

SEC AO98-004

November 19, 1997

SUBJECT: LEGISLATIVE CONTACT BY S. C. BAR COMMITTEE CHAIRS OR MEMBERS

SUMMARY: S. C. Bar committee chairs and committee members are not “employed, appointed or retained” to influence public officials. Therefore, their incidental public communications with legislators regarding S. C. Bar positions does not make the committee chairs or committee members a “lobbyists”.

QUESTION:

An Attorney on behalf of the South Carolina Bar requests an opinion and frames the question as follows: If the South Carolina Bar committee chairs or members contact legislators at the request of the Bar to inform and/or advocate about Bar positions on pending legislation and/or funding matters, are the committee chairs or members required to register as lobbyists?"

DISCUSSION:

This opinion is rendered in response to a request for an opinion dated November 5, 1997, by an attorney representing the South Carolina Bar. The Commission's jurisdiction is limited to the applicability of the State Ethics Act, S.C. Code § 2-17-10 *et seq.*; § 8-13-100 *et seq.*(Supp. 1996). This opinion does not supersede any other statutory or regulatory restrictions or procedures which may apply to this situation.

The Ethics Reform Act at S.C. Code § 2-17-10(12) (Supp. 1996) provides in part as follows:

"Lobbying" means promoting or opposing through direct communication with public officials or public employees:

- (a) the introduction or enactment of legislation before the General Assembly or the committees or members of the General Assembly;
- (b) covered gubernatorial actions;
- (c) covered agency actions;

- (d) consideration of the election or appointment of an individual to a public office elected or appointed by the General Assembly.

"Lobbyist" is defined in part as:

any person who is *employed, appointed, or retained, with or without compensation*, by another person to influence by direct communication with public officials or public employees: (i) the action or vote of any member of the General Assembly, the Governor, the Lieutenant Governor, or any other statewide constitutional officer concerning any legislation; (ii) the vote of any public official on any state agency, board, or commission concerning any covered agency actions; or (iii) the action of the Governor or any member of his executive staff concerning any covered gubernatorial action. ... Lobbyist does not include:

- (a) an individual who receives no compensation to engage in lobbying and who expresses a personal opinion on legislation, covered gubernatorial actions, or covered agency actions to any public official or public employee;
- (b) a person who appears only before public sessions of committees or subcommittees of the General Assembly, public hearings of state agencies, public hearings before any public body of a quasi-judicial nature, or proceedings of this State; ... or

* * *

- (h) an individual who receives no compensation to engage in lobbying and who does not make expenditures or incur obligations for lobbying in an aggregate amount in excess of five hundred dollars in a calendar year.

In SEC AO 94-005, the Commission discussed the Ethics Reform Act's application to a non-profit organization, The South Carolina Economic Developers Association (SCEDA). SCEDA requested an advisory opinion concerning the lobbying provisions of the Ethics Reform Act (Act).

SCEDA is a nonprofit trade association dedicated to improving the economy of South Carolina. To do so, SCEDA undertakes educational programs to enhance the professional skills of the State's economic development professionals and to promote cooperation and exchange of information among its members and the public. SCEDA's membership includes bankers, attorneys, employees of the State Development Board, local economic development corporations, chambers of commerce, utility providers and construction companies, as well as other individuals involved in the process of recruiting business and industry to locate or expand in South Carolina. Many of SCEDA's members are employed by companies which are lobbyist's principals within the definition of the Ethics Reform Act. Although some of SCEDA's members are employed by firms which engage in

lobbying activities, none of SCEDA's officers and directors were at the time of the opinion registered as lobbyists. The Association's officers and directors are not compensated for their service to SCEDA.

SCEDA's activities bring it into contact with various departments of State government, including those in the legislative and executive branches, as well as local officials. This contact, together with the public status of many SCEDA members, created concern regarding the impact of the Ethics Reform Act on traditional SCEDA activities. The Association activities include hosting a legislative reception and soliciting sponsorships for its annual conference. SCEDA's officers and directors have on occasion expressed their position on legislation and other official action pertaining to economic development through oral and written communication with members of the General Assembly, the Governor and his staff, other constitutional officers, and officials of the State Development Board and other State and local agencies and public bodies. However, SCEDA's officers and directors are volunteer and, other than possible telephone and mileage expenses of a de minimis nature, expend no money on lobbying. SCEDA does not reimburse volunteers for costs.

Based on the foregoing, the Commission found SCEDA had not "employed, appointed, or retained" its officers and directors for the purpose of influencing public officials. For that reason, the State Ethics Commission advised that SCEDA's infrequent expressions of an opinion on legislation or other official action did not constitute lobbying and that SCEDA's officers and directors were not lobbyists within the meaning of the Ethics Reform Act.

The South Carolina Bar exists pursuant to SCRCF Rule 410. The Bar's stated purposes include the duty to uphold and defend the Constitution of the United States and South Carolina; to protect and maintain respect for representative government; and to continually improve the administration of justice throughout the State, among other things. No person may engage in the practice of law in this State who is not licensed by the Supreme Court and a member in good standing of the South Carolina Bar, except as otherwise provided by the rules of the South Carolina Supreme Court.

According to the South Carolina Bar's Constitution, the House of Delegates controls and formulates policy for the Bar. The House of Delegates supervises and directs the Board of Governors, officers, sections, committees, board, commissions, and the Young Lawyers Division, among others. On a question relating to the substance of the law, the administration of justice, or the policy of the Bar, the House of Delegates, by the vote of a majority of the total number of Delegates then in office, may direct a referendum by mail ballot of the members of the Bar who are entitled to vote. A majority of votes cast determines the position of the Bar with respect to the question submitted. South Carolina Bar. S. C. Bar Constitution at Section 6.5

The Bar publishes notices of the adoption of legislative positions taken which includes the amount expended from unrestricted funds to support legislative policies and file briefs. Any member of the Bar may file a written objection to a particular position taken on a legislative issue or brief. A procedure is in place pursuant to the S. C. Bar's Constitution at Section 6.6 to hear and determine

the merits of an objection with a refund of the pro rata amount of the objecting member's license fee if the matter at issue is found to have been inappropriately funded from license fees.

South Carolina Bar Sections and Committees carry out the work of the Bar and promote its purposes. A report or recommendation of a section, committee, board or commission becomes the action of the Bar only if it is approved by the House of Delegates or the Board of Governors. The President or his designee expresses the policy of the Board as determined by the House of Delegates or the Board of Governors. No other member or employee may represent the Bar or a section, committee, board, commission or Young Lawyers Division before a legislative body, court or government agency unless specifically authorized by the House of Delegates or Board of Governors. South Carolina Bar Bylaws at Section VI.

The chairs and members of these committees and sections occasionally are requested by the Bar's leadership to contact members of the General Assembly to inform and/or advocate about South Carolina Bar positions on pending legislation and/or funding matters. The South Carolina Bar itself is a registered lobbyist's principal. The normal and ordinary job duties of certain Bar employees include communicating with legislators and those persons are registered as lobbyists.

South Carolina Bar committee chairs and members receive no compensation or expense reimbursement related to contacts they may make with members of the General Assembly. No professional, legal or occupational sanction or penalty is applied to Bar committee members or chairs who decline to contact legislators in support of Bar positions when requested to do so.

Any member of the South Carolina Bar who, when making public utterance, permits himself to be identified as having an official connection with the Bar or one of its sections, committees, boards, commissions or the Young Lawyers Division, must, if the policy of the Bar on the subject matter of the utterance has been determined by the House of Delegates or Board of Governors, fairly state that policy and, if he expresses views at variance with it, clearly identify the variance as his personal views only. If there has not been, or if he has no knowledge of, any such policy determination, he shall nevertheless identify his utterance as his personal views. South Carolina Bar Bylaws, at Section 6.3.

From the South Carolina Bar's Constitution and Bylaws, it is apparent that the act of publicly disseminating views taken by the Bar is strictly regulated by the Bar. While "speaking on behalf of another" is one test to determine if the action taken by an individual is "lobbying", it is not the sole test. In a series of advisory letters, the Secretary of State advised as follows:

A person who is employed as a manager of a company and on occasion is asked to contact their representatives on matters pertaining to their employment is not "employed, appointed, or retained" to lobby. That person would be employed to manage. The incidental communication with a representative does not make the manager a lobbyist.

However, if a part of the normal and ordinary job duties of that manager is to maintain good relations with the General Assembly or to contact State Representatives when directed by the corporate management as a part of one's ordinary and normal job duties, then the manager would be employed to lobby as a part of his normal and ordinary responsibilities, and, arguably, is being paid partly for such duties. Secretary of State Advisory letters No. 91-29, 91-33, 91-35, 91-41, 91-24, 92-35, 92-51, and 92-74.

Consistent with Ethics Commission Advisory Opinions 94-005 and 95-004 and with the Secretary of State advisory letters cited above, it is our opinion that the S. C. Bar committee chairs and members who occasionally contact legislators under the circumstances described above are not required to register as lobbyists.