

The State of South Carolina



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April 30, 1991

The Honorable Michael T. Rose
Senator, District No. 38
402 Old Trolley Road
Summerville, South Carolina 29483

Dear Senator Rose:

You have asked for clarification concerning Section 8-13-460 of the Code. Your question is "whether or not it is a violation of S.C. Code Section 8-13-460 for a lawyer-legislator to vote in the House of Representatives or the Senate on the issue of whether or not a lawyer-legislator may appear for a fee before a state board or commission, without complying with the requirements of S.C. Code Section 8-13-460 regarding submission of a statement of conflict of interest to the presiding officer and excusal of himself from voting."

Of course, Article III, Section 12 of the State Constitution leaves it solely within the province of each House to "determine its rules of procedure." Article I, Section 8 mandates a separation of powers between the 3 branches of government. Article III, Section 11 requires that each House of the General Assembly "shall judge ... the qualifications of its own members ..." Our Supreme Court has, accordingly, ruled that, except where constrained by an express provision of the Constitution, no other branch of government is permitted to adjudicate questions concerning the operations or procedures of either House of the General Assembly. See, Culbertson v. Blatt; 194 S.C. 105, 95 S.E.2d 218 (1940).

The General Assembly has further recognized the need to preserve the principle of separation of powers in the State Ethics Act, through the enactment of Section 8-13-210 et seq., wherein it has created the House and Senate Ethics Committees, and specified the duties of such committees with respect to enforcement of the Ethics Act. In particular, Section 8-13-250 provides that any sanctions designated for violation of the Ethics Act by a member of the General Assembly must originate respectively either in the Senate or

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House, acting through its own Ethics Committee. The ultimate disposition of the matter is then made by the full House or Senate. Thus, it is clear that this Office is prohibited from ultimately resolving the question of whether an individual member of the Senate should or should not have voted on a particular matter, at least until the Senate or House has first acted. See, Section 8-13-250(c). See also, Robert's Rules of Order, § 44 at p. 345 ["the assembly itself is the judge of all questions arising which are incidental to ... voting ..."]

However, to provide as much information to you as possible, we offer the following. Section 8-13-460 provides in pertinent part:

Any public official or public employee who, in the discharge of his official duties, would be required to take action or make a decision which would substantially affect directly his personal financial interest or those of a member of his household, or a business with which he is associated, shall instead take the following actions:

... (b) If he is a legislator, he shall deliver a copy of such statement to the presiding officer of his legislative branch. The presiding officer if requested by the legislator shall cause such statement to be printed in the journal and, upon request, shall excuse a legislator from votes, deliberations, and other action on the matter on which a potential conflict exists; provided, however, any statement delivered within twenty-four hours after the action or decisions shall be deemed to be in compliance with this section.

This provision clearly has as its purpose the avoidance of action by a public official upon a matter in which he is personally interested. 1/ As we have previously cautioned, public officials

... cannot be permitted to place themselves in a position in which personal interest may conflict with public duty

1/ See generally, Section 8-13-410 of the Ethics Act which prohibits any public official or public employee from "using his official position or office to obtain financial gain for himself."

The evil against which the policy is directed lies not only in influence improperly exercised, but also in creating a situation tending to weaken public confidence in the integrity of the public service

Op. Atty. Gen., January 31, 1983. As we noted in another previous opinion, while the General Assembly's enactment of Section 8-13-460(6) "does not disqualify a legislator from voting ... [it] does provide such legislator to be excused from voting if he requests." Op. Atty. Gen., April 12, 1982. Thus, the General Assembly, by the enactment of this provision, appears to have acted in accord with the "uniform practice" of legislative bodies everywhere that "all members ... be the judge of their own personal interest" with respect to a particular vote. Mason's Manual of Legislative Practice, Section 522. See also, Jefferson's Manual, Section 658 ["... because of personal interest, a Member should not vote ... but usually the Member himself should determine this question..."]; ["the weight of authority also favors the idea that there is no authority in the House to deprive a member of the right to vote"].

Of course, the key consideration for a legislator is whether the matter "substantially affects directly" his personal financial interest or that of his household or business. As we noted in an opinion dated June 27, 1983, the State Ethics Commission, in SEC 80-021, Hunter v. Crain et al. defined "substantial" for purposes of Section 8-13-460. According to the Ethics Commission, such term should be interpreted as meaning

... something of real worth and importance; of considerable value; valuable; something worthwhile as distinguished from something without value or merely nominal ...

Moreover, courts have interpreted the closely analogous phrase, "directly affected" as meaning "[i]n a direct way; without anything intervening; not by secondary, but by direct means." Clark v. Warner, 204 P. 929, 934 (Okl. 1922). See also, 26A C.J.S. "Directly", at p. 956 et seq. ["The term ('directly') has been held synonymous with 'immediately' and 'proximately'.]

Similarly, other authorities have stated that the dividing line for voting or not voting is whether the personal interest uniquely relates to the particular legislator or, instead "other members are included with that member in the [legislation] ..., even though that person has a personal or pecuniary interest in the result" Mason's Manual, supra at Section 522. Another leading authori-

ty, which the State Senate has adopted, see Senate Rule 43, has likewise stated:

It is a principle of 'immemorial observance' that a Member should withdraw when a question concerning himself arises ...; but it has been held that the disqualifying interest must be such as affects the Member directly ... and not as one of a class

Jefferson's Manual, supra at section 659.

CONCLUSION

In summary, this Office always advises that the "safest and most appropriate course" is for an individual to "not participate" in a matter in which a potential conflict may arise. Op. Atty. Gen., January 19, 1980. We have often stated that public officials "should not place themselves in a position in which personal interest may conflict with public duty." Op. Atty. Gen., January 31, 1983. This is consistent with the specific mandate of Section 8-13-410 of the Ethics Act that a public official not use his office for personal financial gain.

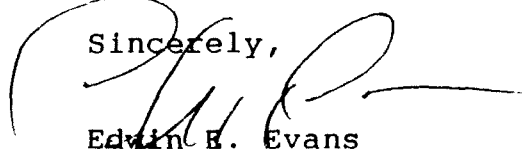
Nevertheless, as noted above, Section 8-13-460(b) of the State Ethics Act does not legally require that a legislator recuse himself from voting with respect to a matter which would "substantially affect directly" his personal financial interest; instead, the statute authorizes that "upon request" of the legislator, he shall be excused "from votes, deliberations, and other action on the matter on which a potential conflict exists...." The Act also specifies a filing procedure for the legislator to follow if Section 8-13-460(b) is triggered, and we have provided legal authorities herein regarding what is meant by the General Assembly's use of the phrase "substantially affect directly" an individual's personal financial interest. Beyond our general advice, referenced above, this Office, however, cannot impose an absolute requirement of recusal, where the General Assembly has not made such requirement mandatory as to members of the General Assembly. Compare, Section 8-13-460(c) [as to public officials who are members of governing boards or commissions, "the presiding officer shall require that the member be excused from any votes, deliberations or other actions on the matter on which the potential conflict exists...."] And as to any review of a

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particular instance where it is alleged that Section 8-13-460(b) has been triggered, the constitutional mandate of separation of powers requires that such review be made by the Senate.

If you have any additional questions, please let us know.

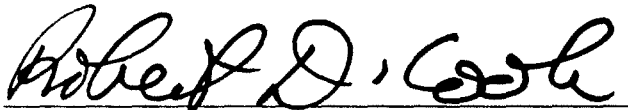
Sincerely,



Edwin E. Evans
Chief Deputy Attorney General

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REVIEWED AND APPROVED BY:



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