

OPINION 1996-2

TO: MEMBERS, THE SENATE OF SOUTH CAROLINA
FROM: COMMITTEE ON ETHICS
RE: OPINION 1996-2
DATE: FEBRUARY 27, 1996

The Senate Committee on Ethics has been asked to render an advisory opinion on the following question:

May a Member of the Senate of South Carolina deliberate, make motions pertaining to, offer amendments pertaining to, and vote on amendments and passage of legislation that affects political subdivisions of the State of South Carolina in general if the Member's business or professional firm sells goods to or provides professional services to any political subdivisions of this state?

In answering this question, the Committee wishes to quote the following sections of *The Ethics, Government Accountability, and Campaign Reform Act of 1991 With Amendments Effective January 12, 1995*:

"SECTION 8-13-740. Representation of another by a public official, member, or employee before a governmental entity.

(A) (1) A public official occupying statewide office, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated may not knowingly represent another person before a governmental entity, except as otherwise required by law.

(2) A member of the General Assembly, an individual with whom he is associated, or a business with which he is associated may not knowingly represent another person before a governmental entity, except:

(a) as required by law;

(b) before a court under the unified judicial system; or

(c) [Until July 1, 1995, subparagraph (c) of paragraph (2) of subsection (A) reads as follows:] in a contested case, as defined in Section 1-23-310, excluding a contested case for a rate or price fixing matter before the South Carolina Public Service Commission or South Carolina Insurance Commission, or in an agency's consideration of the drafting and promulgation of regulations under Chapter 23 of Title 1 in a public hearing.

(c) [From and after July 1, 1995, subparagraph (c) of paragraph (2) of subsection (A) reads as follows:] in a contested case, as defined in Section 1-23-310, excluding a contested case for a rate or price fixing matter before the South Carolina Public Service Commission or South Carolina Department of Insurance, or in an agency's consideration of the drafting and promulgation of regulations under Chapter 23 of Title 1 in a public hearing.

(3) A public member occupying statewide office, an individual with whom he is associated, or a business with which he is associated may not knowingly represent another person before the same unit or division of the governmental entity for which the public member has official responsibility, except as otherwise required by law.

(4) A public official, public member, or public employee of a county, an individual with whom the public official, public member, or public employee is associated, or a business with which the public official, public member, or public employee is associated may not knowingly represent a person before any agency, unit, or subunit of that county except:

(a) as required by law; or

(b) before a court under the unified judicial system.

(5) A public official, public member, or public employee of a municipality, an individual with whom the public official, public member, or public employee is associated, or a business with which the public official, public member, or public employee is associated may not knowingly represent a person before any agency, unit, or subunit of that municipality except as required by law.

(6) A public employee, other than those specified in items (4) and (5) of this subsection, receiving compensation other than reimbursement or per diem payments for his official duties, an individual with whom he is associated, or a business with which he is associated may not knowingly represent a person before an entity on the same level of government except:

(a) as required by law;

(b) before a court under the unified judicial system; or

(c) [Until July 1, 1995, subparagraph (c) of paragraph (6) of subsection (A) reads as follows:] in a contested case, as defined in Section 1-23-310, excluding a contested case for a rate or price fixing matter before the South Carolina Public Service Commission or South

Carolina Insurance Commission, or in an agency's consideration of the drafting and promulgation of regulations under Chapter 23 of Title 1 in a public hearing.

(c) [From and after July 1, 1995, subparagraph (c) of paragraph (6) of subsection (A) reads as follows:] in a contested case, as defined in Section 1-23-310, excluding a contested case for a rate or price fixing matter before the South Carolina Public Service Commission or South Carolina Department of Insurance, or in an agency's consideration of the drafting and promulgation of regulations under Chapter 23 of Title 1 in a public hearing.

(7) The restrictions set forth in items (1) through (6) of this subsection do not apply to:

(a) purely ministerial matters which do not require discretion on the part of the governmental entity before which the public official, public member, or public employee is appearing;

(b) representation by a public official, public member, or public employee in the course of the public official's, public member's, or public employee's official duties;

(c) representation by the public official, public member, or public employee in matters relating to the public official's, public member's or public employee's personal affairs or the personal affairs of the public official's, public member's, or public employee's immediate family.

(B) A member of the General Assembly, when he, an individual with whom he is associated, or a business with which he is associated represents a client for compensation as permitted by subsection (A) (2) (c), must file within his annual statement of economic interests a listing of fees earned, services rendered, names of persons represented, and the nature of contacts made with the governmental entities.

(C) A member of the General Assembly may not vote on the section of that year's general appropriation bill relating to a particular agency or commission if the member, an individual with whom he is associated, or a business with which he is associated has represented any client before that agency or commission as permitted by subsection (A) (2) (c) within one year prior to such vote. This subsection does not prohibit a member from voting on other sections of the general appropriation bill or from voting on the general appropriation bill as a whole.

SECTION 8-13-745. Paid representation of clients and contracting by member of General Assembly or associate in particular situations.

(A) No member of the General Assembly or an individual with whom he is associated or business with which he is associated may represent a client for a fee in a contested case, as defined in Section 1-23-310, 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.

(B) Notwithstanding any other provision of law, after the effective date of this section, no member of the General Assembly or any individual with whom he is associated or business with which he is associated may represent a client for a fee in a contested case, as defined in Section 1-23-310, before an agency, a commission, board, department, or other entity elected, appointed, recommended, or confirmed by the House, the Senate, or the General Assembly if that member has voted on the section of that year's general appropriation bill or supplemental appropriation bill relating to that agency, commission, board, department, or other entity within one year from the date of the vote. This subsection does not prohibit a member from voting on other sections of the general appropriation bill or from voting on the general appropriation bill as a whole.

(C) Notwithstanding any other provision of law, after the effective date of this section, no member of the General Assembly or an individual with whom he is associated in partnership or a business, company, corporation, or partnership where his interest is greater than five percent may enter into any contract for goods or services with an agency, a commission, board, department, or other entity funded with general funds or other funds if the member has voted on the section of that year's appropriation bill relating to that agency, commission, board, department, or other entity within one year from the date of the vote. This subsection does not prohibit a member from voting on other sections of the appropriation bill or from voting on the general appropriation bill as a whole.

(D) The provisions of this section do not apply to any court in the unified judicial system.

(E) When a member of the General Assembly is required by law to appear because of his business interest as an owner or officer of the business or in his official capacity as a member of the General Assembly, this section does not apply.

(F) The provisions of subsections (A), (B), and (C) do not apply in the case of any vote or action taken by a member of the General Assembly prior to January 1, 1992."

And the following section of the Code dealing with Administrative Procedures:

"SECTION 1-23-310. Definitions.

As used in this article:

- (1) "Agency" means each state board, commission, department or officer, other than the legislature or the courts, but to include the Administrative Law Judge Division, authorized by law to determine contested cases;
- (2) "Contested case" means 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;
- (3) "License" includes the whole or part of any agency permit, franchise, certificate, approval, registration, charter, or similar form of permission required by law, but it does not include a license required solely for revenue purposes;
- (4) "Party" means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party;
- (5) "Person" means any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than an agency."

To properly answer this question, we must determine if a political sub-division of the State of South Carolina is considered an agency of the state. Clearly, political sub-divisions are legal entities unto themselves created by the citizens of a given geographical area for general and specific governmental and special purpose needs. *Black's Law Dictionary, Fifth Edition*, defines a "political subdivision" as follows:

"A division of the state made by proper authorities thereof, acting within their constitutional powers, for purpose of carrying out a portion of those functions of state which by long usage and inherent necessities of government have always been regarded as public."

Our own statutes provide that various political sub-divisions of this state are separate entities. Sections 4-1-10, 5-1-10 and 6-1-10 read as follows:

"SECTION 4-1-10. Division of State into counties; each county is a body politic and corporate.

The State of South Carolina is divided into forty-six counties. Each county is a body politic and corporate for the following purposes:

- (1) To sue and be sued;
- (2) To purchase and hold, for the use of the county, lands and personality within the limits thereof;
- (3) To make all contracts; and
- (4) To do all acts in relation to the property and concerns of the county necessary thereto.

SECTION 5-1-10. Certificated municipalities and established township governments declared perpetual bodies politic and corporate.

All municipalities which have a certificate of incorporation issued by the Secretary of State and all township governments which have heretofore been established by act of the General Assembly are hereby declared to be perpetual bodies, politic and corporate and are entitled to exercise all the powers and privileges and are subject to all the limitations and liabilities provided for municipal corporations in this State. The incorporation or corporate capacity of any municipality or township government established heretofore by act of the General Assembly shall not be attacked in any court in this State except as hereinafter provided by statute.

SECTION 6-1-10. Power of political subdivisions to proceed under legislation dealing with bankruptcy or composition of indebtedness.

The consent of the State is hereby granted to, and all appropriate powers are hereby conferred upon, any county, municipal corporation, township, school district, drainage district or other taxing or governmental unit organized under the laws of the State to institute any appropriate action and in any other respect to proceed under and take advantage of and avail itself of the benefits and privileges conferred, and to accept the burdens and obligations created, by any existing act of the Congress of the United States and any future enactment of the Congress of the United States relating to bankruptcy or the composition of indebtedness on the part of the counties, municipal corporations, townships, school districts, drainage districts and other taxing or governmental units or any of them.

As we can see from the above-quoted sections of law, each and every political sub-division in South Carolina is an entity unto itself. However, each also must comply with certain laws that apply to all political sub-divisions and to certain laws that the General Assembly may from time to time impose on individual political sub-divisions. In most of these cases, special laws provided for by the General Assembly of South Carolina for this state's various political sub-divisions are requested by the political sub-divisions themselves. Suffice it to say that for our Opinion political sub-divisions are, indeed, separate units of government.

With this definition firmly in place by law and court cases too numerous to list here, we shall move on to the question posed for the Committee.

Part of the intent of the General Assembly when debating and passing *The Ethics, Government Accountability, and Campaign Reform Act of 1991, with Amendments Effective January 12, 1995* was, indeed, to halt various relationships between government officials and their businesses or professional firms and the political sub-divisions that they were elected or appointed to govern according to the laws of this state. The intent of the General Assembly **was not** to hinder the authority in voting on issues that effect the people who elect their various representatives unless a specific vote deals with a provision that would, indeed, have a direct impact on a Member's business or professional firm as outlined in Sections 8-13-700 or 8-13-745.

We offer the following examples:

Example One

A Member's business sells items to an agency of The State of South Carolina. Parts of the General Appropriation Bill deal with the funding for the agency to which the Member's business sells. The Member should recuse himself from voting on that section of the General Appropriation Bill and report the same to the President of the Senate through a statement. The Member should request the Clerk of The Senate to cause the statement be printed in *The Journal of The Senate of South Carolina* for that legislative day.

Example Two

A Member's professional firm represents a political sub-division of this state in various matters. A Bill

that is being debated directs all such political sub-divisions in this state to carry out such duties as prescribed in the language of the Bill. The Member would not be responsible for recusing himself from any deliberation or votes on the Bill since it is statewide in scope.

Example Three

A Member's business sells items to a political sub-division of this state. A local Bill is being debated that would give the political sub-division the authority to extend it's bonded indebtedness, enabling the political sub-division to purchase a greater quantity of the items that the Member's business sells. The Member should recuse himself from voting on that local Bill and report the same to the President of the Senate through a statement. The Member should request the Clerk of The Senate to cause the statement to be printed in *The Journal of The Senate of South Carolina* for that legislative day.

A conflict does not exist when a Bill before the Senate is of a statewide nature and impacts all political sub-divisions in a like manner. Further, a Member would not have to recuse himself from voting on legislation dealing with a specific political sub-division if it does not directly impact on the dealings of a Member's business or professional firm with a political sub-division.

If a Member, or those with whom he is associated, will benefit directly from legislation before the body, he would be considered to have a conflict of interest and should recuse himself from voting on that Bill and report the same to the President of the Senate through a statement. The Member should request the Clerk of The Senate to cause the statement to be printed in *The Journal of The Senate of South Carolina* for that legislative day. The Committee offers the following sample statement:

"Statement by Senator _____

I certify that I took no action in the matter of _____ which would preclude my business or professional firm from selling to or representing a particular agency of The State of South Carolina, or a political sub-division of this state."

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The ethics laws of our state were not designed to prevent Members from conducting their chosen business or profession. We will not hinder the ability of Members of The Senate of South Carolina to carry out their constitutional duties. The people of the various Senate Districts choose from their population one person to represent them on matters coming before this body. The people's right of representation on all matters should not be abated. The Members have a constitutional right to deliberate, make improvements through amendments, and vote on matters before the Senate. Unless a direct conflict of interest arises, we urge all Members of The Senate of South Carolina to carry out their constitutional duties of office and to not refrain from the full representation of their constituents.

This Opinion, would be considered appropriate for all matters that may come before the Senate, it's Committees, or county delegations.