The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

February 12, 1996

The Honorable Michael L. Fair
Senator, District No. 6
501 Gressette Building
Columbia, South Carolina 29202

RE: Informal Opinion

Dear Senator Fair:

By your letter of December 1, 1995, to Attorney General Condon, you sought an opinion as to which would take precedence in the event of a conflict: The Canons of Judicial Conduct or a state law. By way of background, you advised that the General Assembly has enacted laws calling for committees to be set up and prescribing the membership of the committees. In some of these circumstances, judges, by state law, are slotted for membership. One such committee, you advise, by state law requires the Chief Justice to appoint two Family Court judges for membership. The Chief Justice cited a conflict with regard to Canon 5G, Rule 501 SCACR and declined to make the appointments.

As you are aware, the South Carolina Constitution provides in Article I, Section 8 for separation of powers among the three branches of government in this State:

> In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

Due to the separation of powers doctrine, it would be inappropriate for this Office, as a department of the executive branch of government, to comment upon the propriety of actions taken by the head of the judicial branch of government. However, I have

researched the issues which you have raised and I offer the following as an informal opinion as to the issues which can be addressed without violating the constitutional principles involved in separation of powers.

Article V, Section 4 of the State Constitution provides as to the powers of the Chief Justice and various aspects of the practice of law and administration of justice; in part, that section states:

> The Chief Justice of the Supreme Court shall be the administrative head of the unified judicial system. ... The Supreme Court shall make rules governing the administration of all the courts of the State. Subject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted. [Emphasis added.]

Our Supreme Court has stated in Stokes v. Denmark Emergency Medical Services, ___ S.C. ___, 433 S.E.2d 850 (1993), that "[t]he clause 'subject to the statutory law' establishes the intent to subordinate to the General Assembly the Court's rulemaking power in regard to practice and procedure." 433 S.E.2d at 852. In addition, Article V, Section 4A requires submission of certain Supreme Court rules to the legislature for approval or disapproval:

> All rules and amendments to rules governing practice and procedure in all courts of this State promulgated by the Supreme Court must be submitted by the Supreme Court to the Judiciary Committee of each House of the General Assembly during a regular session, but not later than the first day of February during each session. Such rules or amendments shall become effective ninety calendar days after submission unless disapproved by concurrent resolution of the General Assembly, with the concurrence of three-fifths of the members of each House present and voting. [Emphasis added.]

It is also helpful to examine two statutes relative to promulgation of rules by the Supreme Court. The first is S.C. Code Ann. §14-3-940 (1995 Cum. Supp.):

> There shall be established a "Court Register" which shall be published and maintained in current status with all proposed and final form rules promulgated by the Supreme Court. The Register shall be the

> responsibility of the Court Administrator. The Court Administrator shall transmit to the clerk of court of each county and to the Legislative Council a copy of the Court Register and all additions thereto when published. All rules promulgated by the Supreme Court shall become effective in the following manner:
>
> (a) All rules governing the administration of all courts of the State shall become effective upon publication of such rules in the Court Register.
>
> (b) Rules governing the practice and procedure of all courts of the State shall become effective upon publication in the Court Register and review by the General Assembly pursuant to the provisions of §14-3-950. [Emphasis added.]

Then, §14-3-950 provides, in language virtually identical to Article V, Section 4A of the State Constitution:

> All rules and amendments to rules governing practice and procedure in all courts of this State promulgated by the Supreme Court shall be submitted by the Supreme Court to the Judiciary Committee of each House of the General Assembly during a regular session, but not later than the first day of February during each session. Such rules or amendments shall become effective ninety calendar days after submission unless disapproved by concurrent resolution of the General Assembly, with the concurrence of three-fifths of the members of each House present and voting. [Emphasis added.]

It is apparent from these constitutional and statutory provisions that the rules which will be subject to the state law will be those which impact on the practice and procedure in the courts of this State. Art. V, §4. The concept of practice and procedure has been described as "the method of proceeding and the means and steps by which legal rights are enforced." Langdeau v. Narragansett Insurance Co., 96 R.I. 276, 191 A.2d 28, 31 (1963). Stated another way, practice and procedure connotes "the mode of proceeding and the formal steps by which a legal right is enforced." Stith v. Pinkert, 217 Ark. 871, 234 S.W.2d 45, 47 (1950) (which concept covers writs, summonses, methods of notice to parties, pleadings, rules of evidence, costs, and the like). The court in Sheldon v. Powell, 99 Fla. 782, 128 So. 258 (1930), described practice and procedure as the manner in which the power to adjudicate or determine a cause or issue submitted to a court is exercised. As to similar descriptions of practice and procedure, see Downs v. Reno, 53 Colo. 217, 124 P. 582, 583 (1912) and Haven Federal Sav. & Loan Ass'n v. Kirian, 579 So.2d 730, 732 (Fla. 1991).

To consider the interplay of the state law and rules promulgated by the Supreme Court and thus determine which would have priority or precedence, it is helpful to consider whether the rules in question would be considered ones related to practice and procedure.

It is thus appropriate to examine the Court Register, in particular Rule 101 of the South Carolina Appellate Court Rules; Rule 101 in part sets forth the scope of those rules:

> **(a) Scope.** These rules are divided into six parts. Part I governs the applicability of these Rules and contains general provisions. Part II governs practice and procedure in appeals, petitions, and motions in the Supreme Court and the Court of Appeals. Part III is reserved for future use. Part IV governs the admission to practice, conduct, discipline, continuing legal education, and other obligations and duties of attorneys in this State. Part V governs the conduct, discipline, continuing legal education, and other obligations of judges in the courts of this State; and rules governing employees of the Judicial Department. Part VI contains rules governing judicial administration. [Emphasis added.]

The Supreme Court in publishing the Court Register has placed rules governing practice and procedure in the appellate courts in Part II, whereas rules governing conduct and so forth of judges appear in Part V. The Supreme Court has thus made a distinction between those types of rules. According to Article V, Section 4 of the State Constitution, therefore, rules governing the conduct of judges would not be rules of practice or procedure which would be required to be subject to the statutory law of this State.

Rule 501, establishing the Code of Judicial Conduct, begins on page 1 of part V of the Court Register. Canon 5 states:

> A JUDGE SHOULD REGULATE HIS EXTRA-JUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH HIS JUDICIAL DUTIES.

Canon 5 (G) covers extra-judicial appointments:

> A judge should not accept appointment to a governmental committee, commission or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his country, state

> or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

The commentary to Canon 5 (G) observes:

> Valuable services have been rendered in the past to the states and the nation by judges appointed by the executive to undertake important extra-judicial assignments. The appropriateness of conferring these assignments on judges must be reassessed, however, in light of the demands on judicial manpower created by today's crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not be expected or permitted to accept governmental appointments that could interfere with the effectiveness and independence of the judiciary.

There is a committee which provides guidance on the application of the Canons of Judicial Conduct, the Advisory Committee on Standards of Judicial Conduct, and there is an arm of the Supreme Court which plays a major role in enforcing the Canons, the Judicial Standards Commission. Recently, the Advisory Committee rendered its opinion (No. 32-1995, dated November 13, 1995) that an administrative judge could not serve on a Blue Ribbon Task Force to prepare recommended changes to Title 61 of the South Carolina Code of Laws. Citing Canon 5 (G), the Advisory Committee stated:

> The comments to Canon 5G recognize that valuable services are often rendered by judges receiving extra-judicial appointments, however, this cannot overcome the need to protect the courts from involvement in extra-judicial matters which could interfere with the effectiveness and independence of the judiciary. Furthermore, a judge should avoid an appearance of impropriety. See Canons 1 and 2.
>
> The participation of an administrative judge on a committee that develops regulatory legislation, leads to the appearance of impropriety because legislation promulgated from this committee would impact issues and parties that appear before the administrative judge. Therefore, an administrative judge cannot accept a position on the Blue Ribbon Task Force to propose recommended changes to be incorporated in a bill for the legislature's consideration.

It is observed that great deference should be given to determinations of the Advisory Committee, the Judicial Standards Commission, and the Supreme Court in matters involving interpretation of the Canons of Judicial Conduct. Cf., Faile v. South Carolina

Employment Security Commission, 267 S.C. 536, 230 S.E.2d 219 (1976); Harling v. Board of Com'rs of Police Ins. and Annuity Fund, 205 S.C. 319, 31 S.E.2d 913 (1944); Read Phosphate Co. v. South Carolina Tax Com'n, 169 S.C. 314, 168 S.E. 722 (1933).

I would also add that a Supreme Court has been acknowledged as having inherent authority to supervise the judges of its state. Matter of Almeida, 611 A.2d 1375 (R.I. 1992). Supreme Courts of the various states are generally recognized as having at least inherent and often express authority to prescribe, adopt, promulgate, and amend rules prescribing a judicial code of ethics. Cf., Committee on Legal Ethics of the W. Va. State Bar v. Karl, 449 S.E.2d 277 (W.Va. 1994). The Canons of Judicial Conduct are recognized as having the force and effect of law. Louisiana State Bar Ass'n v. Harrington, 585 So.2d 514 (La. 1990); Collins v. Joshi, 611 So.2d 898 (Miss. 1992); Boros v. Baxley, 621 So.2d 240 (Ala. 1993). Indeed, our Supreme Court stated in In the Matter of Ferguson, 304 S.C. 216, 217, 403 S.E.2d 628, 629 (1991):

> Article V of the South Carolina Constitution provides for a unified judicial system with the Chief Justice as the administrative head, and charges the Supreme Court with administering the courts of this State. Accordingly, this Court, as the highest constitutional court, has the responsibility to protect and preserve the judicial system. Even in the absence of specific constitutional or statutory authority, we have the inherent authority to take whatever action is necessary to effectuate this responsibility.

While giving great deference to the judicial branch of government to make its own determination of such matters and acknowledging that Article V, Section 4 of the State Constitution requires that rules governing practice and procedure be subject to the statutory law of this State, I am of the informal opinion that in this instance, the Rule of the Supreme Court which establishes the Canons of Judicial Conduct would not be a rule of practice or procedure and thus would not be subject to the statutory law of the State. I am of the informal opinion that the Canons would be given priority or precedence in the event that such conflicted with a statute requiring extra-judicial appointment of judges to various entities. Such an interpretation is necessary to uphold the independence and integrity of the judicial system.

This letter is an informal opinion only. It has been written by a designated Senior Assistant Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Senior Assistant Attorney General