5-7-190. If both are absent and a quorum is present, council must elect a member to preside at the meeting.
- Regardless of the form of government, mayors are entitled to motion, second, and vote on matters before council unless prohibited by a conflict of interest but should be judicious in exercising this right.

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# Abstentions and Conflicts of Interest

- Abstentions. Local rules of procedure often require all members present, including the mayor, to vote unless prohibited by a conflict of interest.
- Conflict of Interest, see S.C. Code 8-13-700(B). The proper procedure is to announce the conflict, put the conflict in writing (recusal form), do not participate in deliberations, and do not vote
- Role of Clerk. The Ethics Act does not mention the municipal clerk, but the clerk is implicitly required to assume custody of the recusal form and file it with the minutes for retention.
- Advice for Members of Council. In general, councilmembers should not point out someone else's conflict because a public announcement could be seen as defamation. Instead the proper procedure is to notify Ethics Commission.

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# Questions?

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