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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

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Case No. 2011-CP-40-7854

Appellate Case No. 2012-21-2125

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John S. Rainey .....Appellant,

v.

Nimrata "Nikki" R. Haley .....Respondent.

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# PETITION FOR REHEARING AND MEMORANDUM IN SUPPORT

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Columbia, South Carolina
June 26, 2013

## INTRODUCTION

Appellant sought a declaratory judgment that Respondent's conduct as a member of the South Carolina House of Representatives (House) violated the South Carolina Ethics, Government Accountability, and Campaign Reform Act of 1991 (Ethics Act). The circuit court dismissed for lack of subject matter jurisdiction over the Ethics Act, holding that the Ethics Act grants exclusive authority to the House Ethics Committee over the Ethics Act. Appellant sought review in this Court which affirmed reasoning, "it is clear the Legislature intended the respective Ethics Committees to have *exclusive* authority to hear alleged ethics violations of its own members and staff." Rainey v. Haley, Op. No. 27269 at 82, 2013 WL 2631144, June 12, 2013 (Shearhouse Adv. Sh. No. 26 at 79) (hereinafter "Opinion") (emphasis added).

"In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument." Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322 (2001); see also Rule 221, SCACR. For the reasons set forth below, Appellant respectfully requests rehearing of this matter.

## ARGUMENT

Rehearing is warranted for three reasons. First, the Court's Opinion fails to consider Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999), which Appellant argued to both the circuit court and this Court as dispositive to this appeal. Second, the Court's Opinion mistakenly asserts that Appellant's argument turns on Ford v. State Ethics Commission, 344 S.C. 642, 545 S.E.2d 821 (2001). Third, the Court's holding—that the Legislature has exclusive jurisdiction to hear violations of the Ethics Act—is far broader than the issue presented and forecloses the possibility of any criminal

enforcement of the Ethics Act by any court. Appellant respectfully submits that the Court should refrain from reaching this question until such a case presents itself or, in the alternative, order rehearing to allow the parties to brief this issue. Each ground for rehearing is considered in turn.

## I. The Court's Opinion overlooks Appellant's reliance on the Court's precedent in Baird v. Charleston County.

Rehearing is warranted because the Court's Opinion overlooks precedent approving judicial review of civil disputes concerning conduct regulated under the Ethics Act. Appellant's subject matter jurisdiction argument turned first and foremost on this Court's analysis in Baird. See Appellant's Br. 13-16 (arguing "Baird v. Charleston County is directly on point."). In Baird, citizens sued for declaratory and injunctive relief to stop the issuance of public bonds by claiming that the public official who cast the deciding vote in favor of the bonds did so in violation of the Ethics Act. Baird, 333 S.C. at 524-25, 533-34, 511 S.E.2d at 72, 77. This Court held that courts have the power to declare whether a violation of the Ethics Act has occurred and remanded the case to the circuit court to make this determination. Baird, 333 S.C. at 533-34, 511 S.E.2d at 77. Appellant seeks the same disposition here.

Significantly, in Baird this Court expressly considered and rejected the notion that our courts lack subject matter jurisdiction over the Ethics Act. Just like Appellant here, the Baird plaintiffs sought a declaration that a public official violated the Ethics Act. Id.; see also R. pp. 27-32, Baird, supra (App. Case No. 24885) (Complaint citing violation of Ethics Act Section 8-13-700(B) as grounds for declaratory and injunctive relief).[1] In defending the bond ordinance, the county argued the same contention advanced by

[1] On file with the Court and attached as **Exhibit A**.

Respondent here: that "the court does not have jurisdiction to review the conflict of interest claim[.]" Baird, 333 S.C. at 534-35, 511 S.E.2d at 77. The circuit court accepted this view, reasoning that

> a claim of a conflict of interest by the Plaintiffs as to one of the members of council is also not subject to review by this court as presented here. South Carolina has empowered the State Ethics Commission to examine questions of conflicts of interest. Clearly, there is no provision for reversing a legislative body's enactment due to a claimed conflict of interest on the part of one of its members. The Ethics Act does not provide that any action taken by a public official which constitutes a conflict will make the enactment of legislation void or voidable. Of course, the individual public official is subject to the Commission's investigation as well as potential civil and criminal liability for any action taken. Nonetheless, this Court does not have the ability to go behind Council's vote to recalculate the votes taken by County Council in this matter.

R. pp. 16-17, Baird, supra (App. Case No. 24885) (Cir. Ct. Final Order) (citation to S.C. Code Ann. § 8-13-320 omitted).[2]

This Court *rejected* that reasoning—the same reasoning it now adopts. Writing for a unanimous Court, Chief Justice Toal explained:

> A threshold issue for this Court is whether invalidation of the bond ordinance is a proper remedy for a violation of the State Ethics Act. There is no direct authority which prevents this Court from invalidating a bond ordinance based upon a violation of the State Ethics Act. In general, the vote of a council member who is disqualified because of interest or bias in regard to the subject matter being considered may not be counted in determining the necessary majority for valid action. Therefore, a court has jurisdiction to invalidate an ordinance if the requisite number of votes to pass the ordinance would not exist but for the improper vote.

Baird, 333 S.C. at 535, 511 S.E.2d at 77-78 (citation and footnote omitted). In footnote 12, the Court explained that its power to adjudicate the case *and* order a remedy not expressly provided by the Ethics Act was derived from the Ethics Act itself.

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[2] On file with the Court and attached as **Exhibit B**.

> S.C. Code Ann. § 8–13–780 (Supp.1997) provides the remedies for a breach of the State Ethics Act. Section 8–13–780(A) provides: "The provisions of this section are in addition to *all other* civil and administrative remedies against public officials, public members, or public employees which are provided by law." Thus, the remedies outlined in section 8–13–780 *are not exclusive*.

Id. at 535, n.12, 511 S.E.2d at 77, n.12 (emphasis added). In other words, even though the state Ethics Commission—just like the House Ethics Committee in this case—had *concurrent* jurisdiction over the public official in Baird, the Ethics Act does not foreclose judicial review.[3] Significantly, Section 8-13-780, which this Court cited as the basis for its authority in Baird, makes no distinction between public officials subject to the state Ethics Commission's jurisdiction and those subject to a legislative committee's jurisdiction. To the contrary, both the express language of the Ethics Act *and* this Court's construction of the Act reaffirm the availability of all remedies provided by law.[4]

Rehearing is necessary to avoid the inescapable conclusion that this Court's Opinion has implicitly overturned its well-established precedent in Baird. Baird is this

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[3] Justice Beatty's concurrence would hold that courts have subject matter jurisdiction to review Ethics Act cases, but that the circuit court correctly dismissed Appellant's case because it was unripe for judicial review until he exhausted the House Ethics Committee procedure. Opinion at 91 (Beatty, J., concurring). Appellant respectfully notes that in Baird this Court did not require the plaintiffs to exhaust the nearly-identical state Ethics Commission procedure prior to challenging the public official's conduct in a court. Baird, 333 S.C. at 533, 511 S.E.2d at 77 (noting that the Commission had issued an "informal opinion"); compare S.C. Code Ann. § 8-13-540 (legislative committee procedure) with § 8-13-320(9)-(10) (Commission procedure).

[4] As noted at pages 15 and 16 of Appellant's Brief, this Court has *never* concluded that it lacked subject matter jurisdiction to hear cases under the Ethics Act. E.g., Sanford v. S.C. State Ethics Comm'n, 385 S.C. 483, 685 S.E.2d 600 (2009), opinion clarified, 386 S.C. 274, 688 S.E.2d 120 (construing the Ethics Act as applied to a state Ethics Commission proceeding); Gaffney Ledger v. S.C. Ethics Comm'n, 360 S.C. 107, 600 S.E.2d 540 (2004) (deciding whether a newspaper violated an Ethics Act confidentiality requirement); S.C. Coastal Council v. S.C. State Ethics Comm'n, 306 S.C. 41, 410 S.E.2d 245 (1991) (concluding that the Ethics Act prohibited individuals from serving on a public council).

Court's last construction of the Ethics Act and the only case Appellant is aware of that directly addresses the issues presented here. As then-Judge Kittredge previously explained for this Court:

> The doctrine of *stare decisis* enjoys particular efficacy in the context of challenges concerning the construction of statutes and determination of legislative intent. [...] It is manifestly in the public interest that the law remain permanently settled. Especially is this so in the construction of statutes, for if any change in the statutory law is desired, the General Assembly may readily accomplish it.

Wehle v. S.C. Ret. Sys., 363 S.C. 394, 402, 611 S.E.2d 240, 244 (2005) (per curium) (adopting recommendations and report of Kittredge, J., special referee) (internal citations and quotations omitted). However, the Court's Opinion here calls into question Baird's continued efficacy. Appellant respectfully submits that rehearing will offer the Court another opportunity to consider this case in light of its precedent.

## II. The Court misconstrued Appellant's argument by stating that it relies on Ford v. State Ethics Commission.

The Court mistakenly asserts that Appellant relies on Ford v. State Ethics Commission.[5] Respectfully, this is incorrect as Appellant has *never* relief on Ford for this proposition. In fact, Appellant *agrees* with the Court's view that "Ford in no manner lends support to the argument that the circuit court has jurisdiction to hear this action." Opinion at 83-84. Appellants *only* citation to Ford is on page 17 of his brief in a section explaining that the circuit court misconstrued the Ethics Act by relying on provisions in the Act that do not apply to members of the Legislature. Specifically, Appellant explained that

[5] "Appellant asserts the case Ford v. State Ethics Commission supports the circuit court's exercise of jurisdiction in this matter. 344 S.C. 642, 545 S.E.2d 821 (2001). Appellant's reliance on Ford is misplaced." Opinion at 83.

> The Supreme Court has applied the express language of these [Ethics Act] sections to deny the state Ethics Commission subject matter jurisdiction over members of the legislature. Ford v. State Ethics Comm'n, 344 S.C. 642, 644, 545 S.E. 821, 822 (2001) (commission lacked jurisdiction over state Senator's conduct).

Appellant's Br. 17. Clearly, there is no dispute concerning Ford: Appellant cites Ford for the same proposition for which the Court says it stands. Cf. Opinion at 84. Furthermore, this lone citation to Ford is neither an issue in dispute nor at the heart of this appeal. Accordingly, the Court has misapprehended Appellant's argument and perceived a disagreement where none exists. Since the Court's misattribution of Ford to Appellant's argument is its sole analysis of Appellant's position, Appellant seeks another opportunity to make his position clear.

## III. The Court's Opinion decides matters of constitutional law that exceed the scope of the issues necessary to decide this case.

The Court's Opinion reasons that because the South Carolina Constitution gives the legislative chambers the power to judge the conduct and qualifications of their respective members, the separation of powers doctrine compels the conclusion that enforcement of the Ethics Act is reserved exclusively to the members of those chambers. Opinion at 84 (citing S.C. Const. art. I, § 8 and art. III, §§ 11 & 12). The Court should reconsider construing the Constitution as in conflict with Ethics Act or, in the alternative, order rehearing to allow the parties to specifically address this issue.

As written, the Court's Order exceeds the scope of this appeal by prohibiting a court from exercising *any* subject matter jurisdiction over the Ethics Act, including over

its criminal provisions.[6] The narrow question presented here is "[w]hether courts have subject matter jurisdiction to render *declaratory judgments* about whether regulated conduct by a member of the General Assembly violates the Ethics Act?" Appellant's Br. 5 (emphasis added). Appellant has never contended that a civil declaration finding a violation of the Ethics Act would or could result in criminal penalties. Appellant's Br. 26-27 (noting that Appellant seeks the same relief approved in Baird). Nevertheless, Appellant reads the Court's holding to prohibit criminal prosecutions of members of the Legislature for Ethics Act violations. Respectfully, it is unnecessary for the Court to decide this issue. Since Appellant admittedly lacks any criminal prosecutorial authority, this case is not a proper vehicle for the Court to reach this issue. Appellant submits that before the Court reaches such a holding, it should have before it a case that presents appropriate parties, facts, and legal arguments.

Furthermore, the Court did not have an opportunity to hear argument that would support the dramatic conclusion reached by the Opinion. Specifically, the Court's holding relies on a separation of powers analysis *that the Court previously ruled was irrelevant* to this appeal. Order *in re* motions to strike (Dec. 6, 2012).[7] Appellant filed a reply brief in which he argued that *if* the Court were to accept Respondent's subject matter jurisdiction theory, then it would confer unto the Legislature the power to pass an act, construe its meaning, and enforce the provisions contained therein. Appellant's Reply, 5-11, filed Oct. 18, 2012 (citing *inter alia* S.C. Const. art. I, § 8 and Knotts v. S.C. Dep't. Natural Res., 348 S.C. 1, 7, 558 S.E.2d 511, 514 (2002) (rejecting this proposition)).

[6] See e.g., S.C. Code Ann. § 8-13-1520 ("Except as otherwise specifically provided in this chapter, a person who violates any provision of this chapter is guilty of a misdemeanor and, upon conviction [....]").

[7] Attached as **Exhibit C**.

Respondent's counsel filed a letter with the Clerk objecting to the contents of Appellant's reply brief and Appellant moved to strike the letter. The Court ordered:

> We grant appellant's request to strike the letter and the brief in opposition to the motion to strike. We find both improper. In lieu of a letter, respondent should have filed a motion to strike appellant's initial reply brief. Instead, the improper letter resulted in appellant's motion to strike, which prompted an improper response from respondent. Respondent should have filed a return to the motion to strike, addressing the basis for the motion, not a full brief that includes argument on the merits of the underlying issue. Rule 240(e), SCACR.
>
> However, we also strike appellant's initial reply brief. An appellant may not use a reply brief as a vehicle to argue issues not argued in the appellant's opening brief or raised in the respondent's brief. Bochette v. Bochette, 300 S.C. 109, 386 S.E.2d 475 (Ct. App. 1989). *Because the separation of powers argument was not made in appellant's opening brief, and is not properly responsive to respondent's brief, it is hereby stricken.*

Order *in re* motions to strike (emphasis added). The Court explained further in footnote 1 of the Order that:

> While we realize subject matter jurisdiction can be raised at any time, see Bardoon Prop., NV v. Eidolon Corp., 326 S.C. 166, 485 S.E.2d 371 (1997), and subject matter jurisdiction is the focal point of this appeal, the issue appellant seeks to raise for the first time pertains to the *validity* of the law upon which the circuit court relied in finding it lacked subject matter jurisdiction. Because appellant did not challenge the validity of the law on separation of powers grounds in the lower court, this Court, in deciding the subject matter jurisdiction issue, must determine if the circuit court erred in finding the law as it is written vests subject matter jurisdiction exclusively with executive and administrative tribunals or allows for the exercise of subject matter jurisdiction by the courts.

Id. at n.1 (emphasis original). The precise point Appellant's reply brief attempted to make was that Respondent's construction, if accepted, would render the Ethics Act invalid, not that the law itself was invalid. Appellant's intent, even if inarticulately explained in reply, is nonetheless clear since it would be quixotic to have brought this action only to argue on appeal that the Ethics Act is itself unconstitutional. Nevertheless, Appellant relied on

the Court's instruction that the resolution of this appeal would turn on the parties' competing view of subject matter jurisdiction, not the constitutionality of the statute under the separation of powers doctrine.

If the Court were to grant this motion, it would have an opportunity to consider argument from the parties specifically addressing the interplay between the Legislature's constitutional power to police its membership and the Ethics Act. For example, the Court might find it relevant that the bipartisan South Carolina Commission on Ethics Reform (commissioned by Respondent) concluded that the Legislature's constitutional power to police member conduct is "linked to the actual operation of the legislative branch" and that "[n]either punitive section [of Article III, Sections 11 & 12] appears to contemplate a role for sanctioning conduct not immediately threatening to the legislative proceeding." S.C. Comm'n on Ethics Reform, Final Recommendations (Jan. 28, 2013), at 29.[8] In the Commission's view, the Legislature's constitutional powers under Article III, Sections 12 and 13 (concerning the punishment of non-members) merely provide a mechanism to keep order in the legislative chambers. This power neither limits nor gives rise to the power to regulate the conduct proscribed by the Ethics Act because

> If each body in the General Assembly possessed inherent state constitutional authority to investigate and sanction unethical behavior among its members as a consequence of separation of powers and its ability to punish "disorderly behavior," statutory provisions for legislative ethics committees would be unnecessary.

Id. at 29-30; see also id. at 30-32 (discussing New Jersey's ethics laws and separation of powers doctrine as construed in State v. Gregorio, 186 N.J. Super. 139, 451 A.2d 980 (1982)).

[8] On file with the Office of the Governor and the General Assembly and attached as **Exhibit D.**

Conversely, the Court's Opinion appears to reserve all power under the Ethics Act over legislators to the Legislature. In light of the fact that the Act contains criminal provisions, the Court's Opinion suggests either that the Legislature intended for these criminal provisions to apply to all public officials *except* members of the Legislature *or* that a legislative ethics proceeding can act as judge and jury by convicting a member beyond a reasonable doubt and imposing a criminal penalty. This cannot be the result the Legislature intended in adopting the Ethics Act. Rehearing would afford the Court an opportunity to consider these arguments more fully and therefore rehearing is warranted.

## CONCLUSION

For the aforementioned reasons, Appellant respectfully requests that the Court grant this petition, order rehearing, and order such further relief it deems just and proper.

Respectfully submitted by,

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ATTORNEYS FOR JOHN S. RAINEY, APPELLANT

June 26, 2012
Columbia, South Carolina

# EXHIBIT A

Complaint – Baird v. Charleston County

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF CHARLESTON | ) | |
| Dr. David R. Baird, Dr. George D. Grice, Dr. Michael Lampkin and Dr. Jay B. Robards | ) | C. A. # 97-CP-10-3033 |
| Plaintiffs, | ) | COMPLAINT |
| versus | ) | |
| Charleston County, South Carolina, | ) | |
| Defendant. | ) | |

97 JUN -6 PM 3:00
JULIE J. ARM
CLERK OF COURT
BY

## GENERAL ALLEGATIONS

1. The Plaintiffs are individuals residing in Charleston County, South Carolina. Each is a physician licensed by the State of South Carolina to practice medicine and is actively engaged in the practice of medicine in Charleston County, South Carolina.

2. The Defendant is a political subdivision of the State of South Carolina.

3. University Medical Associates ("UMA") is a corporation organized under the laws of the State of South Carolina and having its principal place of business in Charleston County, South Carolina.

4. The Defendant has been requested by UMA to issue $85,000,000 of tax free "hospital revenue bonds" for UMA's benefit.

5. That request was made pursuant to S. C. Code §§44-7-10 et. seq. which provides for issuance of hospital revenue bonds in a limited set of circumstances, none of which is applicable here.

6. By UMA's own admission, the proposed "hospital revenue bonds" will not be used by UMA to construct or operate a hospital.

7. Also, by UMA's own admission, the proposed hospital revenue bonds are not necessary for the proposed project, which is primarily the re-financing of an existing issue of other bonds that are not tax exempt and the renovation of an existing building so that it can serve UMA's physicians as space for their office practices and other activities.

8. On September 12, 1996, the Finance Committee of Charleston County Council voted 6 to 2 not to issue the bonds requested by UMA.

9. Subsequent to this vote, UMA, despite its claim to be a charitable organization, undertook a massive lobbying and pressure campaign on members of Charleston County Council. The enormity of this campaign was the subject of considerable press attention, including articles in the Charleston *Post and Courier*.

10. Subsequent to the extensive lobbying and pressure exerted by UMA, and a clearly illegal vote described below, Charleston County Council approved the issuance of the bonds.

11. The Plaintiffs, as taxpayers of Charleston County and physicians actively engaged in the practice of medicine in Charleston County, are interested parties with respect to the proposed issuance of these so-called "hospital revenue bonds" and lawfully entitled to bring this action to prevent their issuance.

FIRST CAUSE OF ACTION

12. Each of the foregoing allegations is incorporated herein by reference.

13. Dr. Charles Wallace is an elected member of the Charleston County Council and was such a member at all times described herein;

14. Dr. Charles Wallace is a full time state employee who in 1995 or 1996 was paid $93,749 (in salary and fringe benefits) by the Medical University of South Carolina.

15. In 1995 or 1996 Dr. Wallace was paid an additional $219,452 (in salary and fringe benefits) by UMA.

16. In addition to being highly compensated by UMA, Dr. Wallace works under UMA's rules of governance and is subject to UMA's control.

17. According to UMA's own representations, an affirmative vote by Charleston County Council on the bond deal at issue in this action would result in a direct benefit to UMA of approximately $26 million.

18. Dr. Wallace publicly acknowledged that his vote would be worth $26 million to his employer.

19. The physician members of UMA, including Dr. Wallace, are compensated, in part, based on the financial condition of UMA.

20. An informal opinion of the State Ethics Commission was requested on behalf of Dr. Wallace as to whether he could vote on the issuance of the bonds.

21. At the time the opinion was requested, the State Ethics Commission was misleadingly told that Dr. Wallace "has no direct or indirect financial interest in the outcome of Charleston County's decision to issue the Hospital Revenue Bonds".

22. Despite this untrue assertion, the Commission's attorney correctly opined that Dr. Wallace "should disqualify himself from the issue".

23. Dr. Wallace initially followed the advice of the Commission's attorney and, on at least five separate occasions, did not vote on the issuance of the bonds:

a) On September 12, 1996, the Finance Committee, of which Dr. Wallace is a member, voted (6-2) not to issue the UMA bonds. Dr. Wallace did not vote;

b) On November 14, 1996, The Finance Committee reconsidered its vote and voted 5-3 to issue the bonds. Again, Dr. Wallace did not vote;

c) On November 19, 1996, County Council voted 5-3 to issue the bonds. Again, Dr. Wallace did not vote;

d) On December 3, 1996, after a packed house at a public hearing, County Council voted (4-3) not to issue the UMA bonds. Once again, Dr. Wallace did not vote;

24. On December 17, 1996, a motion was made to reconsider the vote denying the UMA bonds. Dr. Wallace did not vote and the vote was deadlocked (4-4) -- meaning that the vote would not be changed and the UMA bonds would not be issued. After consistently abstaining on five separate occasions, Dr. Wallace then reversed his position, ignored the advice of the State Ethics Commission attorney, and cast the decisive vote in favor of issuance of the bonds.

25. Subsequent to the December 17 vote, one member of County Council who consistently voted not to issue the bonds has died and a re-vote cannot be taken.

26. The reluctant grant of UMA's request by the Charleston County Council was in violation of law and should be overturned because Dr. Wallace was a physician working for UMA, had a direct conflict of interest in the outcome of the vote and yet, in violation of law, chose to cast the deciding vote in favor of the bond issue rather than abstain.

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27. South Carolina Code §8-13-700(B)(Supp. 1995) prohibits a public official from "influenc(ing) a governmental decision in which he, ... or a business with which he is associated has an economic interest."

28. Both Dr. Wallace and UMA, a business with which he is associated, have an economic interest (defined as "an interest distinct from that of the general public." (S.C. Code §8-13-100(11)(Supp.1995)) in the issuance of tax exempt bonds for UMA. The profits of UMA will be increased as a result of issuance of the bonds and the net revenues of UMA available for payment to its physicians, including Dr. Wallace, will be increased as a result of issuance of the bonds.

29. Both before and after his vote, Dr. Wallace received large sums of money from UMA for salary and fringe benefits.

30. Issuance of the proposed bonds under this circumstance would be unlawful and their issuance should be enjoined.

SECOND CAUSE OF ACTION

31. Each of the foregoing allegations is incorporated herein by reference.

32. Issuance by the Defendant of the proposed hospital revenue bonds is a violation of law because the legislation that authorizes issuance of hospital revenue bonds (S.C. Code §§ 44-7-1410 et. seq. provides that hospital revenue bonds may be issued only for the benefit of either a "hospital agency" or a "public agency" and UMA is neither.

33. Issuance of the proposed bonds under this circumstance would be unlawful and for that reason their proposed issuance should be enjoined.

THIRD CAUSE OF ACTION

34. Each of the foregoing allegations is incorporated herein by reference.

35. UMA is a corporation engaged in the clinical practice of medicine.

36. The practice of medicine by a corporation is unlawful for reasons, inter alia, stated in the attached Opinion of the Attorney General of the State of South Carolina.

37. Issuance of the proposed bonds would aid and abet UMA in that unlawful activity.

38. It is unlawful to aid and abet another in the commission of an unlawful activity.

39. Issuance of the proposed bonds under this circumstance would be unlawful and for that reason their issuance should be enjoined.

Wherefore, the Plaintiffs pray for an order enjoining issuance of the proposed hospital revenue bonds, and pray for their costs, attorneys' fees and such other and further relief as shall be meet and proper in the circumstances.

WYCHE, BURGESS, FREEMAN & PARHAM, P.A.

By: Carl Muller

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June 5, 1997

The Plaintiffs respectfully request a trial by jury.

# EXHIBIT B

Final Order – Baird v. Charleston County

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|---|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF CHARLESTON<br><br>DR. DAVID R. BAIRD,<br>DR. GEORGE D. GRICE,<br>DR. MICHAEL LAMPKIN and<br>DR. JAY B. ROBARDS,<br><br>Plaintiffs,<br><br>vs.<br><br>CHARLESTON COUNTY, SOUTH CAROLINA,<br><br>Defendant. | ) | IN THE COURT OF COMMON PLEAS<br>CASE NO. 97-CP-10-3032<br><br>**FINAL ORDER** |



2nd and B. Martin + Scardato

## STATEMENT OF THE CASE

The Plaintiffs, four Charleston physicians, seek to enjoin Charleston County from issuing $85 million dollars in hospital revenue bonds. These bonds are to be issued by Charleston County and are the direct obligation of University Medical Associates of The Medical University of South Carolina ("UMA"), which is a component unit of a South Carolina state agency, Medical University of South Carolina ("MUSC"). Charleston County responded and moved to dismiss on jurisdictional grounds, lack of standing, failure to state a claim, and failure to join an indispensable party. Alternatively, Charleston County moved to require the Plaintiffs to post a bond if the action is allowed to continue. The Defendant's Motions were heard on September 25, 1997. Present at the hearing were Carl F. Muller and John C. Moylan, III, of Wyche, Burgess, Freeman & Parham, P.A., representing the Plaintiff; and Michael A. Scardato and M. William Youngblood of the McNair Law Firm, P.A.,

representing Charleston County. The Defendant filed its Motion to Dismiss on June 30, 1997. The Defendant filed a Memorandum and two affidavits in support of its Motions. The Plaintiffs also filed a Memorandum on the day of the Hearing and presented two letters which were not supported by affidavit. Although the Plaintiffs were given fifteen (15) days to file additional materials, no other affidavits or other materials were presented.

As a preliminary matter, this Court accepted the affidavits submitted by the Defendant and the two letters submitted by the Plaintiffs during the hearing of these motions. The parties referred to these affidavits and the letters during their respective arguments.[1] This Court may consider affidavits regarding jurisdictional issues, in addition to considering allegations of the complaint. See, Woodward v. Westvaco Corp., 319 S.C. 240, 460 S.E.2d 392 (1995) [upholding Rule 12(b)1 Motion to Dismiss as a means for questioning subject matter jurisdiction and vacating on other grounds]; Graham v. Lloyd's of London, 296 S.C. 249, 251, 371 S.E.2d 801, 802 n.1 (Ct. App. 1988); and Allen v. Columbia Financial Management Ltd., 297 S.C. 481, 377 S.E.2d 352 (Ct. App. 1988). Furthermore, Rule 12(b) provides, "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary

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[1]Defendant objected to the Plaintiffs' introduction of two photocopied letters at the hearing which were not authenticated or otherwise presented through an affidavit. No objections were made by Plaintiffs' counsel to the affidavits which were before the Court.

judgment and disposed of as provided in Rule 56,...". Similarly, a motion for judgment on the pleadings is converted to a Rule 56 Motion for Summary Judgment when matters outside the pleadings are presented and not excluded. See, Rule 12(c), S.C.R.C.P. For the reasons set forth below, this Court finds that this case should be dismissed and summary judgment granted to the Defendant.

**SUMMARY OF FACTS**

This controversy centers on the issuance of proposed bonds for the purchase and renovation of a facility to house an outpatient clinical center and other facilities at MUSC. MUSC is a part of the primary government of the State of South Carolina, and its mission is education, health care and research. This mission requires MUSC to maintain an outstanding faculty as well as facilities to instruct the medical care professionals for the future. An integral part of any medical education program includes providing services in a hospital and clinical care setting. (Affidavit of Robert C. Gallager, Paragraph 2.)

MUSC originally had plans to build an out-patient clinical practice facility on its campus. As plans for the new facility were being developed, an opportunity to purchase the St. Francis Hospital facility adjacent to the MUSC campus became available. MUSC determined that this existing facility could be utilized to house its clinical practice programs and not require the construction of a new building, but rather the renovation of the existing St. Francis facility. The cost of the clinical care facilities are incorporated into the fees charged for the services to the patients and for the education of medical practitioners. (Gallager Affidavit, Paragraphs 10 and 11.)

UMA is a non-profit corporation formed to support the teaching, research and service mission of MUSC. With respect to the service mission of providing patient care, UMA acts as the billing and collection agent for the clinical practice of medicine by faculty members at MUSC. (Gallager Affidavit, Paragraph 7.)

The use of tax exempt bonds for the purchase, refinance and/or renovation of hospital facilities is specifically authorized by the South Carolina Hospital Revenue Bond Act, South Carolina Code §44-7-1410, et. seq., (1976) (Hospital Revenue Bond Act). Its stated legislative purpose is to "empower" the "counties of the State" to provide "hospital facilities to serve the people of the State...at the lowest possible expense" and, therefore, "the public health and welfare of the people of the State will be promoted at the least possible expense to those utilizing such hospital facilities so provided". S. C. Code §44-7-1420 (1976). Furthermore, the Hospital Revenue Bond Act specifically empowers the counties to accomplish this essential "governmental function" by vesting "all powers necessary to enable them to accomplish the purposes of this article, which powers shall be in all respects exercised for the benefits of the inhabitants of the State and to promote the public health and welfare of its citizens". S.C. Code §44-7-1420(4) (1976) [emphasis added]. The term "hospital facilities" means..."any one or more buildings, structures, additions, extensions, improvements, or other facilities whether or not located on the same or contiguous site or sites (and including existing facilities), machinery, equipment, furnishings, or other real or personal property suitable for health care or medical care; and includes, without limitation, general hospitals, chronic diseases, maternity, mental, tuberculosis, and

other specialized hospitals; facilities for emergency care, intensive care, and self-care; clinics and outpatient facilities...hospital research facilities...training facilities for nurses, interns, physicians...administration buildings...other administrative facilities...office facilities for hospital staff members and physicians; and including, without limiting any of the foregoing, any other health and hospital facilities customarily under the jurisdiction of or provided by hospitals, or any combination of the foregoing, with all necessary, convenient, or related interests in land, machinery, apparatus, appliances, equipment, furnishings, appurtenances, site preparation, landscaping, and physical amenities". Id 44-7-1430(f) (Cum. Supp.) The counties are specifically empowered to enter into agreements with any "hospital agency or public agency" incidental to the "issuance of bonds". Id 44-7-1440 (1976). Hospital and public agencies include any corporation "whether for profit or not for profit" and "any county, city, town or hospital district of the State..." authorized to acquire, by lease or otherwise, operate and maintain hospital facilities. Id 44-7-1430(e) and (j) (Cum. Supp. 1996).

As a result, MUSC chose to pursue the use of tax exempt bonds to fund the purchase price and renovation costs for its clinical practice facility at the former St. Francis Hospital site. (Gallager Affidavit, Paragraphs 10 and 11.) UMA, as the billing and collection agent for the clinical services by MUSC faculty members, would pledge the clinical practice revenues collected as security for the repayment of the tax exempt bonds issued for this project through its loan agreement with Charleston County as provided by South Carolina Code §44-7-1460 (1976). Consequently, the application

for the issuance of tax exempt bonds was pursued through Charleston County as provided by the Hospital Revenue Bond Act. Area hospitals have used the tax exempt bond method for financing hospital facilities in the past, and they include Baker Hospital, Baker Professional Office Building, Bon Secours-St. Francis Hospital, Roper Hospital, Roper Geriatric Project, Charleston Surgery Center and MUSC.

If such tax exempt bonds are not issued, the cost of obtaining financing could be increased by over $25 million dollars in interest costs over the life of the loan to acquire the facility, and increased by over $12 million dollars over the life of the loan to renovate the facility. (Gallager Affidavit, Paragraph 12.) These costs, however, will be primarily borne by the patients. Generally, the interest rate on tax-exempt bonds is approximately 2% below the interest rate for taxable bonds.

The bonds will be payable solely from, and the bond holders can look only to, a defined revenue stream. These bonds will not be general obligations of Charleston County or a charge upon its general credit or taxing powers, but rather a limited obligation payable solely from certain defined revenues of UMA, which is a component unit of MUSC. Charleston County is merely a conduit to make it possible for a state agency, MUSC, acting through its component unit, UMA, to borrow money at favorable tax-exempt rates for qualifying hospital projects. As part and parcel of the transaction, UMA, in turn, pledges the revenues collected from the clinical practice program as security to pay these bonds issued by Charleston County. The security or certificate of indebtedness by UMA, as a component unit of MUSC, is in the form of a loan agreement between Charleston County and UMA securing the revenue

stream from the project as an integral part of the bond transaction. As the Charleston County Ordinance states:

> The Bonds shall be a limited obligation of the County, the principal and interest on which shall be payable by the County solely out of the revenues derived from the Project. The Bonds and the interest thereon shall never constitute an indebtedness of the County within the meaning of any state constitutional provision or statutory limitation and shall never constitute or give rise to a pecuniary liability of the County or a charge against its general credit or taxing powers. Such limitation shall be plainly stated on the face of the Bonds. Ordinance authorizing Bonds Section 3; passed and approved on third reading December 31, 1996, and attached to the Affidavit of Beverly T. Craven, Clerk of Charleston County Council.

Charleston County Council approved the Bond Ordinance issuing these bonds after third reading of the Bond Ordinance on December 31, 1996. Significantly, there is no claim that any council members with an alleged conflict voted after the third reading which passed and approved the Ordinance. The Ordinance presented to this Court indicates three readings and: "Passed and approved on third reading this 31st day of December, 1996". (B. Craven Affidavit, Ordinance dated December 31, 1996.)

County Council has found that the bonds in question met all the requirements of South Carolina law, including, among other things, that the project constituted "hospital facilities" as defined by South Carolina Code §44-7-1430(f) and that the project will benefit the general public welfare by making available hospital facilities to the fullest extent possible at the lowest expense to those utilizing such hospital facilities (Bond Ordinance passed December 31, 1996). County Council authorized the petition for approval of the bonds to the Budget and Control Board of South

Carolina.

The State Budget and Control Board approved the issuance of these bonds. This state board specifically found that the requirements of the Hospital Revenue Bond Act will be met by the issuance of these bonds. (Approval dated May 20, 1997; B. Craven Affidavit.)

## STATUS OF PROCEEDINGS

The Plaintiffs have filed this action seeking to enjoin the issuance of the bonds. The Plaintiffs claim that one member of County Council had a conflict of interest and voted for the bonds after the second reading of the Ordinance but do not allege that this member voted after the third reading, which passed the Ordinance. The Plaintiffs further claim that UMA is not an entity which can enter into agreements for such bonds; and UMA engages in the unlawful practice of medicine and that the issuance of the bonds would aid and abet UMA in that unlawful activity. The Plaintiffs filed this lawsuit but have failed to post any bond or otherwise fulfill statutory conditions precedent to filing an action affecting the issuance of any state security.

The Defendant seeks the dismissal of this case on the following grounds:

1) Plaintiffs lack standing.

2) This Court does not have subject matter jurisdiction over the allegations of a conflict of interest by one member of Council or jurisdiction to overturn a purely legislative decision by County Council in approving the bonds.

3) The Complaint fails to raise any questions concerning the final and legally

significant vote approving the bonds following the third reading of the Bond Ordinance and thereby fails to state a cause of action upon which relief can be granted.

4) This Court lacks subject matter jurisdiction and/or Plaintiffs have failed to state a cause of action upon which relief can be granted in their Second and Third causes of action alleging that UMA is not a "hospital agency" or "public agency"; or that UMA engages in the "unauthorized practice of clinical medicine" since South Carolina Statutory law and case law establishes that UMA is a recognized affiliate of the Medical University of South Carolina. Alternatively, Plaintiffs have failed to join UMA as an indispensable party in this action and, therefore, the matter should be dismissed.

5) The Plaintiffs have failed to comply with South Carolina Code §15-77-20(1976).

## APPLICATION OF LAW

This Court must address the jurisdictional issues as a matter of law on the facts before it. Woodward v. Westvaco, 315 S.C. 329, 433 S.E.2d 890, 891-892 (Ct. App. 1993, vacated on other grounds); Woodward v. Westvaco Corp., 319 S.C. 240, 460 S.E.2d 392 (1995). Also, this Court must convert the remaining 12(b) Motions to one for Summary Judgment, since matters outside the pleadings were submitted by both parties and not excluded by this Court at the hearing. Rule 12(b) and (c), of the *South Carolina Rules of Civil Procedure*.[2]

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[2]In a proposed Order submitted after the hearing of these Motions, the Plaintiffs also reasoned that this Court must convert the 12(b) Motions to Motions for Summary Judgment. (Proposed Order submitted by Plaintiff's counsel at Page 2.)

Rule 56(c) of the *South Carolina Rules of Civil Procedure* provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[3]

This rule is interpreted as, "the plain language of Rule 56(c) mandates the entry of summary judgment...against a party who fails...to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial". See Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Fender & Latham, Inc. v. First Union National Bank of South Carolina, 316 S.C. 48, 446 S.E.2d 448, 449 (Ct. App. 1994) ("The trial court should grant summary judgment....")

Moreover, Rule 56(e) of the *South Carolina Rules of Civil Procedure* provides that a party opposing a properly supported motion for summary judgment may not rest on the mere allegations of his pleadings but must set forth or point to specific facts showing that there is a genuine issue for trial. SSI Medical Services, Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (S.C. 1990) and Charping v. J. P. Scurry & Co., Inc., 296 S.C. 312, 372 S.E.2d 120 (Ct. App. 1988).

And, in attempting to oppose a motion for summary judgment, "[a] conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment". Shupe v. Settle, 315 S.C. 510, 445 S.E.2d 651, 655 (Ct. App. 1994). Additionally, the opposing party must do more

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[3] "The moving party need not 'support its motion with affidavits or other similar materials negating the opponent's claim.'" Baughman v. AT&T Co., 306 S.C. 101, 410 S.E.2d 537, 545 (1991).

than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial. Baughman v. AT&T Co., 306 S.C. 101, 410 S.E.2d 537, 545 (1991).

1. LACK OF STANDING:

Standing is a fundamental, constitutional prerequisite for maintaining any action. The Supreme Court of South Carolina has long and repeatedly insisted upon the constitutional requirement of standing. Fundamental elements of standing that a private citizen must show are: a) direct injury to himself; and b) something more than a general interest common to all members of the public. See, e. g. Douglas v. McLeod, 277 S.C. 76, 282 S.E.2d 604 (1981); Booth v. Grissom, 265 S.C. 190, 217 S.E. 2d 223 (1975); O'Shields v. McLeod, 257 S.C. 477, 186 S.E.2d 408 (1972).

This lack of standing is evident on a review restricted to the Complaint. The Plaintiffs lack standing as "interested parties" under South Carolina Code §44-7-1590 (1976) to bring this Complaint, since they merely allege that they are individuals residing in the County of Charleston and "as taxpayers of Charleston County and physicians actively engaged in the practice of medicine in Charleston County" with respect to the proposed issuance of the bonds in question (Complaint, Paragraph 11). These allegations fail to adequately demonstrate that the Plaintiffs are indeed interested parties, since the bonds in question will not be the obligation of Charleston County as provided by the terms of the Hospital Revenue Bond Act. Clearly, the Complaint fails to state that the Plaintiffs have an interest in the proposed hospital facilities, which is something more than a general interest common to all members of

the public or any aspect of the proposed bonds in question; or that they would be harmed by the issuance of these bonds.

In addition, even if this Court were to expand its review to the entire record, there is no showing of any detriment to the Plaintiffs. While the Plaintiffs claim to be taxpayers of Charleston County, the record establishes that the bonds will not be the obligation of Charleston County or "give rise to a pecuniary liability of the County". Ordinance authorizing bonds, Section 3 (Affidavit of B. Craven, Clerk of Council).

The Plaintiffs argue in their Return that the Plaintiffs as "taxpayers and physicians in Charleston County believe that the issuance of the proposed bonds would illegally benefit their direct competitors in the medical profession". There is nothing in the record which substantiates any "illegal benefit" to a competitor of the Plaintiffs. On the contrary, the record fails to show that these Plaintiffs would be harmed in any way whatsoever by the issuance of these bonds. As a result, whether by virtue of the Plaintiff's Complaint or the record viewed as a whole, the Plaintiffs have failed to allege or establish standing to bring this action. As a result, this action must be dismissed for lack of standing.

2. THE PLAINTIFFS HAVE FAILED TO ESTABLISH THE EXISTENCE OF MATERIAL ISSUES OF FACT THAT WOULD ENTITLE THEM TO THE RELIEF DEMANDED IN THE COMPLAINT.

The Plaintiffs have brought this action after losing their effort to defeat the Bond Ordinance and Resolutions before Charleston County Council. County Council approved the bonds, and subsequently those bonds have been examined and approved

by the State Budget and Control Board. In essence, the Plaintiffs seek to have the vote by Charleston County Council overturned by this Court. This bond matter, like rezoning, is a legislative matter, and the Court has no power to void the action taken by County Council that is consistent with the Constitution and general law of South Carolina. Hospital Assoc. of S.C., Inc. v. County of Charleston, ____ S.C. ____, 464 S.E.2d 113, 117-18 (1995). See, Lenardis v. City of Greenville, 316 S.C. 471, 450 S.E.2d 597 (Ct. App. 1994).

The decision of the legislative body is presumptively valid. Id. The Plaintiffs seek to impugn the action taken by Charleston County Council by claiming one of its members had a conflict of interest.

First and foremost, a court cannot conceivably examine individual votes on every legislative matter that a citizen may not agree with. In Bear Enterprises v. The County of Greenville, 319 S.C. 137, 459 S.E.2d 883, 885 n.1. (Ct. App. 1995), the Court of Appeals noted that disgruntled property owners could not question individual council members on their votes in order to overturn Council's collective zoning decision.

> We are aware of no authority allowing someone challenging action by Council to interrogate members individually to impeach Council's decision. The governing body of a municipality acts as a collective body, not as individuals, and decisions made in this fashion are the product of debate and compromise. If individuals are not satisfied with decisions made by members of a municipal government within the limits of the law, their remedy is at the polls not the courts.

The same considerations hold true for the Plaintiffs' challenges to Charleston

County Council's legislative findings that the project meets the requirements of the Hospital Revenue Bond Act. Council has spoken and there is no room for this court to delve into the motives and interests by each council member regarding this controversy or any other action taken by County Council or other legislative body. Otherwise, disgruntled citizens would seek to analyze the votes of each public official on those issues with which they disagree in the courts, instead of at the ballot box.

The Ordinance in question was passed by Charleston County. To the extent that the Plaintiffs seek to go behind the collective action of council, they seek to use parol evidence to impeach the action by council. The courts of South Carolina have long recognized the "Enrolled Bill Rule", which was adopted after examining United States Supreme Court and other state court precedent.

> We announce that the true rule is that, when an act has been duly signed by the presiding officers of the general assembly, in open session in the senate and house, approved by the governor of the state, and duly deposited in the Office of the Secretary of the State, it is sufficient evidence, nothing to the contrary appearing upon its face, that it passed the general assembly and that it is not competent either by the journals of the two houses or either of them, or by any other evidence, to impeach such an act. And, this being so, it follows that the court is not at liberty to inquire into what the journals of the two houses may show as to the successive steps which may have been taken in the passage of the original bill. Hoover v. Chester, 39 S.C. 307, 17 S.E. 752, 755 (1893).

This same reasoning applies to the Plaintiffs' challenge to the Charleston County Ordinance. This is especially true after the advent of "home rule". Following years of debate, the South Carolina Constitution was amended and directed the South Carolina General Assembly to implement home rule by establishing the structure,

organization, powers, duties, functions and responsibilities of local governments by general law. (S.C. Constitution, Article VIII, §§ 7 and 9.) The grant of powers thus conferred on counties is limited only by the requirement that its Ordinances be consistent with the Constitution and general law of South Carolina.

Procedurally, this Court cannot go behind the Ordinance which states that the County Council enactment received three readings and was passed. To go behind this enactment by Charleston County Council would violate the same principles established in the "Enrolled Bill Rule" doctrine long recognized by South Carolina Courts. Indeed, this rule was adopted after considering the United States Supreme Court Opinion in Field v. Clark, 143 U.S. 649 (1892), which decided that "the signing by the speaker of the house of representatives and by the president of the senate,...of an enrolled bill is an official attestation by the two houses of such bill as that has passed congress; and when the bill, thus attested, receives the approval of the president and is deposited in the department of state, according to law, its authentication as a bill that has passed congress is complete and unimpeachable". Hoover v. Chester, supra, 170 S.E. at 754-55, citing with approval Field v. Clark, 143 U.S. 649 (1892).

Even if this Court were to consider the intermediate procedural aspects of the passing of this Ordinance, there is no allegation or proof of any alleged conflict on the part of those voting to pass the Ordinance after the third reading. The allegations of the Complaint fail to raise any questions as to the vote regarding the third reading of the Ordinance in question. The allegations focus on the votes taken after the second reading of the Bond Ordinance and significantly fail to raise any issues concerning the

vote following the third reading, which is the vote that approved the Bond Ordinance. South Carolina law requires that County Council take legislative action by Ordinance and that "all Ordinances shall be read at three public meetings of council on three separate days with an interval of not less than seven days between the second and third readings [emphasis added]". S.C. §4-9-120 (1976). Similar constitutional and statutory provisions have been interpreted to mean that a bill must be read three times but there is no requirement for a yea or nay vote on each reading. See, Brailsford v. Walker, 205 S.C. 228, 31 S.E.2d 385, 387 (1944). There is only the requirement for a vote after the third reading. As this Court observed at the hearing of this matter, the first two readings are for the public to ensure sufficient notice of council's impending actions and the third reading is for council to act upon the ordinance under consideration. There being no challenge to the vote following the third and only legally required vote on the Bond Ordinance in question, Plaintiffs have failed to state a cause of action upon which relief can be granted as established by the Plaintiff's Complaint. This fact is further established by a review of the entire record and the Ordinance itself, which states that the three readings were held and that the Ordinance passed after third reading. See, Ordinance passed and approved on third reading, December 31, 1996, as signed by the chair of Charleston County Council and attested to by Clerk of Charleston County Council. See, Ordinance 12/31/96 attached to Affidavit of B. Craven.

Moreover, a claim of a conflict of interest by the Plaintiffs as to one of the members of council is also not subject to review by this court as presented here.

South Carolina has empowered the State Ethics Commission to examine questions of conflicts of interest. See, South Carolina Code Section §8-13-320 (Cum. Supp. 1996.) Clearly, there is no provision for reversing a legislative body's enactment due to a claimed conflict of interest on the part of one of its members. The Ethics Act does not provide that any action taken by a public official which constitutes a conflict will make the enactment of legislation void or voidable. Of course, the individual public official is subject to the Commission's investigation as well as potential civil and criminal liability for any action taken. Nonetheless, this Court does not have the ability to go behind Council's vote to recalculate the votes taken by County Council in this matter.

As a further matter, the record fails to substantiate a conflict of interest on the part of councilman Dr. Charles Wallace. The record before this Court does not substantiate that Dr. Wallace had any "economic interest" in the bond issuance in question. In fact, the record establishes that his salary is in no way affected by the issuance of the bonds. Furthermore, Dr. Wallace's employer does not have an economic interest in the bonds, since it will not have an economic interest in the issuance of Hospital Revenue Bonds, which would be in any way distinct from that of the general public.

Even if MUSC as a state agency is assumed to be a "business" under the Ethics

Act,[4] no conflict has been shown here.[5] S. C. Code §8-13-700(B) (Cum. Supp. 1996) provides in part:

> No public official, public member, or public employee may make, participate in making, or in any way attempt to use his office, membership, or employment to influence a governmental decision in which he, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated has an economic interest..."

South Carolina Code §8-13-100(11) defines the term "economic interest" to mean an interest distinct from that of the general public in a purchase, sale, lease, contract, option or other transaction or arrangement involving property or services in which a public official, public member or public employee may gain economic benefit of $50.00 or more. The definition does not prohibit a public official, public member or public employee from participating in, voting on, or influencing or attempting to influence an official decision, if the only economic interest or reasonably foreseeable benefit that may accrue to the public official, public member, or public employee is

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[4]Clearly, a state or its agencies are not "businesses" in the traditional sense. Whether they are a "business" under the Ethics Act need not be decided at this time, since this Court has determined there is no economic benefit to MUSC that is in any way different from the general public.

[5]The record demonstrates that the Ethics Commission was requested to give an informal opinion as to whether Dr. Wallace could vote on the bonds. (Complaint, Paragraph 20 and Defendant's Answer admitting same, Paragraph 14.) An informal opinion has no weight before the Ethics Commission, and this Court will similarly disregard such an informal opinion of the Ethics Commissions' legal counsel. Furthermore, the opinion given appears to have been based on advice to avoid even the appearance of impropriety. (Answer, Paragraph 15.) This is clearly not a finding of impropriety or a conflict of interest. Also, it is in the form of an informal opinion by the Ethics Commission's legal counsel, which has no precedential value on the Ethics Commission and, therefore, should be treated the same in these proceedings.

incidental to the public officials, public members, public employees' position or which accrues to the public official, public member or public employee, as a member of the profession, occupation or large class to no greater extent than the economic interest or potential benefit which could reasonably be foreseen to accrue to all other members of the profession, occupation or large class.

The record establishes no benefit to Dr. Wallace and no benefit to MUSC that is in any way different from the general public. On the contrary, the record before this Court establishes that the bonds were authorized for the exact purposes intended, and that is to benefit the citizens of the State by providing hospital facilities at a lower cost to those utilizing those facilities. Additionally, it is in the general public's interest to lower facility costs to support MUSC's mission to educate and train medical practitioners in South Carolina and to provide medical services to the general public and citizens of South Carolina.

The Plaintiffs also claim that UMA is not a "hospital agency" or a "public agency" required for it to qualify as an entity to enter into agreements for tax exempt bonds. First, the Ordinance, as well as the State Budget & Control Board found that UMA did so qualify. Again, this legislative, as well as regulatory, determination, by county council should be given great deference. Moreover, the record, at a minimum, establishes that UMA is a non-profit corporation formed to support the teaching, research, and service missions of MUSC (Gallager Affidavit, Paragraph 7). The Hospital Revenue Bond Act provides that counties may enter into agreements with a "hospital agency" or "public agency" for the issuance of tax-exempt bonds. S.C.

Code §-7-14309(e) and (j) (Cum. Supp. 1996) and S.C. Code §44-7-1440 et seq. (1976). "Hospital agency" includes "any corporation...whether for profit or not for profit, existing or created at any time and empowered to acquire, by lease or otherwise, operate and maintain hospital facilities". Id. Based upon the record before this Court, there is nothing to indicate UMA fails to qualify as such an entity to participate in the issuance of the bonds in question. UMA is a faculty practice plan as contemplated by state law and as applied by the courts of this State. See, S.C. Code §59-101-195 and 197 (Cum. Supp. 1996) and as held in Proveaux v. Medical University of South Carolina, ____ S.C. ____, 482 S.E.2d 774 (1997); and Higgins v. Medical University of South Carolina, ____ S.C. ____, 486 S.E. 2d 269 (Ct. App. 1997).

As a result, there is nothing in the record to indicate that UMA is not a proper and capable entity for participating in the issuance of the tax-exempt bonds as has been determined by Charleston County Council and the State Budget and Control Board, and the Defendant is entitled to summary judgment on this claim.

The Plaintiffs also claim that UMA is engaged in the unlawful practice of clinical medicine. Again, nothing presented in this case establishes any illegality by UMA. UMA has been recognized as the billing and collection agent for the MUSC faculty. See, Proveaux v. MUSC, supra, and Higgins v. MUSC, supra. Alternatively, any alleged illegal activities must necessarily be directed at UMA and not alleged as against the County of Charleston. For the purposes of this case, UMA has been established to be an appropriate "hospital agency" or "public agency" to participate

in the issuance of tax-exempt bonds under the Hospital Revenue Bond Act. This has been the finding of Charleston County Council, and the record before this Court fails to substantiate any claim of illegal activity on the part of UMA. As a result, the Defendant is entitled to Summary Judgment as to this claim as well.

3. THE PLAINTIFFS HAVE FAILED TO FULFILL THE STATUTORY CONDITIONS PRECEDENT TO FILING THIS LAWSUIT:

Plaintiffs have failed to comply with the requirements of South Carolina Code §15-77-20 which states:

> No suit shall be filed nor shall any pending suit be prosecuted in any court of this State affecting the issuance or sale of any state security, certificate of indebtedness or bond the intent or effect of which is to prevent, delay or affect the sale or other disposition thereof or which would have this effect unless and until the plaintiff in such action shall make application to the circuit judge presiding in the circuit in which the action is brought... for leave to bring or prosecute such action and shall convince such judge or justice of the merit in such action or proceeding. Such suit shall not then be filed or prosecuted unless and until the plaintiff shall file in such court a bond in such amount as will adequately protect the State against loss, damage, injury and costs in an amount of not less than twenty-five thousand dollars, subscribed by a duly licensed surety company or secured by the deposit of a like amount in cash, conditioned to pay all loss, damage, injury and costs, including attorney's fees, which the State may sustain in any such action. And before any such action shall be commenced at least ten days' notice thereof, together with a copy of the proposed complaint, shall be given to the Governor and State Treasurer, so as to afford them an opportunity to appear before the judge or justice in opposition to the filing of the suit and to be heard upon the amount of the bond to be required.

The South Carolina Supreme Court has previously upheld the right of the Legislature to declare as a matter of public policy the conditions upon which suits affecting the issuance and sale of any state security may be brought. Williamson v. Richards, 158 S.C. 534, 155 S.E. 890, 895 (1930). [Upholding 1930 version of the

Statute which is almost identical to the present one. Compare South Carolina Code §15-77-20 (1976) to Act. No. 709; 1930 (36) 1221.] Moreover, the South Carolina Supreme Court has held that the failure to comply with these conditions is fatal and subject to dismissal by the Circuit Court. Id.

Charleston County is a division of the State of South Carolina. South Carolina Constitution, Article X, Section 14 and South Carolina Code §4-1-10 (1976). (See also, Complaint, Paragraph 2 and Answer admitting same, Paragraph 3.) This lawsuit affects the sale of a security by this political subdivision of the State of South Carolina, as secured by UMA, a component unit of MUSC.

UMA is a component unit of MUSC, which is a governmental entity and part of the primary government of the State of South Carolina. MUSC is a state agency with the mission to educate medical practitioners in the State of South Carolina. In performing its mission, MUSC's doctors provide clinical services which are billed and collected through UMA. UMA is a non-profit corporation formed as a billing and collecting agent for the clinical practice of medicine by faculty members at MUSC. See, Proveaux v. Medical University of South Carolina, ___ S.C. ____, 482 S.E.2d 774 (1997). In Proveaux, supra, the South Carolina Supreme Court found that a MUSC faculty member who received compensation checks from MUSC and UMA for his clinical work was covered by the Tort Claims Act General Immunity, since he was acting within the scope of his official duty. See also, Higgins v. Medical University of South Carolina, et al., ___ S.C. ___, 486 S.E.2d 269, 274, (Ct.App. 1997). The General Assembly has specifically required that any remuneration for physicians or

other employees of a medical school of the State of South Carolina shall be approved in advance by the MUSC President or the Board of Trustees. "All compensation must be approved by someone other than the recipient thereof. Compensation shall include all remuneration obtained, through a professional service organization or otherwise, with the use of state owned facilities, equipment or supplies." See, S.C. Code §59-101-195 (Cum. Supp. 1996). Moreover, UMA is an affiliate of The Medical University of South Carolina as defined by South Carolina Code §59-101-197 (Cum. Supp. 1996).

The Plaintiffs argue that they do not need to comply with South Carolina Code §15-77-20 (1976), because the Bonds in question are not "state" securities. Yet, the Plaintiffs fail to address the fact that this lawsuit will affect the loan obligation and pledge of revenue by UMA to Charleston County which is the heart of this bond transaction. Thus, the state security or certificate of indebtedness to the County of Charleston, a political subdivision of the State of South Carolina, is affected thereby triggering the applicability of this Statute.

The Plaintiffs claim that they need only follow the requirements of the Hospital Revenue Bond Act, which states: "any interested party within twenty days after the date of the publication of the Notice, but not afterwards, may challenge the action so taken by the state board, the county board or the Department of Health & Environmental Control by action de novo in the Court of Common Pleas in any county where the hospital facilities are to be located". [Emphasis added.] S.C. Code §44-7-1590 (Cum. Supp. 1996). Action de novo means filing a lawsuit pursuant to the

statutory rules as may be applicable under Title 15 of the South Carolina Code and also pursuant to the South Carolina Rules of Civil Procedure. The Plaintiffs do not challenge the applicability of the Rules of Civil Procedure. Given the nature of this lawsuit affecting the issuance of a state obligation, the Plaintiffs must also comply with the requirement of South Carolina Code §15-77-20, which sets forth the conditions for filing such a lawsuit or action. The Hospital Revenue Bond Act does not attempt to set forth the procedural steps for filing an "action". These requirements are set forth in other sections of the South Carolina Code. The Plaintiffs understood that an action meant one involving a Summons and Complaint and service of process, even though the Hospital Revenue Bond Act does not explicitly provide for such. Chapter 77 of Title 15 of the South Carolina Code is entitled "Suits Involving State, State Agencies and Officials and United States". Under South Carolina Code §15-77-20, "no suit shall be filed nor shall any pending suit be prosecuted in any court of this state affecting the issuance and sale of any state security, certificate of indebtedness or bond the intent or effect of which is to prevent the sale or other disposition thereof, or which would have this effect..." Under the present record, the underlying lawsuit is subject to this Statute. Unquestionably, the Plaintiffs have failed to fulfill the requirements of this Statute and, therefore, this action must be dismissed on this basis as well.

Furthermore, it does not matter whether the failure to comply with South Carolina Code §15-77-20 (1976) is a procedural question or jurisdictional, since the outcome is the same. (Compare Googe v. Speaks, 194 S.C. 206, 9 S.E.2d 439

(1940) (the exclusivity of the Workers' Compensation Act is a "procedural" question, rather than a "jurisdictional question" with McSwain v. Shei, 304 S.C. 25, 402 S.E.2d 890 (1991) (exclusive "jurisdiction" over disputes between employees and employers for injuries lies within the Workers Compensation Commission). Whether viewed as a jurisdictional or procedural defect, the fact remains that this condition precedent to filing an action challenging the bonds in question was not taken and, therefore, this action cannot proceed as specifically provided by South Carolina Code §15-77-20 (1976).[6] The record establishes that none of the prerequisites for filing this action were met and, therefore, the Plaintiffs have failed to fulfill this procedural requirement. Consequently, Summary Judgment must be granted to the Defendant on this ground as well.

## CONCLUSION

Based on the foregoing, this Court finds that the Plaintiffs cannot proceed with this action as a matter of law. This Court finds that the record before it fails to establish the existence of a material issue of fact, which would entitle the Plaintiffs to proceed with this action for the relief demanded in the Complaint. Charleston County is hereby granted Summary Judgment on each of the claims asserted in the Complaint for the reasons expressed above, and the Complaint is hereby dismissed

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[6]The Defendants alternatively requested that this Court require a Bond for the continuation of this lawsuit, if the action was not dismissed at this stage, pursuant to S.C. Code §15-77-20 or pursuant to equitable principals based upon the Plaintiffs' equitable claim in this case seeking to enjoin Charleston County from issuing the bonds in question. Due to this dismissal, the Court need not decide that issue at this time.

with prejudice. Alternatively, this Court finds that the jurisdictional questions raised by the Defendant would likewise entitle the Defendant to a dismissal of this action.

AND IT IS SO ORDERED.

Daniel E. Martin, Sr.
Presiding Judge, Ninth Judicial Circuit

Charleston, South Carolina
October 23, 1997

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C. P. & G. S.
By
DEPUTY CLERK

CHAR:115809



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# EXHIBIT C

December 6, 2012 Order – John S. Rainey v. Nimrata Nikki R. Haley

# The Supreme Court of South Carolina

John S. Rainey, Appellant,

v.

Nimrata Nikki R. Haley, Respondent.

Appellate Case No. 2012-211048

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ORDER

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Appellant moves to strike a letter submitted by respondent to the Clerk of this Court regarding appellant's initial reply brief. Respondent has filed a brief in opposition to the motion to strike. Appellant has filed a reply to the return, requesting respondent's brief in opposition to the motion to strike also be stricken.

We grant appellant's request to strike the letter and the brief in opposition to the motion to strike. We find both are improper. In lieu of a letter, respondent should have filed a motion to strike appellant's initial reply brief. Instead, the improper letter resulted in appellant's motion to strike, which prompted an improper response from respondent. Respondent should have filed a return to the motion to strike, addressing the basis for the motion, not a full brief that includes argument on the merits of the underlying issue. Rule 240(e), SCACR.

However, we also strike appellant's initial reply brief. An appellant may not use a reply brief as a vehicle to argue issues not argued in the appellant's opening brief or raised in the respondent's brief. *Bochette v. Bochette*, 300 S.C. 109, 386 S.E.2d 475 (Ct. App. 1989). Because the separation of powers argument was not made in appellant's opening brief, and is not properly responsive to respondent's brief, it is hereby stricken.[1]

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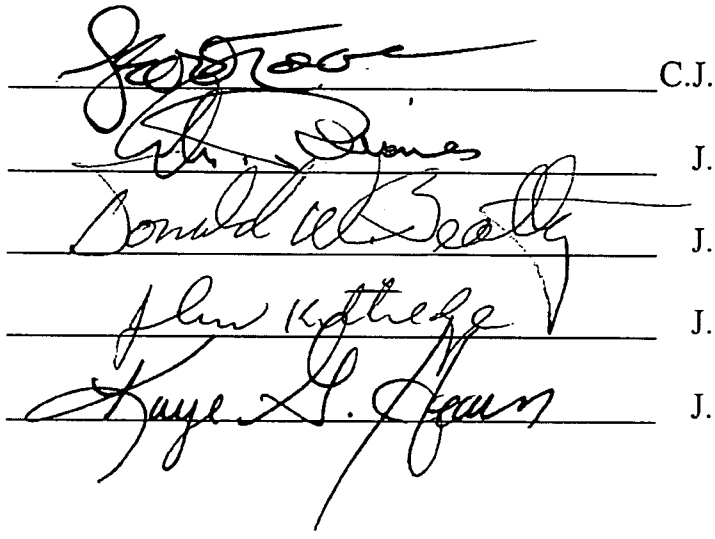
[1] While we realize subject matter jurisdiction can be raised at any time, *see Bardoon Prop., NV v. Eidolon Corp.*, 326 S.C. 166, 485 S.E.2d 371 (1997), and subject matter jurisdiction is the focal point of this appeal, the issue appellant seeks to raise for the first time pertains to the *validity* of the law upon which the circuit court relied in finding it lacked subject matter jurisdiction. Because appellant did not challenge the validity of the law on separation of powers grounds in

Appellant has also filed a motion to strike items four and nine from respondent's designation of matter to be included in the record on appeal. Respondent has filed a brief in opposition to the motion to strike,[2] and appellant has filed a reply. The motion is granted.[3] Rule 209(b), SCACR (a party may only designate materials that are properly included in the record on appeal); Rule 210, SCACR (the record on appeal shall not include matter not presented to the lower court). Appellant shall serve and file an amended record on appeal within twenty days of the date of this order.



C.J.

J.

J.

J.

J.

Columbia, South Carolina
December 6, 2012

cc:
Graham L. Newman
Kevin A. Hall

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the lower court, this Court, in deciding the subject matter jurisdiction issue, must determine if the circuit court erred in finding the law as it is written vests subject matter jurisdiction exclusively with executive and administrative tribunals or allows for the exercise of subject matter jurisdiction by the courts.

[2] We do not strike this brief because although entitled a brief, it is actually in the format of a return, not a brief, and does not include argument on extraneous matter.

[3] Again, while issues of subject matter jurisdiction can be raised at any time, and arguably documents can be submitted in support of the issue even if not submitted previously, the documents appellant seeks to have stricken are not relevant to the issue of subject matter jurisdiction.

M. David Scott
Karl Smith Bowers, Jr.
Richard A. Harpootlian
Christopher Phillip Kenney
Matthew Todd Carroll

# EXHIBIT D

South Carolina Commission on Ethics Reform – Final Recommendations

# South Carolina Commission on Ethics Reform


## FINAL RECOMMENDATIONS

Presented to the Governor and the General Assembly

January 28, 2013

# South Carolina Commission on Ethics Reform

On October 18, 2012, Governor Nikki R. Haley issued Executive Order 2012-09 creating the South Carolina Commission on Ethics Reform ("Commission") for the purpose of providing "a comprehensive review and update of current ethics and open records laws by an independent, objective and bipartisan group of experienced individuals." The Commission was directed to request and evaluate written recommendations from the public, to include citizens; public interest groups; state and local government agencies, officials, and employees; the State Ethics Commission; and the legislative ethics committees. Consistent with the requirements of Executive Order 2012-09, this written report is provided to the Governor, the General Assembly, and most importantly, the citizens of South Carolina.

The following individuals served as members of the Commission: Henry McMaster, Esq. and Travis Medlock, Esq. as Co-Chairmen, Dean Charles Bierbauer, Benjamin Hagood, Esq., Mr. Flynn Harrell, C. Kelly Jackson, Esq., Ms. Monica Key, Susi McWilliams, Esq., Mr. Bill Rogers, John Simmons, Esq., and F. Xavier Starkes, Esq. James Burns, Esq. served as counsel to the Commission, and Professor John Simpkins served as a legal expert to the Commission.

In carrying out its mission, the Commission held five (5) public meetings, to include three (3) public hearings, and accepted oral testimony and written recommendations from members of the public, government officials, and public interest groups. In order to investigate, research, and develop the Commission's recommendations, the Commission was divided into three (3) sub-committees to address the following topic areas: a) Ethics/Conflicts of Interest/Campaign Finance; b) Ethics Enforcement; and c) FOIA/Open Records. In addition to research related to specific recommendations, the Commission also researched the ethics laws and open records laws of the forty-nine (49) other states. Importantly, the Commission acknowledges that the members of by the Unified Judicial System are governed by the Supreme Court of South Carolina pursuant to the South Carolina Constitution. This comprehensive report including the list of recommendations is the product of the Commission's work.

The Commission acknowledges the valuable contributions and recommendations of many individuals and groups including: numerous interested South Carolina citizens; Governor Nikki Haley; Attorney General Alan Wilson; m embers of the General Assembly; State Inspector General Patrick J. Maley, the State Ethics Commission; Common Cause of South Carolina; Dr. Thomas B. Higerd; th e League of Women Voters of South Carolina; the Municipal Association of South Carolina; former Senator Mike Rose; the S.C. Association of Counties; the S.C. Association of School Administrators; the S.C. Law Enforcement Officers' Association; the S.C. Pol icy Council; the S.C. Progressive Network; the S.C. School Boards Association; Mr. Trey Walker, Director of State Relations for the University of South Carolina.

Over twenty years have passed since our General Assembly addressed comprehensive ethics reform. The time is upon us again. Our state is positioned for great prosperity and success. But to achieve this, our people must have confidence in, and respect for, their institutions, including our government at all levels. Our recommendations are offered to tha t end.

This report does not address every change and improvement which must be made. Rather, in the time and scope of our Commission, we sought to identify those areas which need immediate attention as well as some which would stimulate the further examin ation of broad categories of needed change. The work of ethics reform is never over. We hope that our efforts will inform and encourage the insights and enthusiasm of others committed to the vision of South Carolina as the best place to be.

We thank Governor Haley for giving us the opportunity to serve our great State, of which we are deeply proud.

Henry McMaster
Co-Chairman

Travis Medlock
Co-Chairman

January 28, 2013

## ETHICS/CONFLICTS OF INTEREST AND CAMPAIGN DISCLOSURE SUBCOMMITTEE

**RECOMMENDATION 1:** Revise statutory language governing the filing of the Statement of Economic Interests for non-incumbent candidates. The S.C. Ethics Reform Commission recommends, at a minimum, that the General Assembly amend S.C. Code Ann. § 8-13-1356(B) to provide:

*"A candidate must electronically file a statement of economic interests with the state ethics Commission for the preceding calendar year prior to filing a declaration of candidacy or petition for nomination."*

**ISSUE:** The current statutory language in S.C. Code Ann. § 8-13-1356(B) created immense confusion regarding how candidates (not incumbents) were to file a Statement of Economic Interests in light of the mandatory electronic filing with the State Ethics Commission. During the 2012 election cycle, hundreds of individuals were removed from primary elections due to confusion of the specific statutory requirements for filing a Statement of Economic Interests. The statute currently requires the candidate to file the statement of economic interest with the same official with whom the candidate files a declaration of candidacy or petition for nomination. The proposed statutory change should eliminate confusion over the filing of a paper versus an electronic copy of a candidate's Statement of Economic Interests during an election cycle by centralizing the filing of all statements of economic interest with the State Ethics Commission. This recommendation has broad support among those individuals holding office currently, the State Ethics Commission, and relevant non-governmental entities. There should also be a mechanism by which officials of the political parties can verify that such action has been taken.

**RECOMMENDATION 2:** Currently, all public officials must disclose in his or her State of Economic Interests his own income and that of his "immediate family members" from public (government) sources. "Immediate family member" is defined as his or her spouse and dependent children living in the public official's household. A public official must report the source and the amount of these taxpayer funds he receives.

The Commission recommends that all public officials should also disclose all private sources of income. The disclosure must include the name and address of the income source, and the nature of the goods or services provided for that income. Income to a business which is owned in whole or in part by the public official is deemed to be income to him.

As to the private sources of income, the Commission recommends that all public officials also report the amount of the income if : 1) the source or a lobbyist on its behalf has sought or

will seek official action by the public official, the public official's office or the governmental entity upon or in which the public official serves; or 2) the source or will be subject to regulation by the public official, the public official's office, or the public official's governmental entity; or 3) the source has or will have any contractual or financial relationship with the public official in his official capacity, the public official's office, or the public official's governmental entity.

For example, a member of a city council, county council, or a member of the General Assembly must report the amount of income from a company (lobbyist's principal) which employs a lobbyist for communication with the public official's governmental entity; a mayor's spouse must report the amount of income from a company having business before the mayor or the city council; a member of the school board must report the amount of any income he receives from a company which has a contract with the school district. Therefore, public officials must disclose specific amounts of income provided by lobbyist's principals, and public officials must disclose specific amounts of income provided by businesses that have contracts with or are regulated by the government.

The following table illustrates the recommended disclosures:

| Individual | Income Source Disclosure | Specific Income Amounts Disclosed |
|---|---|---|
| Public Official (as that term is defined by the Ethics Reform Act) | All sources of income:<br><br>-Public sources<br><br>-Private sources<br><br>-Lobbyist's principals<br><br>-Businesses with government contract and associated relationship with public official | -Income from any public source or government entity<br><br>-Income from any lobbyist's principal<br><br>-Income from a business with government contracts and associated with the public official |
| Public Official's Immediate Family Member | All sources of income:<br><br>-Public sources<br><br>-Private sources<br><br>-Lobbyist's principals<br><br>-Businesses with government contract and associated relationship with public official | -Income from any public source or government entity<br><br>-Income from any lobbyist's principal<br><br>-Income from a business with government contracts and associated with the public official |
| Public Member (as that term is defined by the Ethics Reform Act) | All sources of income:<br><br>-Public sources<br><br>-Private sources<br><br>-Lobbyist's principals<br><br>-Businesses with government contract and associated relationship with public member | -Income from any public source or government entity<br><br>-Income from any lobbyist's principal<br><br>-Income from a business with government contracts and associated with the public member |

**ISSUE:** S.C. Rules of Conduct provide: "A public official, public member, or public employee may not knowingly use his official office, membership, or employment to influence a government decision to obtain an economic interest for himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated." While the Commission cannot identify every possible situation which may lead to a conflict of

interest, this recommendation seeks to support the rule that an individual may not use his public office for private gain. Disclosure of sources of income by public officials, their spouses, and dependent children will promote transparency and prevent conflicts of interest so that when a public official casts a vote or takes official action, the public will have a way to determine whether that public official may profit from the official action taken. Where a public official or spouse has an occupation which implicates client-confidentiality issues, the source of income could be identified by categories, e.g., "worker's compensation clients" rather than individual clients.

The Commission debated at length whether to require disclosure of all income either by total amounts received or disclosure of total amounts by income brackets. We note that federal officials and their spouses must report all sources of income.

We believe that reporting of income and amounts is important to full disclosure of the public official's interests and the potential for actual or perceived conflicts of interest. However, we are also concerned about the financial privacy of public officials and family members, especially since the Ethics Reform Act applies not only to full time state officials and part-time legislators, but also to numerous members of state boards and commissions and local governing bodies. We are concerned that unwarranted invasion into financial privacy will discourage participation in public service. The Commission believes that this recommendation achieves the appropriate balance between these important conflicting considerations.

*Exhibit A provides background information related to income disclosure laws in other states.*

**RECOMMENDATION 3:** Revise the Statement of Economic Interests filed by all public officials to require the disclosure of all fiduciary positions held, whether compensated or uncompensated, to include the name of the entity, title of position, the date the position was assumed, and a brief description of the duties performed. This disclosure requirement would not apply to religious, social, fraternal, or political entities to which a public official belongs.

**ISSUE:** Like the financial disclosures in Recommendation # 2, disclosures of positions held by a public official will promote public confidence in the ethical decision-making of those elected officials who also hold certain fiduciary positions.

**RECOMMENDATION 4:** Currently, S.C. Code Ann. § 8-13-745(A) provides that a legislator or an individual or business with whom the legislator is associated cannot represent a client for a fee before of a governing body of a state agency, commission board, department,

or other entity ("State Board") if the legislator has voted in an election, appointment, recommendation, or confirmation of a member of the State Board. The Commission recommends enlarging this prohibition to include "influencing in any way" the process, as well as voting in it. "Influencing in any way" should be defined to include: voting at any committee or subcommittee level; making recommendations or speaking informally to those legislative colleagues who will be voting; and making recommendations or speaking informally to the executive official or legislative colleague who makes the initial appointment.

**ISSUE:** The current ethics law and this recommendation seek to prevent or disclose conflicts of interest and improper influence by legislators without creating overly-broad prohibitions which could penalize practicing lawyers or any potential legislator from serving as a member of the General Assembly.

**RECOMMENDATION 5:** Under S.C. Code Ann. § 8-13-745(A), a legislator who votes to elect, appoint, recommend, or confirm an individual to a state agency, commission board, department, or other entity ("State Board") cannot represent a client for a fee in a contested case before that State Board for a period of twelve (12) months after casting his vote for that individual. We recommend extending this period to twenty-four (24) months.

**ISSUE:** Lengthening that period of recusal from twelve (12) to twenty-four (24) months will reduce the likelihood of an actual or apparent conflict of interest.

**RECOMMENDATION 6:** S.C. Code Ann. § 8-13-740 permits legislators to appear before governmental entities, to include state agencies and commissions, a court of the Unified Judicial system, or contested cases so long as: 1) the decisions of the governmental entity are ultimately subject to review in court or by contested case hearing; and 2) the legislator does not vote or influence the budget for the governmental entity. It should be revised for clarification.

**ISSUE:** We recommend it should expressly allow representation and providing advice on matters prior to an appearance before the tribunal. This revision will clarify the boundaries of a legislator's ability to represent clients for a fee before governmental entities.

**RECOMMENDATION 7:** Legislators should report on their Statement of Economic Interests professional fees to themselves or their firms for handling judicial cases where a state agency is an opposing party.

**ISSUE:** S.C. Code Ann. § 8-13-740(B) already requires legislators to report on their Statement of Economic Interests: 1) any fees that the legislators or their firms earn for appearing before a state agency in a contested case; and 2) the nature of such contacts that were made in the earning of the fees. No disclosure is currently required where the state agency is the opposing party. Our recommendation would require legislators to disclose fees where the state agency is an opposing party. We would also expand current disclosure to include fees earned prior to an actual court appearance or the commencement of the action, such as contact with the agency staff.

**RECOMMENDATION 8:** Revise S.C. Code Ann. § 8-13-1300(6) to provide as follows:

> (6) The term "committee" means a combination of two or more individuals, such as any person, committee, association, organization, or other entity that makes or accepts anything of value to make, contributions or expenditures and has one or more of the following characteristics:
>
> A. Is controlled by a candidate;
>
> B. Is a political party or executive committee of a political party or is controlled by a political party or executive committee of a political party; or
>
> C. Has the major purpose to support or oppose the nomination or election of one or more clearly identified candidates. Supporting or opposing the election of clearly identified candidates includes supporting or opposing the candidates of a clearly identified political party.
>
> If the entity qualifies as a "committee" under sub-subdivision A, B, or C of this subdivision, it continues to be a committee if it receives contributions or makes expenditures or maintains assets or liabilities. A committee ceases to exist when it winds up its operations, disposes of its assets, and files its final report. The term "committee" includes the campaign of a candidate who serves as his or her own treasurer.

**ISSUE:** Our current ethics law's definition of "committee" has been found unconstitutional and, thus, unenforceable by two different federal district courts because it is too broad: it

purports to impose the reporting and other regulatory requirements of the State Ethics Commission on all political committees, rather than limiting these requirements to those committees which have as the major purpose, as opposed to a major purpose, the support or opposition of the nomination or election of one or more clearly identified candidates. Thus, various "committees" have been able to participate in our elections without identifying themselves or their contributors. Our revision mirrors the North Carolina's ethics law which has been held constitutional by the Fourth Circuit Court of Appeals, which also governs federal appeals from South Carolina. Revising the definition of "committee" corrects this defect which currently exists. Such "committees" would be required to register with the State Ethics Commission. This statutory change will shed light on "committees" inside and outside South Carolina which seek to influence an election. This was the original goal of our current legislation.

*See Appendix 1 for further legal analysis.*

**RECOMMENDATION 9:** Abolish "Leadership Political Action Committees."

**ISSUE:** Numerous individuals and groups who commented on ethics reform before this Commission expressed concern about the existence of so-called "leadership PACs." "Leadership PACs" can circumvent the contribution limitations by allowing donors to contribute to candidates and also to "Leadership PACs" which then make direct contributions to the candidates. Additionally, these "Leadership PACs" may create the public perception that financial contributions by interested parties are necessary to establish good relationships with the legislature or its leaders. Existing law already prohibits a legislator from receiving a campaign contribution directly or indirectly from a registered lobbyist (S.C. Code Ann. § 8-13-1314(3)). The Senate has banned "Leadership PACs" by rule. We recommend that "Leadership PACs" in both the House and the Senate be abolished by law. The Commission further recommends that S.C. Code Ann. § 8-13-1314 be reviewed to assess the adequacy of contribution limits which have remained unchanged since 1992.

**RECOMMENDATION 10:** Amend Proviso 89.25 governing the use of State-owned aircraft in two respects for clarity. First, official business for purposes of use of State-owned aircraft should include bill signings, press conferences, and any activity in furtherance of the public official's official duties and responsibilities. Second, delete the words "is prima facie evidence of a violation of Section 8-13-700(A) of the 1976 Code" from Proviso 89.25. The language referenced above should be codified rather than included in a Budget Proviso because it has a permanent effect and will be more accessible in the Code of Laws.

**ISSUE:** We believe that the use of State-owned aircraft by government officials for official business such as bill signings and press conferences held in the communities affected by them has legitimate, positive aspects, such as promoting a sense of community. However, it is critical that those government resources be used strictly for activities in furtherance of the individual's official duties. The deletion of the language regarding "prima facie evidence of a violation" ensures that the accused official receives the same due process under the procedures of the State Ethics Commission as under other alleged violations.

Further, there is no legislative definition or clear determination regarding the meaning of "official business" for which state-owned aircraft is authorized. For this reason, controversies have occurred over such questions as flights commencing or ending at non-official locations and the propriety of personal "legs" of an otherwise official business flight. Future opinions by the State Ethics Commission recommended in this report based on a clear definition could help resolve this uncertainty.

**RECOMMENDATION 11:** Add a new provision to Title 8, Chapter 13, Article 7 that excludes from the provisions of S.C. Code Ann. § 8-13-700 (use of official position for financial gain), § 8-13-710 (reporting of gifts by public employees), § 8-13-715 (prohibition of honorarium for speaking engagements of public officials), and § 8-13-755 (public employee not permitted to have economic interest in contracts) those public employees of institutions of higher education who are participating in the development of intellectual property that benefits the institution and the State of South Carolina—even if it also benefits an individual public employee—where the institution retains some royalty rights to the intellectual property.

**ISSUE:** Certain employees of institutions of higher education, such as MUSC, USC, and Clemson, participate in the development of intellectual property and the growth of the state's knowledge-based economy through state authorized programs such as the SC SmartState and SC Launch. Typically, university policy or other intellectual property agreements allow a sharing of the intellectual property rights, including royalty revenue, between the university and the public employee-inventor. These arrangements provide individual incentive to the public employee-inventor; help recruit national intellectual capital to the university; return financial benefits to the university's investment in personnel, equipment and programming; and invigorate the state's economy. Frequently, private sector partners, such as drug manufacturers, BMW, and other corporate partners, will contribute funding and equipment to the entrepreneurial activity. The unintended effect of the broad application of the S.C. Ethics Reform Act to all public employees, public employee-inventors and entrepreneurial faculty puts them in vulnerable legal positions, and thwarts the development of the state's knowledge-based economy. The requirement that the exemption apply only where the state institution

retains some rights to the intellectual property should prevent abuse of the exception to promote purely private endeavors.

**RECOMMENDATION 12:** Revise S.C. Code Ann. §§ 2-17-10(12), (13), and (20) so as to define "lobbying" and "lobbyist" to include individuals who lobby not only the General Assembly, Offices of the Governor and Lieutenant Governor, state agencies, boards and commissions, but also any political subdivision of the State, to include counties, city councils, municipalities, school districts, and special purpose or public service districts. The registration fee for lobbyists and lobbyists' principals should be increased from the current level of $100.00 per year.

**ISSUE:** Lobbying occurs at virtually every level of government, but lobbyists are only required to register with the State Ethics Commission when they have direct communication with the highest levels of state government (Office of the Governor, Office of the Lieutenant Governor, statewide constitutional officers, the General Assembly, and state agencies, boards, or commissions). Currently, lobbyists and lobbyist's principals are not required to register if they are lobbying political subdivisions of the state. Transparency should exist at all levels of government, and to the extent that local governments are being lobbied, these activities should be known to the public. Moreover, recommendations in this report reflect a need to increase resources for the State Ethics Commission. By increasing the registration fee for lobbyists, the need to appropriate additional state funds could be lessened. Lobbying fees need not be the same, a variety of factors could determine their calculation.

## ETHICS ENFORCEMENT SUBCOMMITTEE

**RECOMMENDATION 13:** A criminal investigatory team with members from the South Carolina Law Enforcement Division, Department of Revenue, Office of the Inspector General and the State Ethics Commission, with attorneys from the Attorney General's Office should be created and authorized by statute to investigate allegations of criminal public corruption for prosecution.

**ISSUE:** Most ethics cases would be investigated and resolved by the enhanced State Ethics Commission described later in this report without the participation of the Public Integrity Unit. However, those ethics commission investigations which develop serious criminal allegations would benefit from the availability of the Public Integrity Unit. The State Ethics Commission could refer appropriate cases to the Attorney General for his consideration, including consideration by the Public Integrity Unit. The Attorney General would determine whether to proceed criminally and if so, whether regular investigative procedures would be adequate. If those procedures are not adequate, the Attorney General could seek State Grand Jury authorization since public corruption is within the State Grand Jury's jurisdiction.

Creation of the Public Integrity Unit would bring a strong law enforcement team to address public corruption cases, including those presenting serious ethics violations. Any legislation passed to establish the Public Integrity Unit should address the resources necessary to perform its work. Importantly, all partner agencies of the Public Integrity Unit would share information in furtherance of the Public Integrity Unit's mission.

**RECOMMENDATION 14:** Revise the statutory language governing the State Ethics Commission to give it the authority and jurisdiction to investigate and take appropriate action, where necessary, against members of the legislative branch. Jurisdiction currently exists for all other public officials, except judges: Under the South Carolina Constitution, the Supreme Court of South Carolina promulgates requirements for investigations of members of the Unified Judicial System. This revision would not abolish the ethics committees of the House or Senate or impede their ability to discipline members for internal behavior, as granted in the South Carolina Constitution. It is further recommended that the composition of the State Ethics Commission be changed to eight members: four to be appointed by the General Assembly and four to be appointed by the Governor. The Commission suggests that members of the State Ethics Commission serve staggered terms of four years each. In addition, legislation to guarantee adequate and stable funding should be adopted to ensure that the operation and integrity of the State Ethics Commission could not be compromised. The State Ethics Commission should also institute a random audit procedure of filings, to include

Statements of Economic Interest and Campaign Disclosures, to insure compliance with the Ethics Reform Act.

**ISSUE:** The Commission received recommendations fr om numerous governmental and non-governmental entities through testimony and written submissions supporting the authority of an independent ethics body to examine potential violations by members of the General Assembly. We recommend expansion of the compos ition and jurisdiction of the State Ethics Commission to investigate and sanction potential violations by legislators. This can be achieved without constitutional implications by permitting the legislative bodies to continue self-governing issues of internal discipline of members. Allowing an equal number of appointments from the legislative and executive branches would remove the perception of investigative bias against either branch. The Commission notes that sitting members of either the executive or legislative branches should not be appointed to the State Ethics Commission. The Commission also recommends that a procedure be adopted to provide adequate and stable ongoing funding for the State Ethics Commission so that its integrity and viability will not be compromised.

We believe these changes would be consistent with the manner in which all of the ethics oversight bodies were created. The bodies currently charged with investigating ethics complaints against legislators, that is, the House Ethics Committee and the Senate Ethics Committee are established in Section 8 of the South Carolina Code of Laws. Removing Ethics Act jurisdiction should likewise be accomplished by statute. No separation of powers concerns should arise because the legislature, through the continued existence of the House and Senate Ethics Committees, would retain their vehicles through which the authority given to them by the South Carolina Constitution to discipline members for "disorderly behavior," and impose the sanction of suspension or expulsio n. Specifically, our state Constitution provides only that "each house may . . . punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member, but not a second time for the same cause." Therefore, the Commission doe s not believe a change to the South Carolina Constitution is required to give the State ethics Commission jurisdiction over members of the General Assembly.

In addition, employing statutory means to shift jurisdiction from the Senate and House Ethics Committees to the State Ethics Commission would be consistent with prevailing state practice. In the 40 states with state ethics commissions, 33 of the state comm issions have jurisdiction over the legislative branch of state government. Statutory change is the most common mechanism for establishing state commission jurisdiction over the legislative branch. Only 3 of the 36 states where statewide ethics commissions have authority over legislators have created their commissions through constitutional measures.

The enhanced State Ethics Commission can provide clarity to such perennial questions as what constitutes "personal use" and "ordinary and necessary expenses" r egarding the use of campaign funds and remove any inconsistencies that may exist between the decisions of the House and Senate Ethics Committees and the State Ethics Commission.

*Exhibit A provides background information related to state ethics commissions in other states. Also, see Appendices 2 and 3 for further legal analysis.*

**RECOMMENDATION 15:** Revise the statutory language to strengthen penalties for criminal violations of the S.C. Ethics Reform Act.

**ISSUE:** The Commission received recommendations by oral testimony and written recommendations from a number of governmental and non -governmental entities. While many of our ethics laws are aspirational in nature, it is necessary that penalties for violations of the ethics laws are sufficiently strong to serve as a deterrent. While we do not recommend any specific penalty, we recommend that a progressive scale of some kind be incorporated into the statutory scheme to help determine the appropriate penalty. The State Ethics Commission provided proposed statutory revisions, attached as *Exhibit B*, that the Commission believes addresses the points.

**RECOMMENDATION 16:** Revise the statutory language regarding the use of campaign funds to pay penalties resulting from a criminal prosecution of the S.C. Ethic s Reform Act. The Commission recommends amending S.C. Code Ann. § 8 -13-1348 as follows:

Section 8-13-1348(A) renumbered (A)(1) and the following subsections added:

(A)(2) Campaign funds may not be used to pay penalties resulting from a criminal prosecution.

**ISSUE:** Currently, the S.C. Ethics Reform Act permits violators to pay fees, civil and criminal penalties with campaign funds. The Commission believes that penalties resulting from criminal prosecution should not be paid with campaign funds unde r any circumstances.

**RECOMMENDATION 17:** The Commission recommends enhanced prosecutorial tools for use by solicitors and the Attorney General for addressing public corruption, including serious ethics violations, through the adoption of criminal statute s for mail fraud and wire fraud.

**ISSUE:** Federal prosecutors have long utilized mail and wire fraud statutes to address public corruption violations. Currently, South Carolina has no such statute, although several other states do including, Illinois, Florida, Mississippi and Utah. Adoption of such statutes would provide a strong enforcement tool in the criminal arena and serve as a strong deterrent, we believe.

**RECOMMENDATION 18:** The Commission recommends that S.C. Code Ann. §§ 8-27-10 et seq. be amended to its original 1988 version to protect state employees who report abuse, misuse, destruction, or loss of public funds or resources. Further, the Commission recommends that if an employee's report results in a net savings, the employee should be rewarded twenty-five percent (25%) of the net savings, up to $25,000.00.

**ISSUE:** The Employment Protection for Reports of Violations of State or Federal or Regulation Act, also known as the "Whistleblower Act," was passed and signed into law in 1988. One purpose of this Act is to reward state employees for identifying waste, fraud and abuse related to the use, or misuse, of public resources. Currently, if an employee makes a report related to abuse of government resources, the reward for such identification is limited to $2,000.00. In order for state employees to remain vigilant in identifying waste, fraud, and abuse, the reward should be significant enough to encourage employees to be forthcoming. The original Act also serves to protect those state employees from retribution for being forthcoming when they report abuse of public resources. Over the course of time, this Act has been weakened to the point where a whistleblower is not afforded the necessary protection that was included in the original Act. One of the best sources of transparency is a state employee identifying abuse, and that employee should be protected appropriately.

## FOIA/OPEN RECORDS SUBCOMMITTEE

**RECOMMENDATION 19:** Revise statutory language related to the time for fulfilling Freedom of Information Act ("FOIA") requests for public records. The Commission recommends the General Assembly amend S.C. Code Ann. § 30 -4-30(c) to provide for the following:

- Public bodies shall respond to requests for public information in no more than seven calendar days, indicating whether or not the reques t has been granted.
- If written notification is not received within seven days, the request must be considered as approved.
- If the request is granted or approved, the requested record must be made available no later than 30 days from the date of the original request if there is no charge, or if a deposit is received, then no later than 30 days after receipt of the deposit.
- If requested records are more than 24 months old, the public body may use no more than 45 calendar days to provide them.

**ISSUE:** Delay is one of the prime obstacles —and sometimes obstructions—to effective use of and respect for the Freedom of Information Act. The current act is really a two -stage process: a defined time to respond to a request indicating whether or not the request will be fulfilled, and an ill-defined time to actually meet that request. Revision would enhance "timely response" in the interest of the public. Listing all requirements in "calendar days" rather than "work days" would promote understanding by the publi c, as different entities may have differing work day definitions. The automatic online posting by government entities of minutes and materials can be effective in obviating the need for many FOIA requests. Digitized records can be more readily accessed, t ransferred and, if necessary, duplicated. Stored paper records, particularly those that may predate digitization and be stored offsite, may require additional time to obtain. Redaction is a necessary process that can consume time. However, it is incumbe nt upon government entities to have clearly assigned responsibilities for staff to process FOIA requests in a timely fashion.

*Exhibit A provides information on FOIA request and response times in other states.*

**RECOMMENDATION 20:** Revise statutory language related to the allowable charges for fulfilling Freedom of Information (FOIA) requests for public records. The Commission recommends the General Assembly amend S.C. Code Ann. § 30 -4-30(b) to provide for the following:

- Public bodies may establish fees con sistent with the actual cost of searching for and making copies of records.
- Fees should be charged to reflect the lowest copier rate available to the public body.

- Copy charges may not apply to records stored and transmitted in an electronic format. However, charges for conducting a search for records stored in an electronic format are acceptable.
- When search costs are recoverable, they should be charged at the hourly rate of compensation for the public body's lowest cost, qualified employee.
- Fees should not be charged for the review to determine if the documents are subject to disclosure.
- The number of hours for searches may be capped, depending on the complexity of the search.
- A deposit not to exceed 25% of the anticipated total cost for search and reproduction of the records should be required.

**ISSUE:** Exorbitant rates charged for searches and copying are as dysfunctional and disrespectful of the process as are voluminous requests that exceed reason. Current law is imprecise regarding charges for the time consumed in searching for or redacting documents. Governmental entities have employed various formulas for determining the cost of copying documents. Public bodies may, indeed, incur widely varying costs for copying, depending on the per page charges in copier contracts. The use of online posting of minutes and documents can minimize copying costs, though citizens without access to online technology retain a right to receive printed copies of requested documents.

**RECOMMENDATION 21:** Revise statutory language of the Freedom of Information Act (FOIA) to eliminate the current legislative exemption. The Commission also recommends that the General Assembly amend S.C. Code Ann. § 30-4-40(8) to allow for a legislative exemption for drafts of proposed legislation not yet introduced.

**ISSUE:** Legislators, whose responsibilities include creating FOIA laws, should exempt themselves from compliance with them. Recognizing the importance of confidentiality in the process of crafting legislation, the content of bills prior to their introduction should be protected from disclosure. Similarly, recognizing the importance of personal privacy, existing FOIA exemptions provide the necessary protection concerning constituent correspondence where disclosure might infringe on that privacy. All levels of government should be subject to the same statutory requirements regarding open records. Otherwise, the public trust suffers.

**RECOMMENDATION 22:** Revise statutory language of the Freedom of Information Act (FOIA) to create enforcement provisions. The Commission recommends the General Assembly amend S.C. Code Ann. § 30-40-100(b) to provide for the following:

- Establish a specific enforcement mechanism through the Administrative Law Court for the speedy resolution of disputes concerning FOIA requests and responses thereto.
- Allocate adequate resources (staffing/funds) for meaningful enforcement.
- Retain right of judicial appeal.

**ISSUE:** The current law lacks a way to ensure a timely resolution and enforcement. Without enforcement public access to the public information sought is not ensured. In addition, the governmental agency needs a mechanism to seek redress for requests that are proffered solely for reasons of harassment. While several options exist for creating an enforcement mechanism, the Administrative Law Court appears to be most feasible for South Carolina. Other approaches exist. Iowa has this year created the Iowa Public Information Board as an "enforcement agency to resolve complaints regarding violations of Iowa's Sunshine Laws." The authority of the Iowa board commences in mid-2013, so there is no track record of its effectiveness. The Administrative Law Court may require the allocation of resources to provide adequate staffing. Further, the Commission recommends a uniform and simplified pleading form for use by members of the public. It would still be requisite to have an appeals process at an appropriate level in the state judicial system.

**RECOMMENDATION 23:** Revise statutory language of the Freedom of Information Act (FOIA) to require that any organization supported in whole or in part by public funds or the entity's employees participate in the State Health Plan and/or State Retirement Plan should be considered a "public body" and subject to FOIA.

**ISSUE:** When an organization is supported in whole or in part by public funds to carry out its operations or its employees participate in the State Health Plan and State Retirement Plan, such organizations should be considered a public body for purposes of FOIA. The Commission believes that the public is entitled to know how its funds are used, to include participation in government programs meant solely for the use of government officials and employees. If the taxpayer is a source of funding for an organization, then the organization should be subject to FOIA. One example of such an organization would be one where the dues of its members are paid by public funds.

# EXHIBIT A - STATE COMPARISONS FOR ETHICS REFORM

| | | Other States | Current SC Law | SC Ethics Reform Commission Recommendations |
|---|---|---|---|---|
| ETHICS OVERSIGHT[1] | State Ethics Commission: Enforcement | 33 states have state commissions with investigative, adjudicatory, and/or other types of jurisdiction over the legislature. | SC is one of only six states where the state ethics commission has no jurisdiction over the legislature. | Grant the State Ethics Commission jurisdiction over the executive and legislative branches. |
| | State Ethics Commission: Appointment Power | 12 states allow multiple branches to independently appoint members to the state ethics commission. | SC is one of 22 states with hybrid types of appointments, including gubernatorial appointments with legislative confirmation. | Create new State Ethics Commission with appointments made by the Governor, Senate, and House. |
| CONFLICTS OF INTEREST[2] | Disclosure of Sources of Income | 47 states require some type of income disclosure of private and public sources. | SC is the ONLY state to require just one source of income to be disclosed: government income. | Revise SEI requirements to include all sources of income, both public and private, including the name and address of the source and the type of income (how the income was earned). |
| | Disclosure of Income Amounts | 11 states require the amount of income to be disclosed: five require the exact amount, and six require categorical amounts. | SC only requires the amount of government income to be disclosed. | Require amounts of income to be disclosed when that income is from a lobbyist principal and/or from a business that contracts with a governmental entity. |
| | Disclosure of Fiduciary Positions | 38 states require fiduciary positions to be disclosed. | SC does not require fiduciary positions to be disclosed. | Require fiduciary positions to be disclosed, whether compensated or uncompensated. |
| | Disclosure of Client Identification | 22 states require some types of client identification disclosure. | SC is one of only five states to only require client-lobbyists to be disclosed. | Require disclosure of professional or consulting services rendered to individual clients. |
| | Disclosure of Government Contracts | 27 states require some disclosure of government contracts, including government contracts with a spouse or immediate family member, with a business with which he/she is associated, and/or at all levels of government. | SC only requires disclosure of government contracts between the public official and the governmental entity for which he/she serves. | Require disclosure of amounts of income received by a public official, spouse, and/or business with which he/she associated that contract with any governmental entity. |
| TRANSPARENCY[3] | FOIA: Response Time | 34 states have a statutory time limit requiring at least an initial response within ten days. | SC is one of only three states with a statutory time limit of more than ten days for an initial response. | Reduce response time to seven calendar days for an initial response, and if approved, then 30 calendar days from the date of original request or if approved with a fee, then 30 calendar days after receipt of deposit. |
| | FOIA: Legislative Exemption | 35 states apply FOIA to the legislature in full. | SC is one of 15 states to exempt the legislature in whole or in part. | Remove the legislative exemption for FOIA to include all legislative records except for records regarding draft legislation. |

[1] National Conference of State Legislatures: "State Ethics Committees;" "Membership and Qualification for the State Ethics Commission;" and "State Ethics Oversight Agencies."
[2] National Conference of State Legislatures: "Personal Disclosure for State Legislators: Income Requirements;" and "Statutory Restrictions on Legislators Contracting with the State and Disclosure Requirements."
[3] Reporters Committee for Freedom of the Press: "Open Government Guide."
*NCSL identifies legislators rather than all public officials in its state-by-state research.

## EXHIBIT B

**SECTION 16-1-20.** Penalties for classes of felonies.

(A) A person convicted of classified offenses, must be imprisoned as follows:

(1) for a Class A felony, not more than thirty years;
(2) for a Class B felony, not more than twenty-five years;
(3) for a Class C felony, not more than twenty years;
(4) for a Class D felony, not more than fifteen years;
(5) for a Class E felony, not more than ten years;
(6) for a Class F felony, not more than five years;
(7) for a Class A misdemeanor, not more than three years;
(8) for a Class B misdemeanor, not more than two years;
(9) for a Class C misdemeanor, not more than one year.

**SECTION 16-13-230.** Breach of trust with fraudulent intent.

(A) A person committing a breach of trust with a fraudulent intention or a person who hires or counsels another person to commit a breach of trust with a fraudulent intention is guilty of larceny.

(B) A person who violates the provisions of this section is guilty of a:

(1) misdemeanor triable in magistrates court or municipal court, notwithstanding the provisions of Sections 22-3-540, 22-3-545, 22-3-550, and 14-25-65, if the amount is two thousand dollars or less. Upon conviction, the person must be fined not more than one thousand dollars, or imprisoned not more than thirty days;

(2) felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than five years if the amount is more than two thousand dollars but less than ten thousand dollars;
(3) felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years if the amount is ten thousand dollars or more.

**Section 8-13-700 (F)** In addition to the civil penalties provided for in Section 8-13-320(10)(l), a person who violates the provisions of this section is guilty of a:

(1) misdemeanor triable in magistrates court if the economic interest is one thousand dollars or less, and upon conviction, the person must be fined not more than one thousand dollars, or imprisoned not more than thirty days, or both;

(2) misdemeanor if the economic interest is more than one thousand dollars but less than ten thousand dollars, and upon conviction, the person must be fined not more th an five thousand dollars, or imprisoned not more than three years or both;

(3) felony if the economic interest is more than ten thousand dollars, and upon conviction, the person must be fined not more than ten thousand dollars, or imprisoned not more than ten years or both, and is permanently disqualified from being a public official, a public member or a public employee.

**Section 8-13-720(B)** In addition to the civil penalties provided for in Section 8 -13-320(10)(l), a person who violates the provisions of this section is guilty of a:

(1) misdemeanor triable in magistrates court if the amount solicited or received is one thousand dollars or less, and upon conviction, the person must be fined not more than one thousand dollars, or imprisoned not more than t hirty days, or both;

(2) misdemeanor if the amount solicited or received is more than one thousand dollars but less than ten thousand dollars, and upon conviction, the person must be fined not more than five thousand dollars, or imprisoned not more than t hree years or both;

(3) felony if the amount solicited or received is more than ten thousand dollars, and upon conviction, the person must be fined not more than ten thousand dollars, or imprisoned not more than ten years or both, and is permanently disqu alified from being a public official, a public member or a public employee.

**Section 8-13-725(A)(2)** In addition to the civil penalties provided for in Section 8 -13-320(10)(l), a person who violates the provisions of this section is guilty of a:

(1) misdemeanor triable in magistrates court if the economic interest is one thousand dollars or less, and upon conviction, the person must be fined not more than one thousand dollars, or imprisoned not more than thirty days, or both;

(2) misdemeanor if the econom ic interest is more than one thousand dollars but less than ten thousand dollars, and upon conviction, the person must be fined not more than five thousand dollars, or imprisoned not more than three years or both;

(3) felony if the economic interest is mo re than $10,000, and upon conviction, the person must be fined not more than ten thousand dollars, or imprisoned not more than ten years or both,

and is permanently disqualified from being a public official, a public member or a public employee.

**Section 8-13-1348(F)** In addition to the civil penalties provided for in Section 8-13-320(10)(l), a person who violates the provisions of this section is guilty of a:

(1) misdemeanor triable in magistrates court if the amount converted to personal use is five hundred dollars or less, and upon conviction, the person must be fined not more than one thousand dollars, or imprisoned not more than thirty days, or both;

(2) misdemeanor if the amount converted to personal use is more than five hundred dollars but less than five thousand dollars, and upon conviction, the person must be fined not more than five thousand dollars, or imprisoned not more than three years or both;

(3) felony if the amount converted to personal use is more than five thousand dollars, and upon conviction, the person must be fined not more than ten thousand dollars, or imprisoned not more than ten years or both, and is permanently disqualified from being a public official, a public member or a public employee.

## APPENDIX 1

## SOUTH CAROLINA ETHICS REFORM ACT DEFINITION OF "COMMITTEE"

This memorandum discusses current case law concerning the definition of "committee" in the South Carolina Ethics Act and proposes language to replace the current statutory definition, which has been held to be unconstitutional in two recent US District Court decisions.

### I. *South Carolina Citizens for Life, Inc., v. Krawcheck, et al.*

The opinion in *South Carolina Citizens for Life, Inc., v. Krawcheck, et al.*, 759 F.Supp.2d 708 (D.S.C.2010) (hereinafter "*Citizens for Life*"), provides the most extensive analysis of the use of the term "committee" in state and federal election law. The case arose from the activities of the National Right to Life Committee's South Carolina affiliate, plaintiff South Carolina Citizens for Life, which had previously distributed voter guides for state government elections and intended to do so again in 2006. Prior to the 2006 general election, plaintiff sought an advisory opinion from the South Carolina Ethics Commission regarding whether it was considered a "committee" for the purposes of the South Carolina Ethics Act and therefore subject to reporting obligations and other requirements. *Id.* at 711. After being informed by the State Ethics Commission that a formal advisory opinion could not be rendered until a post-election meeting of the Commission, plaintiffs brought an action against the Commission contending, among other claims, that the term "committee" as contained in the South Carolina Ethics Act was unconstitutionally overbroad. *Id.* The case was heard by US District Judge Terry Wooten.

The South Carolina Ethics Act defines a "committee" as:

> [A]n association, a club, an organization, or a group of persons which, to influence the outcome of an elective office, receives contributions or makes expenditures in excess of five hundred dollars in the aggregate during an election cycle. It also means a person who, to influence the outcome of an elective office, makes:
>
> (a) contributions aggregating at least twenty-five thousand dollars during an election cycle to or at the request of a candidate or a committee, or a combination of them; or
>
> (b) independent expenditures aggregating five hundred dollars or more during an election cycle for the election or defeat of a candidate.

> "Committee" includes a party committee, a legislative caucus committee, a noncandidate committee, or a committee that is not a campaign committee for a candidate but that is organized for the purpose of influencing an election.
>
> S.C. Code Ann. § 8-13-1300(6).

The decision in *Citizens for Life* relies heavily upon the analysis employed in *North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir.2008) (hereinafter "*Leake*"), a Fourth Circuit case involving a similar challenge under North Carolina law. *Leake*, in turn, frequently references the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612 (1976) (hereinafter "*Buckley*"), a seminal decision regarding state and federal election law. It should be noted that a more recent election law decision, *Citizens United v. Federal Election Commission*, 508 U.S. 310, 130 S.Ct. 876 (2010) does not address the definition of "committee." *Citizens for Life*, 759 F.Supp.2d at 720.

Judge Wooten began his analysis of the South Carolina statutory language in *Citizens for Life* by recognizing an inherent tension in election law between legislative power to regulate elections and the guarantee of freedom of expression under the First Amendment to the US Constitution. Quoting *Buckley v. Valeo*, Judge Wooten noted that "legislatures have the well established power to regulate elections, ... and that pursuant to that power, they may establish standards that govern the financing of political campaigns." *Id.* at 714 (quoting *Buckley*, 424 US at 13, 26). He continued that the Supreme Court also was sensitive to the reality that "campaign finance restrictions 'operate in an area of the most fundamental First Amendment activities,' and thus threaten to limit ordinary 'political expression.'" *Id.* (quoting *Buckley*, 424 U.S. at 80).

Recognizing the potential burden posed by these reporting requirements, the Supreme Court delineated a "boundary between regulable election-related activity and constitutionally protected political speech." *Id.* (quoting *Leake*, 525 F.3d at 281. To preserve First Amendment rights of political expression, the Supreme Court determined in *Buckley v. Valeo*, that "campaign finance laws may constitutionally regulate only those actions that are 'unambiguously related to the campaign of a particular ... candidate.'" *Id.* (quoting Buckley, 424 U.S. at 80). In the opinion of the Court, "only unambiguously campaign related communications have a sufficiently close relationship to the government's acknowledged interest in preventing corruption to be constitutionally regulable." *Id.*

Furthermore, to ensure that groups not primarily engaged in political activities were not subject to reporting requirements pursuant to the regulatory authority of the legislature, the Court in *Buckley* held that regulable political committees were only "organizations that are under the control of a candidate or ***the major purpose of which is the nomination or election of a candidate.***" *Buckley,* 424 U.S. at 80 (emphasis added). This standard has come to be

known as "the major purpose test." Under this test, political advocacy on behalf of a particular candidate must be **the** major objective of the group in question, not merely one of a number of activities in which the group is involved. In other words, "nomination or election of a candidate" must be **the** major purpose—as opposed to simply **a** major purpose—of the organization's activities in order for that group to be designated a "committee" and therefore subject to electoral law reporting requirements.

Judge Wooten further noted the application of the major purpose test from *Buckley* by the Fourth Circuit Court of Appeals in *Leake*, where the court focused on the distinction between the use of the definite article "the" versus the indefinite article "a" in analyzing the definition of "committee" under the election law of North Carolina. In *Leake*, as in *Citizens for Life*, the definition of "committee" was alleged to be unconstitutionally overbroad as well as unconstitutionally vague because it failed to incorporate the major purpose test. Under North Carolina law, a "political committee" (North Carolina's functional equivalent of a "committee" under South Carolina election law) was defined as follows:

> [A] combination of two or more individuals ... that makes or accepts anything of value to make, contributions or expenditures and has one or more of the following characteristics:
>
> a. Is controlled by a candidate;
>
> b. Is a political party or executive committee of a political party or is controlled by a political party or executive committee of a political party;
>
> c. Is created by a corporation, business entity, insurance company, labor union, or professional association pursuant to § 163-278.19(b); or
>
> d. **Has a major purpose to support or oppose the nomination or election of one or more clearly identified candidates.**

N.C. Gen.Stat. § 163-278.6(14), amended by N.C. Sess. Laws 2007-391 (emphasis added).

In analyzing the North Carolina statutory language, the Fourth Circuit determined that "in light of *Buckley's* goals, it is clear that the importance the plaintiffs attach to the definite article is correct." *Leake*, 525 F.3d at 287. The Fourth Circuit further observed that "[a] single organization can have multiple 'major purposes,' and imposing political committee burdens on a multi-faceted organization may mean that North Carolina is regulating a relatively large amount of constitutionally protected speech unrelated to elections merely to regulate a

relatively small amount of election related speech." *Id.* at 289. *See also*, *Colo. Right to Life Comm. Inc. v. Coffman*, 498 F.3d 1137 (10th Cir.2007), *New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir.2010), *Nat'l Right to Work Legal Defense and Educ. Found. v. Herbert*, 581 F.Supp.2d 1132 (D.Utah2008) (each applying the major purpose test to election law provisions in Colorado, New Mexico, and Utah, respectively).

Applying the major purpose test to the facts in *Citizens for Life*, Judge Wooten found the "South Carolina definition of committee contains constitutional infirmities similar to those addressed by the Fourth Circuit in *Leake*." *Citizens for Life*, 759 F.Supp.2d at 716. In distinguishing between the North Carolina and South Carolina statutory language, Judge Wooten observed that "[w]hile the State of North Carolina attempted to incorporate a form of *Buckley's* major purpose test into its definition of political committee, the South Carolina Ethics Act creates committee restrictions without any reference to an entity's major purpose. *Id.* He further noted that "an entity that spends several million dollars annually on issue advocacy or community outreach can be required to register as a committee under South Carolina law if the group decides to spend five hundred and one dollars on a campaign related communication. Without the incorporation of the 'major purpose test' into the statute, this result is inconsistent with both *Buckley* and *Leake*." *Id.* Accordingly, Judge Wooten granted plaintiff South Carolina Citizens for Life's motion for summary judgment and declared the definition of "committee" in the South Carolina Ethics Act to be unconstitutionally overbroad. *Id.* at 720.

## II. *South Carolinians for Responsible Government v. Krawcheck, et al.*

In a related case, *South Carolinians for Responsible Government v. Krawcheck, et al.*, 854 F.Supp.2d 336 (D.S.C.2012), Judge Margaret Seymour reached the same conclusion as Judge Wooten in *Citizens for Life*. Regarding the definition of "committee" in the South Carolina Ethics Act, Judge Seymour held, "on its face, this definition does not relate to an organization's 'major purpose,' nor does it tie the Ethics Code's regulations to an organization's main goal, conduct or functions." *Id.* at 343.

## III. Conclusion and Suggested Revision

Following the decision in *Leake*, North Carolina election law was changed to reflect the shift from the indefinite article to the definite article in the definition of a committee (*i.e.* from "a major purpose" to "the major purpose"). The revised language defines a "political committee" as follows:

> (14) The term "political committee" means a combination of two or more individuals, such as any person, committee, association, organization, or other entity that makes, or accepts anything of value

to make, contributions or expenditures and has one or more of the following characteristics:

a. Is controlled by a candidate;

b. Is a political party or executive committee of a political party or is controlled by a political party or executive committee of a political party;

c. Is created by a corporation, business entity, insurance company, labor union, or professional association pursuant to G.S. 163-278.19(b); or

d. Has ***the*** major purpose to support or oppose the nomination or election of one or more clearly identified candidates.

Supporting or opposing the election of clearly identified candidates includes supporting or opposing the candidates of a clearly identified political party.

If the entity qualifies as a "political committee" under sub-subdivision a., b., c., or d. of this subdivision, it continues to be a political committee if it receives contributions or makes expenditures or maintains assets or liabilities. A political committee ceases to exist when it winds up its operations, disposes of its assets, and files its final report.

The term "political committee" includes the campaign of a candidate who serves as his or her own treasurer.

Special definitions of "political action committee" and "candidate campaign committee" that apply only in Part 1A of this Article are set forth in G.S. 163-278.38Z.

NC Code § 163-278.6 (emphasis added).

The current definition of "committee" in the South Carolina Ethics Act has been held to be unconstitutional by two federal judges because it fails to incorporate the major purpose test first articulated in *Buckley* and most recently endorsed in *Leake*. As the revised North Carolina language appears to address the Fourth Circuit's concerns in *Leake*, a similar change is suggested, consistent with all other provisions of the South Carolina Ethics Act, to bring South Carolina election law's definition of "committee" into conformity with the constitutional requirements expressed in *Buckley* and reaffirmed in *Leake*.

## APPENDIX 2

## SEPARATION OF POWERS AND STATE ETHICS COMMISSION JURISDICTION

### Statutory Provisions

The State Ethics Commission is established in Section 8-13-310 (A) of the South Carolina Code of Laws. The commission is defined as the "appropriate supervisory office" for all individuals required to file ethics-related disclosure forms "except for those members of or candidates for the office of State Senator or State Representative." (S.C. Code Ann. Section 8-13-100(2)(a)). Similar exceptions exist with respect to the investigative powers of the commission. The commission may "initiate or receive complaints and make investigations" of any "public official, public member, or public employee" consistent with its statutory jurisdiction "except [for] members or staff, including staff elected to serve as officers of or candidates for the General Assembly unless otherwise provided for under House or Senate rules." (Section 8-13-320(9)).

The same Section of the South Carolina Code that establishes the State Ethics Commission further delineates the legislative exception by explicitly creating a "House of Representatives Legislative Ethics Committee and a Senate Legislative Ethics Committee." (Section 8-13-510). Each legislative committee has the power to determine compliance with disclosure requirements and to receive complaints of and investigate

> possible violations of breach of a privilege governing a member or staff of the appropriate house, the alleged breach of a rule governing a member of, legislative caucus committees for, or a candidate, or staff for the appropriate house, misconduct of a member or staff of, legislative caucus committees for, or a candidate for the appropriate house, or violation of [South Carolina law relating to ethics and lobbying]. (Section 8-13-530(3)).

### Separation of Powers

As the South Carolina Constitution is silent on the issue of ethics oversight, there is a question as to whether a constitutional change would be necessary to remove the legislative exception to the jurisdiction of the South Carolina Ethics Commission. Article I, Section 8 of the South Carolina Constitution reads:

> 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.

Article III, Section 1 of the South Carolina Constitution vests legislative power in two houses, "one to be styled the 'Senate' and the other to be styled the 'House of Representatives,' and both together the 'General Assembly of the State of South Carolina.'"

To facilitate the exercise of legislative power, Section 12 of Article III permits each house of to adopt its own procedural rules and "punish its members for disorderly behavior...." This language and the placement of the section immediately following seem to indicate specific conditions in which punishment may be warranted. Article III, Section 13, which concerns punishment of non-legislators, grants legislative authority to imprison persons not members of either house. Those at risk of legislative arrest and imprisonment are:

> any person not a member who shall be guilty of disrespect to the house by any disorderly or contemptuous behavior in its presence, or who, during the time of its sitting, shall threaten harm to the body or estate of any member for anything said or done in either house, or who shall assault any of them therefor, or who shall assault or arrest any witness or other person ordered to attend the house in his going thereto or returning therefrom, or who shall rescue any person arrested by order of the house: Provided, That such time of imprisonment shall not in any case extend beyond the session of the General Assembly. (Art. III, Sec. 13)

The purpose of legislative arrest appears to be to prevent disruption of legislative business. Reading the two sections together, the power to punish both members and non-members appears to be linked to the actual operation of the legislative branch. The sections mention only urgent impediments to the smooth functioning of legislative business such as "disorderly behavior" and threats of "assault or arrest." Neither punitive section appears to contemplate a role for sanctioning conduct not immediately threatening to legislative proceedings. Further, a later section concerning the removal of legislative officers states that legislators "shall be removed for incapacity, misconduct or neglect of duty, *in such manner as may be provided by law*, when no mode of trial or removal is provided in this Constitution." (Art. III, Sec. 27, emphasis added) Indeed, even the section of the code establishing the three ethics bodies indicates that waiver of the legislative exception may be accomplished by House or Senate rule (*See* Section 8-13-320(9), exempting legislative staff, members, and candidates from State Ethics Commission investigations "unless otherwise provided for under House or Senate rules.")

## Conclusion

All bodies charged with investigating and punishing unethical conduct by public officials in South Carolina are statutorily created. If each body in the General Assembly possessed inherent state constitutional authority to investigate and sanction unethical behavior among its

members as a consequence of separation of powers and its ability to punish "disorderly behavior," statutory provisions for legislative ethics committees would be unnecessary. As all ethics bodies are created by statute, any modifications to their operation may be accomplished by amending the relevant section(s) of the South Carolina Code. Bills were introduced during the 2011-2012 legislative session in both the Senate and the House of Representatives to bring the legislative branch within the jurisdiction of the State Ethics Commission (*See* H. 4421 and S. 1373). Neither bill made it out of committee.

Nevertheless, extra-legislative ethics oversight is not unusual in other parts of the country. A majority of states have brought members of the legislature under the jurisdiction of a state ethics commission. Of the 40 states with state ethics commissions (of which South Carolina is one), 33 have assigned their commissions jurisdiction over the legislative branch. South Carolina is one of six states that have not granted this expanded jurisdiction.

In conclusion, a constitutional amendment is not required to allow the State Ethics Commission to subsume the jurisdiction of the Senate and House Legislative Ethics Committees. A change to existing statute would be consistent with the manner in which all of the bodies were created and would pose no threat to the separation of powers, as the punitive authority vested in the legislature appears to be in service of maintaining the core legislative function.

## SEPARATION OF POWERS IN *STATE v. GREGORIO*

The New Jersey case, *State v. Gregorio*, 186 N.J. Super. 138, 451 A.2d 980 (1982), addresses issues raised by non-legislative prosecution of ethics violations as possible violations of the separation of powers doctrine and legislative rule-making authority. In this matter, a grand jury indicted New Jersey State Senator John T. Gregorio, alleging failure to report income received from two bars in financial disclosure statements he filed with the Joint Legislative Committee on Ethical Standards. Senator Gregorio submitted these reports pursuant to the code of ethics adopted by both houses of the New Jersey State Legislature in a joint resolution under the Conflicts of Interest Law, N.J. Stat. Ann. § 52:13D-12 *et seq.* The State also contended that Gregorio's failure to disclose violated the law against tampering with public records or information, N.J. Stat. Ann. § 2C:28-7.

Gregorio moved to dismiss the charges on the grounds that the prosecution in state court violated the separation of powers clause or free speech or debate clause of the New Jersey Constitution. The New Jersey State Legislature argued as *amicus curiae* that the requirement of financial disclosure statements constitutes a legislative rule beyond the power of the executive branch to enforce and outside the jurisdiction of the judiciary branch. The court rejected all of these arguments and denied the motion to dismiss, holding that the prosecution was not precluded by the separation of powers doctrine or free speech or debate clauses of the

Constitution, or as an unlawful arrogation of power by the executive branch. The separation of powers and rule-making authority issues are discussed separately below.

**Issue 1: Separation of Powers, Generally**

The court in *Gregorio* considered separation of powers language very similar to that contained in the South Carolina Constitution. The New Jersey language reads:

> The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution. N.J. Const. art. III, ¶ 1.

By comparison, the South Carolina Constitution provides:

> 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. S.C. Const. art. I, § 8.

The New Jersey Superior Court held that the separation of powers doctrine does not bar prosecution. The relevant parts of the decision are included below:

> [I]t can hardly be argued that the application of criminal penalties for willfully providing false information impairs any of the procedures adopted by our Legislature to implement the statutory mandate. To the contrary, criminal prosecution in such a case plainly advances the legislative goal. *Gregorio* at 984.

> To accept defendant's theory, one must subscribe to the view that the Legislature intended to make its members super-citizens shielded from criminal prosecution by sheer virtue of their public office... Such a result is at odds with logic, contrary to public policy, and would constitute a perversion of the legislative objective to foster the "respect and confidence of the people" in our representative form of government. *Gregorio* at 985.

**Issue 2: Rule-Making Authority**

Addressing the issue of whether legislative rule-making authority precluded additional punitive measures by other branches of government, the New Jersey Superior Court considered constitutional language almost identical to provisions in the South Carolina Constitution. The New Jersey language reads as follows:

> Each house shall choose its own officers, determine the rules of its proceedings, and punish its members for disorderly behavior. It may expel a member with the concurrence of two-thirds of all its members. N.J. Const. art. IV, § 4, ¶ 3.

Legislative rule-making authority is granted in the following section of the South Carolina Constitution:

> Each house shall choose its own officers, determine its rules of procedure, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member, but not a second time for the same cause. S.C. Const. art. III, § 12.

As with the separation of powers doctrine, the New Jersey court held that rule-making authority does not bar prosecution. Again, the relevant parts of the decision are excerpted below:

> [T]he requirement that financial disclosure statements be filed with the joint committee were adopted pursuant to the Conflicts of Interest Law, not by virtue of the constitutional authority of the Legislature to make rules and punish members for disorderly behavior. The constitutional rule-making power of the Legislature is generally exercised in the context of establishing standards to provide for the orderly and efficient conduct of legislative proceedings.... The code of ethics provision requiring the filing of financial statements stands upon an entirely different footing.... [T]he Legislature made a clear procedural election when it adopted a code of ethics and characterized it as an agency rule. It cannot be said that the code was adopted pursuant to a power demonstrably committed to the Legislative Branch of government by the text of the Constitution. Simply stated, it was adopted pursuant to the Conflict of Interest Law, not by virtue of a rule promulgated pursuant to the constitutional responsibility of the Legislature to establish its own procedures. *Gregorio* at 988-89.

## APPENDIX 3

## STATE ETHICS COMMISSION FUNDING OPTIONS

Two general approaches—or combinations thereof—merit consideration with regard to ensuring sufficient commission resources. First, commission funding could be set at a fixed percentage of a larger budget or even a specific amount. The percentage or amount would reflect a determination of how much funding the commission requires to fulfill its charge. This approach would isolate the commission budget from retaliatory reductions and ensure adequate operating capital. If funded on a percentage basis, the commission could be funded either by a fixed percentage of the annual appropriation of the entity in which it is housed (such as the office of the attorney general or the judicial or executive branch, if appropriate) or a percentage of the overall budget.

Second, procedural measures may be implemented with respect to adjusting commission funding. These measures would shield the commission's budget to some degree from political influence. For example, there could be a requirement for a supermajority in one or both legislative houses in order to reduce the annual appropriation. Another option would be to require both executive and legislative branches to affirmatively endorse the commission's appropriation, *i.e.* actual assent from both branches, eliminating the possibility of an overridden veto.

While each of these approaches has been used both in other states and countries to secure funding for the judicial branch, there is less data available on their use in state ethics commissions' appropriations. Two examples from Alabama and Indiana are worth noting. Alabama recently enacted legislation (Act 2011 - 259) designating 0.1% of the State General Funds Appropriations Act to fund the activities of the State Ethics Commission. This appropriation currently amounts to $1,784,000.00. Funding can be reduced only by 2/3 approval of both houses of the state legislature. Indiana allocates 25% of the Inspector General's budget to fund operating expenses of the State Ethics Commission. The current overall budget for the commission is $369,408.00.

This concludes the Commission's report.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

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Case No. 2011-CP-40-7854

Appellate Case No. 2012-21-2125

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John S. Rainey .....Appellant,

v.

Nimrata "Nikki" R. Haley .....Respondent.

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**PROOF OF SERVICE**

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I, Beth Craft, assistant to the attorney for Appellant John S. Rainey, Richard A. Harpootlian, P.A., with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify that on June 26, 2013, served VIA HAND DELIVERY, the following document to the below mentioned person(s):

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