

MARCH 16, 2004

SUBJECT: CONTACT BY A MEMBER OF THE SENATE TO A MEMBER OF
THE JUDICIARY REGARDING AN ACTION PENDING BEFORE HIM

SUMMARY: Members of the Senate should avoid making direct contact with members of the judiciary regarding matters pending before them and any contact should be limited to procedural matters.

COMPLAINT: The South Carolina Senate Ethics Committee has received a complaint regarding several members of the Senate contacting a member of the judiciary regarding a case pending before him.

DISCUSSION: The Senate Ethics Committee met to discuss the validity of a complaint against several members of the Senate regarding contact the members made to a member of the judiciary about the status of a case involving the Complainant. The Complainant alleged that the contact by the members prejudiced his case and compromised the impartiality of the judge. However, the committee found that the contact by the members did not violate any provision of law or ethical rule and the complaint was dismissed. The action of the committee was appealed to the full Senate and the committee's decision was affirmed.

Although there is no provision of law or ethical rule prohibiting members of the Senate from contacting members of the judiciary regarding the status of cases pending before them, members should be cognizant of the ethical rules that govern judges in the exercise of their responsibilities and respect these rules when making contact. Canon 1 of the South Carolina Code of Judicial Conduct provides "[a]n independent and honorable judiciary is indispensable to justice in our society" and that "[t]he provisions of this Code are to be construed and applied to further that objective." Canon 2 provides that "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

These Canons require judges to maintain the independence and impartiality of the judiciary. In our system, members of the judiciary are elected by the General Assembly, in the case of judges of the family, circuit, appeals, and Supreme Court, and are appointed by the Governor with the advice and consent of the Senate, in the case of magistrates. Understandably, this special relationship places an extra burden on the judge to uphold the independent judiciary requirement when dealing with members of the Senate. Also, these Canons prohibit judges from even the appearance of impartiality. Due to a member's position, any contact by a member of the Senate on behalf of a constituent who is

also a party can promote the appearance that the judge is likely to favor one party over another. Any appearance of impartiality erodes the public confidence in the judicial system.

Canon 3B(7) provides:

A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding.

Pursuant to this Canon, judges are not allowed to initiate, permit, or consider an *ex parte* communication, except under limited circumstances. An *ex parte* communication is any communication to the judge about a matter before him that is made outside the presence or knowledge of all parties to the matter. As a result, any communication to a judge regarding any substantive aspect of a matter before him should be strictly avoided.

There is no doubt members of the Senate have a legitimate interest in assuring the judiciary provides services to constituents in a fair and expeditious manner. In an attempt to address constituent concerns, there may be times when the member feels that it is necessary to contact a judge about a matter pending before him. However, out of respect for the ethical rules that govern judges, direct contact should be avoided if possible. South Carolina Court Administration is an available alternative for a member to pass along constituent concerns without making direct contact. If the member feels that direct contact must be made, it should be limited to procedural concerns of constituents, for example, no hearings have been scheduled or late or overdue orders. The member also must ensure that any communication to a judge about a procedural matter is in writing and copied to all parties and attorneys involved in the matter. Members should not make any type of contact that would have the appearance of promoting one side of a controversy over another on any issue.

CONCLUSION: There is no provision of law or ethical rule that prohibits members of the Senate from contacting members of the judiciary regarding matters pending before them. However, the ethical rules governing judges promote the independence of the judiciary and prohibit *ex parte* communications. In an effort to maintain public confidence in the judiciary, members should avoid direct contact if possible and limit any contact to procedural matters.

Note: This opinion is not intended to limit members who are also attorneys from zealously representing the interests of their clients before the judges of this State.