

# Senate Ethics Committee

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ADVISORY OPINION # 92-7

## M E M O R A N D U M

To: Members, South Carolina Senate

From: Edward E. Saleeby

Re: Voting on the Election or Confirmation of Agency, Board,  
or Commission Members

Date: May 21, 1992

A question has arisen concerning whether a member may participate in deliberations or take any action with regard to consideration of a gubernatorial appointee, who is subject to advice and consent of the Senate or an individual who is elected by the General Assembly in a joint session of the General Assembly, when the member may represent a client before the entity upon which the individual will serve. Section 8-13-745 (A) provides that

**No member of the General Assembly or an individual with whom he is associated<sup>1</sup> or business with which he is associated<sup>2</sup> may**

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<sup>1</sup>Section 8-13-100 (21) defines "Individual with whom he is associated" as an individual with whom the person or a member of his immediate family mutually has an interest in any business of which the person or a member of his immediate family is a director, officer, owner, employee, compensated agent, or holder of stock worth one hundred thousand dollars or more at fair market value and which constitutes five percent or more of the total outstanding stock of any class.

<sup>2</sup>Section 8-13-100 (4) defines "Business with which he is associated" means a business of which the person or a member of his immediate family is a director, an officer, owner, employee, a compensated agent, or holder of stock worth one hundred thousand dollars or more at fair market value and which constitutes five

represent a client for a fee in a contested case, as defined in Section 1-23-310<sup>3</sup>, before an agency, a commission, board, department, or other entity if the member of the General Assembly has voted in the election, appointment, recommendation, or confirmation of a member of the governing body of the agency, board, department, or other entity within the twelve preceding months. [Emphasis added].

This provision is very clear and specific in that a member<sup>4</sup> has two options: (1) he may vote on confirmation or vote to elect and not represent a client in a contested case for a fee before that entity for the next twelve months, or (2) he may abstain from voting and retain the ability to represent a client, without limitation, for a fee before that entity. It is also important to note that a member may represent a client if no fee is accepted irrespective of whether a vote is cast in an election or confirmation.

Since a member cannot cast a vote and then represent a client for a fee before that particular agency, board, or commission, in a contested case, the next consideration is whether a member may properly take other actions prior to actual vote to elect or confirm.

The new Ethics Act specifies in copious detail which activities are permissible and which activities are prohibited. If the General Assembly intended to prohibit something other than a vote on election or confirmation, it could have easily specified other activities which would be inappropriate. As Section 8-13-745 (A) only requires a member to recuse himself from the vote on whether to elect or confirm, the Committee concludes that a member may make any motions, participate in any debate or discussions, or

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percent or more of the total outstanding stock of any class.

<sup>3</sup>Section 1-23-310 (2) defines "contested case" as "a proceeding, including but not restricted to ratemaking, price fixing, and licensing, in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." Among other definitions presented in this section, "agency" is defined as "each state board, commission, department or officer, other than the legislature or the courts, authorized by law to make rules or to determine contested cases."

<sup>4</sup>For convenience and readability, each reference to "member" in this opinion, unless otherwise stated, is intended to apply to a member of the Senate or "an individual with whom he is associated or business with which he is associated."

take any other action so long as the member abstains from voting on the question of whether to elect or confirm.

In order to demonstrate that representation for a fee would not later be an issue during litigation or otherwise, the Committee suggests that subsequent to a report of a confirmation or failure to confirm, any affected member submit the following statement for inclusion in the Senate Journal:

Statement by Senator \_\_\_\_\_

I certify that I took no action in the matter of \_\_\_\_\_ which would preclude my representation of a client under the provisions of Section 8-13-745.

This statement would be appropriate only after the Senate has taken a formal vote to elect or confirm and has reported its action of confirmation, election, or failure to confirm or elect a given individual to a particular agency, board, or commission.

The Committee further concludes that such a statement is consistent with Section 8-13-745 (A), as well as the provisions of Rule 32, which in pertinent part provides:

When the report of a committee is received by the Senate, the final question on every nomination shall be: "Will the Senate advise and consent to this nomination?" Messages containing nominations to the Senate may be published in the Journal, when received as other messages, and the fact that a nomination has been made or that it has been confirmed or rejected shall not be regarded as a secret. But all information communicated, or remarks made by a Senator when acting upon nominations concerning character or qualifications of the person nominated, and all votes upon nominations, shall be kept secret. [Emphasis added].

Furthermore, consistent with the above referenced rule, the Committee formally advises that it is strictly forbidden to indicate in any manner or in any way discuss with anyone who is not privy to executive session whether a matter has come before the Senate in executive session, except to an extent that an individual has been confirmed or rejected.