

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

October 10, 1996

The Honorable C. Tyrone Courtney
Senator, District No. 13
Box 2229
Spartanburg, South Carolina 29304

Re: Informal Opinion

Dear Senator Courtney:

By your letter of September 24, 1996, you have sought an opinion as to whether or not an attorney can serve on the Highway Commission and also represent the South Carolina Department of Transportation in court proceedings concerning condemnation. For the reasons set forth below, I would advise against an attorney-commissioner undertaking to represent his or her board or commission in court proceedings.

First of all, this question involves a number of issues that would come under the Ethics, Government Accountability, and Campaign Reform Act of 1991. Although S.C. Code Ann. § 8-13-320(11) requires the State Ethics Commission to publish advisory opinions on the requirement of the Act, I can tell you that Section 8-13-700 forbids any public member from using his office to obtain an economic interest. Moreover, no public member may make, participate in making, or in any way attempt to use his office to influence a governmental decision in which he or a business with which he is associated has an economic interest. Additionally, Section 8-13-725 prohibits any public member from using confidential information gained in the course of or by reason of his official responsibilities in any way that would affect an economic interest held by himself, or a business with which he is associated. Thus, because this Office defers to the judgment of the State Ethics Commission in interpreting the State Ethics Act, I recommend that you consult with the Commission for its guidance on the applicability of these statutes.

The Honorable C. Tyrone Courtney

Page 2

October 10, 1996

In addition to the ethical considerations, another problem arises in that public policy and most probably the common law master-servant principle would be violated under the factual scenario presented in your letter. The South Carolina Supreme Court, in McMahan v. Jones, 94 S.C. 362, 77 S.E. 1022 (1913), declared employment of two commission members, by the commission, to be illegal. The Court stated:

No man in the public service should be permitted to occupy the dual position of master and servant; for, as master, he would be under the temptation of exacting too little of himself, as servant; and as servant, he would be inclined to demand too much of himself, as master. There would be constant conflict between self-interest and integrity.

Likewise, legal treatises have summarized the common law master-servant relationship as follows:

[A] conflict of interest exists where one office is subordinate to the other, and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power of appointment as to the other office, or has the power to remove the incumbent of the other or to punish the other. Furthermore, a conflict of interest may be demonstrated by the power to regulate the compensation of the other, or to audit his accounts ...

* * *

[I]t is not the performance, or the prospective right of performance, of inconsistent duties only that gives rise to incompatibility, but the acceptance of the functions and obligations growing out of the two offices The offices may be incompatible even though the conflict in the duties thereof arises but on rare occasions In any event, the applicability of the doctrine does not turn upon the integrity of the office-holder or his capacity to achieve impartiality

67 C.J.S. Officers Sec. 27. See also Ops. Atty. Gen. dated May 21, 1984; May 15, 1989; March 3, 1978; January 19, 1994; and others. Finally, the South Carolina Supreme Court stated in Bradley v. City Council of Greenville, 212 S.C. 389, 46 S.E.2d 291 (1948):

The Honorable C. Tyrone Courtney
Page 3
October 10, 1996

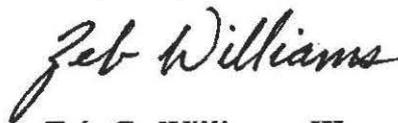
In the absence of constitutional or statutory provision it is ... "contrary to public policy to permit an officer having an appointing power to use such power as a means of conferring an office upon himself, or to permit a body to appoint one of its own members."

Thus, based on governmental ethics considerations, common law master-servant principles, and the public policy established by the Court in Bradley v. City of Greenville, *supra*, it is my opinion that an attorney serving on the Highway Commission should not undertake to represent the South Carolina Department of Transportation in court proceedings concerning condemnation.¹

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

With kind regards, I am

Very truly yours,



Zeb C. Williams, III
Deputy Attorney General

ZCW,III/an

¹ It might be advisable to seek an ethics advisory opinion from the South Carolina Bar's Ethics Advisory Committee to have considered whether the Rules of Professional Conduct, Rule 407, S.C.A.C.R., would have any effect on this situation.