HJR

26

REPRESENTATIVE DAVE DONLEY
ALASKA STATE LEGISLATURE
DISTRICT ELEVEN - SPENARD

P.O. BOX V, JUNEAU 99811
(907) 465-3892

CHAIRMAN
LABOR AND COMMERCE
COMMITTEE

MEMBER
STATE AFFAIRS COMMITTEE
HEALTH, EDUCATIONAL
AND SOCIAL SERVICES COMMITTEE
INTERNATIONAL TRADE
SUB-COMMITTEE

April 9, 1987

M E M O R A N D U M

TO: All co-sponsors, HJR 26

FROM: Representative Dave Donley DD

Many thanks for co-sponsoring HJR 26, a resolution authorizing the Alaska Supreme Court to issue advisory opinions on important questions of law submitted by the legislature or by the governor.

The bill has been given three referrals in the House: State Affairs, Judiciary and Finance.

For your information I am enclosing some backup material. As you can see, a similar measure is already in effect in nine other states. If you have any further questions, please call myself or my aide, Katy McHugh, at #3892.

Once again, thank you for your support of this legislation.

INTERIM IN ANCHORAGE
1024 WEST SIXTH AVENUE • ANCHORAGE, ALASKA 99501 • (907) 561-8234

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

P.O. Box Y, State Capitol
Juneau, Alaska 99811-3100
Mail Stop 3100
(907) 465-3991

JAN 16 1987

January 16, 1987

MEMORANDUM

TO: Representative-Elect Dave Donley

FROM: Penelope Weyhrauch
Legislative Analyst

RE: Advisory Opinions from the State Supreme Court
Research Request 87-071

You asked for information on state legislatures which are allowed to ask for advisory opinions from their state supreme court. According to the National Center for State Courts, nine states allow their state legislatures to ask their state supreme courts for advisory opinions. Four of these states--Delaware, Maine, Massachusetts and Rhode Island--require their supreme court to respond to questions from the legislature. States which allow their supreme courts to respond to questions on a discretionary basis are: Alabama, Colorado, Louisiana, Michigan and New Hampshire.

I contacted Massachusetts, Colorado and New Hampshire to discuss the mechanism by which their legislatures request advisory opinions from their supreme courts. I did not contact the six other states listed above, because I believe that little new information would be gained by doing so.

The **Massachusetts** Supreme Judicial Court is required by its state constitution to give opinions at the request of the legislature or the governor. Jim Powers, with the Massachusetts Legislative Research Agency, said that this requirement is confined to "important questions of law and upon solemn occasions." The legislature usually asks the court constitutional questions of law, though other questions can also be asked. The court allows interested parties eight weeks to submit briefs on a question before it gives its opinion. Mr. Powers said that if the court does not wish to respond to a question, they may wait until the legislature acts on the issue and the question becomes moot. The court does not respond to political or frivolous questions.

The **Colorado** state constitution establishes that the state supreme court may respond to questions from the legislature, but according to Kim Morss, Legal Counsel and Legislative Liaison for the Colorado Judicial Council, it is not required to respond. According to Ms. Morss, the provision has rarely been used because the Colorado Judiciary and Legislature "don't like each other."

The New Hampshire supreme court may issue advisory opinions to the legislature, but it is not required to do so. The state constitution gives the supreme court discretionary authority to respond to questions. Tom Berry, staff member for the supreme court, said that the legislature frequently asks the supreme court for advisory opinions, usually relating to constitutional questions of law.

* * * *

I hope this information is helpful to you. I have attached copies of applicable sections of the state constitutions discussed in this memorandum. I have also attached court rules from Delaware and Michigan which establish advisory opinion authority for the supreme courts of those states. If you have any questions or would like additional information, please contact our agency.

PW

Attachments

Mass. Const V

November and elections, for the choice of councillors, senators and representatives shall be held biennially on the Tuesday next after the first Monday in November.

Art. LXXXIII. The general court shall have full power and authority to provide for prompt and temporary succession to the powers and duties of public offices, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such offices in periods of emergency resulting from disaster caused by enemy attack, and to adopt such other measures as may be necessary and proper for insuring continuity of the government of the commonwealth and the governments of its political subdivisions.

Art. LXXXIV. Article LXII of the Amendments to the Constitution is hereby amended by striking out section 1 and inserting in place thereof the following section:—*Section 1.* The commonwealth may give, loan or pledge its credit only by a vote, taken by the yeas and nays, of two-thirds of each house of the general court present and voting thereon. The credit of the commonwealth shall not in any manner be given or loaned to or in aid of any individual, or of any private association, or of any corporation which is privately owned and managed.

Art. LXXXV. Article II of Chapter III of the Constitution of the commonwealth is hereby annulled and the following is adopted in place thereof:—

Article II. Each branch of the legislature, as well as the governor or the council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions.

Art. LXXXVI. Names of candidates of political parties for the offices of governor and lieutenant-governor shall be grouped on the official ballot for use at state elections according to the parties they represent, and the voter may cast a single vote for any such group, which shall count as a vote for each candidate in such group, but may not cast a vote for only one of the candidates in such group.

Art. LXXXVII. SECTION 1. For the purpose of transferring, abolishing, consolidating or coordinating the whole or any part of any agency, or the functions thereof, within the executive department of the government of the commonwealth, or for the purpose of authorizing any officer of any agency within the executive department of the government of the commonwealth to delegate any of his functions, the governor may prepare one or more reorganization plans,

the individual claimants; that the controversy did not involve the rights or franchises of the people; nor the rights of the state in its sovereign capacity; and so the writ was denied. People ex rel. Bentley v. McClees, 20 Colo. 403, 38 P. 468, 26 L.R.A. 646 (1894).

III. OPINIONS.

A. General Consideration.

Cross reference. As to provisions for certification of questions of law by the supreme court, see Rule 21.1, C.R.C.P.

Law review. For article, "Limitations Upon Legislative Inquiries Under Colorado Advisory Opinion Clause", see 4 Rocky Mt. L. Rev. 237 (1932).

Original jurisdiction of supreme court enlarged. The constitutional amendment requiring the supreme court to answer questions propounded by the governor or by either branch of the general assembly is an enlargement of the original jurisdiction previously conferred upon that court by the constitution. In re House Bill No. 122, 12 Colo. 466, 21 P. 478 (1889).

Supreme court is not authorized to give advisory opinions other than pursuant to section. No provision of the law authorizes the supreme court to give advisory opinions to state agencies other than to the general assembly or to the governor when requested upon solemn occasions pursuant to this section. Cameron v. Carroll & Co., 138 Colo. 432, 334 P.2d 748 (1959).

Provision is only exception to rule that no court may construe legislation until it has been adopted. The only exception to the rule that neither the supreme court, nor any other court, may be called upon to construe or pass upon a legislative act until it has been adopted is the constitutional provision authorizing the general assembly to propound interrogatories to the supreme court upon important questions upon solemn occasions. City of Rocky Ford v. Brown, 133 Colo. 262, 293 P.2d 974 (1956).

But, no jurisdiction to pass on constitutionality of proposed law. The courts do not have jurisdiction to pass upon the constitutionality of the substance of legislation prior to enactment or adoption. CF & I Steel Corp. v. Buchanan, 191 Colo. 570, 554 P.2d 1354 (1976).

Courts should not take jurisdiction to pass upon the constitutionality of a proposed law prior to its enactment or adoption. Billings v. Buchanan, 192 Colo. 32, 555 P.2d 176 (1976).

Judicial response to ex parte inquiry from executive department is inconsistent with separation of governmental powers. It must be admitted that the promulgation of a judicial opinion in response to an ex parte inquiry from the executive department of the government, concerning the affairs of the legislative department, is anomalous and peculiar, and, apparently at least, inconsistent with the prevalent American system of separating the governmental powers into distinct departments. But it must be borne in mind that the same instrument which divides the powers of the government into distinct departments has been so amended by the voice of the people as to require the supreme court to "give its opinion upon important questions, upon solemn occasions, when required by the governor, the senate or the house of representatives". In re Speakership of House of Representatives, 15 Colo. 520, 25 P. 707, 11 L.R.A. 241 (1890).

Where there is no majority of supreme court as to either validity or invalidity of a statute which is the subject of interrogatories, no opinion respecting the interrogatories can be rendered under this section. In re Interrogatories Propounded By McNichols, 142 Colo. 188, 350 P.2d 811 (1960).

Answers by supreme court have effect of judicial precedents. The answers by the supreme court to questions are reported as are other opinions, and have the force and effect of judicial precedents; differing in this respect from the few analogous provisions elsewhere adopted. In re House Bill No. 122, 12 Colo. 466, 21 P. 478 (1889).

This section does not require wholesale exposition of all constitutional provisions relating to a given general subject. In re Senate Resolution No. 2, 94 Colo. 101, 31 P.2d 325 (1933). See In re Senate Resolution, 9 Colo. 620, 21 P. 470 (1886).

There is no constitutional requirement that reasons be given in answering questions upon the governor's request. In re Senate Concurrent Resolution No. 10 of Forty-First Gen. Ass'y, 137 Colo. 491, 328 P.2d 103 (1958).

Rule that every statute duly passed must be held constitutional unless contrary appears beyond reasonable doubt is not applicable to pending legislation when submitted to the supreme court for its opinion under this section. In re Senate Resolution No. 2, 94 Colo. 101, 31 P.2d 325 (1933).

Section as basis for jurisdiction. See In re Senate Rule, 9 Colo. 641, 21 P. 477 (1886); In re Election of Dist. Judges, 11 Colo. 373, 18 P. 282 (1888); In re Leasing of State Lands, 18 Colo. 359, 32 P. 986 (1893); In re Relief Bills, 21 Colo. 62, 39 P. 1089 (1895); In re Internal Imp. Fund, 24 Colo. 247, 48 P. 807 (1897); In re Interrogatories of Governor on Chapter 118, 97 Colo. 587, 52 P.2d 663 (1935); In re Interrogatories by Governor, 112 Colo. 294, 148 P.2d 809 (1944); In re House Resolution No. 2, 116 Colo. 18, 178 P.2d 415 (1947); In re Senate Bill No. 95 of Forty-Third Gen. Ass'y, 146

Colo. 233, 361 P.2d 350 (1961); In re Interrogatories from House of Representatives, 157 Colo. 76, 400 P.2d 931 (1965); In re Interrogatory of Governor, 162 Colo. 188, 425 P.2d 31 (1967); In re Interrogatories by Governor, 163 Colo. 113, 429 P.2d 304 (1967); In re Interrogatories Propounded by Senate, 168 Colo. 563, 452 P.2d 382 (1969); In re Interrogatories by Colo. State Senate, 168 Colo. 558, 452 P.2d 391 (1969).

Applied in S. H. Kress & Co. v. Johnson, 16 F. Supp. 5 (D. Colo.), aff'd mem., 299 U.S. 511, 57 S. Ct. 49, 81 L. Ed. 378 (1936).

B. Questions Submitted.

1. In General.

Question must relate to purely public rights, be propounded upon solemn occasion, and possess a peculiar or inherent importance not belonging to all questions of the kind; that executive questions must be exclusively publici juris, and legislative ones be connected with pending legislation, and relate either to the constitutionality thereof or to matters connected therewith of purely public right. In re Lieutenant Governorship, 54 Colo. 166, 129 P. 811 (1913).

This section has been construed by the supreme court as applying only to cases where questions publici juris are raised, thus excluding from this branch of its jurisdiction all controversies wherein private rights alone are involved. In re Senate Resolution, 12 Colo. 466, 21 P. 478 (1889).

Question submitted must be specific. As a necessary condition precedent to the exercise of our extraordinary jurisdiction, under this section, the question submitted must be specific. In re House Bill No. 107, 21 Colo. 32, 39 P. 431 (1895). See In re House Bill No. 165, 15 Colo. 593, 26 P. 141 (1890); In re Loan of School Fund, 18 Colo. 195, 32 P. 273 (1893); In re University Fund, 18 Colo. 398, 33 P. 415 (1893).

And particular section of constitution to be considered must be pointed out. One prerequisite required in such matters is that it must appear that the bill which is the subject of inquiry will likely pass the branch of the general assembly submitting the question, and the particular section of the constitution to be considered in connection therewith must be pointed out. In re Senate Resolution No. 10, 33 Colo. 307, 79 P. 1009 (1905). See In re House Bill No. 165, 15 Colo. 593, 26 P. 141 (1890); In re Loan of School Fund, 18 Colo. 195, 32 P. 273 (1893); In re Lieutenant Governorship, 54 Colo. 166, 129 P. 811 (1913).

Thus, a resolution asking the supreme court for its opinion under this section, that points out numerous particulars in which the bill may conflict with provisions of the constitution, and involves a wholesale exposition of constitutional provisions relating to a general subject, will for that reason be refused consideration by the court. In re House Bill No. 99, 26 Colo. 140, 56 P. 181 (1899).

Questions, when propounded by executive, must relate to matters exclusively juris publici. In re Senate Resolution, 12 Colo. 466, 21 P. 478 (1889). See In re University Fund, 18 Colo. 398, 33 P. 415 (1893).

And when propounded by branch of general assembly, must be connected with pending legislation and relate either to the constitutionality thereof or to matters connected therewith of purely public right. In re Senate Resolution, 12 Colo. 466, 21 P. 478 (1889). See In re University Fund, 18 Colo. 398, 33 P. 415 (1893); In re Interrogatories of House, 62 Colo. 198, 162 P. 1144 (1916).

The question whether a bill proposing to increase the fees of district attorneys throughout the state will apply to district attorneys now in office does not come within the rule announced. In re Senate Resolution, 12 Colo. 466, 21 P. 478 (1889).

Department propounding question in first instance determines whether occasion exists which justifies its submission. In re Senate Resolution No. 10, 33 Colo. 307, 79 P. 1009 (1905). See In re Senate Resolution, 12 Colo. 466, 21 P. 478 (1889).

But what are "important questions upon important occasions" must be ultimately determined by the supreme court itself. In re Senate Resolution No. 2, 94 Colo. 101, 31 P.2d 325 (1933). See In re Appropriations by Gen. Ass'y, 15 Colo. 316, 22 P. 464 (1889); In re Senate Resolution, 12 Colo. 466, 21 P. 478 (1889); In re Penitentiary Comm'rs, 19 Colo. 409, 35 P. 915 (1894); In re Senate Bill No. 416, 45 Colo. 394, 101 P. 410 (1909); In re Lieutenant Governorship, 54 Colo. 166, 129 P. 811 (1913); In re Interrogatories of House, 62 Colo. 188, 162 P. 1144 (1916).

Questions propounded to the supreme court by the senate are limited to those specifically enumerated in this section of the constitution, and the court must determine whether or not questions so propounded are within the specifications. In re Interrogatories of Senate, 94 Colo. 215, 29 P.2d 705 (1934).

While the supreme court concedes to the governor full liberty to submit such questions as he may deem consistent with his executive powers, it reserves for itself the right to express its opinion freely, in whole or in part, or not at all, as it shall deem consistent with its judicial powers and constitutional obligation. In re Fire & Excise Comm'rs, 19 Colo. 482, 36 P. 234 (1894).

involved and complex legal problems and fundamental constitutional questions in proceedings under this section, although the state constitution seems to provide that it shall so do; however, the constitutional directive cannot be taken to mean that the supreme court should so act when possible prejudice may well result later to citizens whose rights are protected by both the state and federal constitutions. In re Interrogatories of Governor Concerning Senate Bill No. 34, 142 Colo. 188, 350 P.2d 811 (1960).

Were the supreme court, in an ex parte proceeding, to respond to interrogatories propounded by the general assembly with respect to the validity of a proposed statute, to the effect that such legislation is in all respects constitutional, such holding would be prejudicial to any citizen who at a future date might question its validity in the supreme court. In re Interrogatories Propounded by Senate, 131 Colo. 389, 281 P.2d 1013 (1955).

This court should not give ex parte opinion in relation to controversy that has already arisen, especially if actual litigation involving private rights is likely to arise from such controversy. In re Penitentiary Comm'rs, 19 Colo. 409, 35 P. 915 (1894).

Ordinance proposed by people. An ordinance proposed by the people under the laws of initiative and referendum is clothed with the presumption of validity and its constitutionality will not be considered by the courts by means of a hypothetical question, but only after enactment. City of Rocky Ford v. Brown, 133 Colo. 262, 293 P.2d 974 (1956).

The supreme court may not intrude upon the legislative powers of the people through an advisory opinion since the separation of governmental powers must be held inviolate. City of Rocky Ford v. Brown, 133 Colo. 262, 293 P.2d 974 (1956).

Bill requiring corporations to pay their employees semimonthly in lawful money of the United States, prohibiting contracts in violation thereof and providing penalties for its violation involves private rights and a question from the senate as to the constitutionality of such bill does not invoke the jurisdiction of the supreme court so as to require an opinion thereon under this section. In re Senate Bill No. 27, 28 Colo. 359, 65 P. 50 (1901).

A bill for an act to secure to laborers and others the payment of their wages in lawful money of the United States, and prescribing penalties for its violation, involves private rights of individuals and corporations, and is not a bill concerning matters publici juris such as will invoke the jurisdiction of the supreme court upon a question from the house of representatives as to its constitutionality under this section, authorizing the submission of questions to the court for its opinion. In re House Bill No. 99, 26 Colo. 140, 56 P. 181 (1899).

Rank of appropriation for administrative body not yet appointed. Under this section the court is not required to respond to a question as to the effect and rank of an appropriation for an administrative body not yet appointed. But to end doubt and controversy the court declared that an appropriation for the salary and expenses of the state tax commission was of the first class. In re Opinion of Justices, 55 Colo. 17, 123 P. 660 (1912).

Right of police commissioner to retain office after removal. The court will not, in a ex parte proceeding in response to an executive question, inquire into or determine the right of a police commissioner of Denver to retain his office after the governor has attempted to remove him. In re Fire & Excise Comm'rs, 19 Colo. 482, 36 P. 234 (1894).

Section 4. Terms. At least two terms of the supreme court shall be held each year, at the seat of government.

Adopted November 6, 1962 — Effective January 12, 1965. (See Laws 1963, p. 1049.)

Cross reference. As to terms of the supreme court, see also § 13-2-101 and § 13-2-102.

C.J.S. See 21 C.J.S., Courts, § § 148, 164, 165.

Section 5. Personnel of court - departments - chief justice. (1) The supreme court shall consist of not less than seven justices, who may sit en banc or in departments. In case said court shall sit in departments, each of said departments shall have full power and authority of said court in the determination of causes, the issuing of writs and the exercise of all powers authorized by this constitution, or provided by law, subject to the general control of the court sitting en banc, and such rules and regulations as the court may

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N.H.B.J. 28 (July 1959).

[Art.] 74. [Judges to Give Opinions, When.] Each branch of the
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re the opinions of the justices of the supreme court upon important
ions of law and upon solemn occasions.

HISTORY

mendments—1958. Substituted "su-
court" for "superior court".

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Supreme Court is limited by this
in giving advisory opinions and
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constitutional principle that courts,
in cases permitted under this
shall not give advisory opinions
notice and hearing. Faulkner v.
(1931) 85 NH 147, 155 A 195.

justices cannot avoid the duty
upon them by this article to
important questions of law by
presuming that a statute providing
sonal expenses of legislators is
tional and refusing to examine
its or technical grounds. Opinion
Justices (1949) 95 NH 533, 64 A2d

a majority of the justices rendered
on on an inquiry propounded to
a governor and council concern-
alidity of a statute imposing
upon property owned by the
minority opinion was rendered expressing the belief that this was not a proper subject upon which the justices could render an opinion because it amounted to a quasi-judicial determination of existing rights in a nonjusticiable matter. Opinion of the Justices (1944) 93 NH 478, 39 A2d 765.

Where in addition to special questions as to the constitutionality of proposed legislation the opinion of the court is requested as to whether such legislation violates the Constitution "in any respect" the court will not, where the bill presents no constitutional defects upon its face, speculate upon whether other constitutional issues might be raised. Opinion of the Justices (1957) 101 NH 518, 131 A2d 818.

This article does not authorize advisory opinions on questions which the body asking the advice has determined not to consider. Re School-Law Manual (1885) 63 NH 574, 4 A 878

2. Who may obtain opinion—Generally

The power of the Supreme Court to advise parties as to their rights and duties is limited by the common law to questions arising in the administration of property held in a fiduciary capacity, and by the Constitution to opinions given upon request of the legislature and the governor and council. Harvey v. Harvey (1904) 73 NH 106, 59 A 621.

Justices of Supreme Court have authority to give advisory opinions only when requested to do so by either branch of

...commissioner and excise commissioner of ...y of Denver at the present time required ...arture from the rule and an opinion upon ...cts as submitted, without prejudice to the ... to show other or different facts. In re Fire ...xcise Comm'rs, 19 Colo. 482, 36 P. 234 ...).

3. Improper Questions.

Constitutionality of proposed legislation. ...stions propounded by the governor as to ...constitutionality of a proposed legislative ...not introduced and which may never be ...ed, are premature. In re Interrogatories by ...overnor, 71 Colo. 331, 206 P. 383 (1922). See ...e Proposed Amendments to Constitution & ...lative & Referendum Measures, 50 Colo. ..., 114 P. 298 (1911).

Under the provisions of this section, ques...ons of the executive concerning the constitu...ality of proposed legislation are only to be ...swered when doubt as to the constitutional... is expressed. In re Interrogatories by Gov..., 71 Colo. 331, 206 P. 383 (1922).

Constitutionality of legislation no longer ...ding. When both houses of the general ...mbly have taken a final vote on a bill, it is ...longer pending legislation, and the court ...declines to respond to a question as to its ...stitutionality; nor will the court consider ...a question when presented at so short a ... before the termination of the legislative ...on as to afford no opportunity for such ...tigation as the question requires. In re ...te Bill No 416, 45 Colo. 394, 101 P. 410 ...).

...s section does not authorize the supreme ... to answer questions propounded by the ... of representatives concerning the con...tionality of a measure passed by that body ...which is no longer before it for considera... In re House Resolution No. 12, 88 Colo. ..., 298 P. 960 (1931).

...preme court is not at liberty in response to ...ative inquiry to pass upon the constitu...ity of statutes. In re University Fund, 18 ..., 398, 33 P. 415 (1893).

Questions of executive regarding legislation ...nger pending. The jurisdiction conferred ...e constitution upon this court to answer ...tive and legislative questions, is extraor...y; the construction of statutes is within ...rdinary jurisdiction of the courts. One of ...most common subjects of judicial consid...n is the construction of legislative acts as ...arise in due course of litigation. If we ...to extend the extraordinary ex parte ...dic... of this court to executive ques...involving the construction of legislative ..., would be a most serious innovation, ...o... tendency would be to transfer in a great measure the management of our state institutions from the executive to the judicial department of the government. In re Penitentiary Comm'rs, 19 Colo. 409, 35 P. 915 (1894).

Questions referring to statutes of long standing, and requiring the determination of the right and duty of certain officials, are not to be determined ex parte. In re Interrogatories of House, 62 Colo. 188, 162 P. 1144 (1916).

The duty of the court in responding to legislative questions is limited to those which relate to proposed legislation. Completed legislation is not a subject of legislative inquiry. It is not within the province of the court to advise the general assembly as to whether existing legislation upon any subject satisfies the requirements of the constitution. All departments of government are of equal dignity. Neither can declare that another has not performed a duty imposed by the constitution. In re Senate Resolution No. 4, 54 Colo. 262, 130 P. 333 (1913).

Questions relating to desirability or policy of proposed legislation cannot be propounded. In re Senate Resolution, 12 Colo. 466, 21 P. 478 (1889).

Complex question of constitutional and statutory construction. In order to answer questions propounded by the governor the court would be obliged to construe at least three sections of the constitution and at least four sections of statutes. It appeared that there was a conflict between the specified constitutional provisions themselves as well as between the constitutional and statutory provisions, and a possible conflict between the statutory provisions, presenting a most difficult problem of constitutional and statutory construction requiring exhaustive research and most careful consideration. The questions propounded by the governor might all be the subject of litigation in which the parties to be affected will be afforded ample opportunity of presenting their causes, and then, and not until then, would it be the court's duty, on requested review, to give these important constitutional and statutory questions its exhaustive research and study. In re Interrogatories by the Governor, 126 Colo. 48, 245 P.2d 1173 (1952).

The supreme court should not prejudge involved legal problems and fundamental constitutional interpretations in ex parte proceedings, it being the policy of the supreme court to accommodate the general assembly only in such cases as are clear and where no prejudice will result to anyone in the future. In re Interrogatories Propounded by Senate, 131 Colo. 389, 281 P.2d 1013 (1955).

As a general proposition the supreme court seriously doubts the wisdom of prejudging

the Legislature or the Governor and Council. Opinion of the Justices (1969) 109 NH 366, 252 A2d 429.

3. —Private individuals

Advisory opinions of the Supreme Court cannot be given on the petition of private individuals. State v. Harvey (1965) 106 NH 446, 213 A2d 428.

It has been denied consistently that there is any right in courts to give advisory opinions to private litigants. Piper v. Town of Meredith (1969) 109 NH 328, 251 A2d 328.

4. —Legislature

This article authorizes the legislature, as well as the governor and council, to require the advice of the justices upon important legal questions pending in the body entitled to the advice, and awaiting the consideration and action of that body in the course of its legislative or executive duty. Opinion of the Justices (1906) 73 NH 625, 63 A 505, 5 Ann. Cas. 689.

Under this article either the House or the Senate has independent authority to request advisory opinions, and the duty of the justices to return their answers does not depend upon consent or approval of the other branch, whose request that no answer be returned may be disregarded. Opinion of the Justices (1959) 102 NH 80, 150 A2d 813.

A question of law necessary to be determined by one branch of the legislature in the performance of its duties furnishes the basis for a proper request to the court for its opinion. Opinion of the Court (1881) 60 NH 585.

The reasons of one branch of the legislature for refusing to concur in the request of the other for the opinion of the justices are not subject to judicial scrutiny. Opinion of the Justices (1959) 102 NH 80, 150 A2d 813.

The fact that no suit can be maintained against the state affords the legislature a proper occasion for requiring the advice of the justices as to the validity of a contract entered into on behalf of the state by the governor, with the advice and consent of the council. Opinion of the Justices (1903) 72 NH 601, 54 A 950.

The justices will give an opinion on an inquiry propounded to them by the legislature concerning the power of the legislature to convene itself without approval of the governor and council, even though the legislative session has ended, since such an opinion might be of benefit to future legislatures. Opinion of the Justices (1944) 93 NH 474, 37 A2d 478.

Questions propounded to the justices by the house of representatives which do not directly involve the powers and duties of that body do not require an answer by the justices. Opinion of the Justices (1949) 95 NH 557, 66 A2d 76; Opinion of the Justices (1892) 67 NH 600, 43 A 1074.

5. —Governor and council

An advisory opinion may be sought where the powers of the governor and council are in question. Opinion of the Justices (1959) 102 NH 183, 152 A2d 870.

A request for an opinion by the governor and council is proper where the question propounded relates to action awaiting the consideration of the governor and council in the course of their executive duties. Opinion of the Justices (1950) 96 NH 517, 83 A2d 738: Opinion of the Justices (1908) 74 NH 606, 68 A 873.

Questions concerning the executive duties of the governor and council are proper subjects upon which to base a request for an opinion of the justices since such opinion would assist the governor and council in the performance of the duties legally imposed upon them by statute. Opinion of the Justices (1949) 96 NH 513, 68 A2d 859.

The governor and council may properly request the opinion of the justices on the validity of a statute which provides for re-organization plan of the state government where it is necessary that the validity of the statute be determined so that the governor will know whether or not to call the legislature into special session and submit to them such a plan. Opinion of the Justices (1950) 96 NH 517, 83 A2d 738.

Under a statute which imposes upon the governor the duty to provide by contract for railroad transportation of certain public officers, if the governor is in doubt as to what public officers are included in the meaning of the statute he, with advice and consent of the council, may require the opinion of the justices on the question. Opinion of the Justices (1908) 74 NH 606, 68 A 873.

While it is the duty of the justices, when requested by the governor and council, to give their opinions upon important questions of law and upon solemn occasions, it first must appear to the justices that their answer to any question so presented will be of assistance to the

tant question of law necessary to be determined by the body making the inquiry. Opinion of the Justices (1892) 67 NH 600, 43 A 1074.

12. —Private rights

This article does not authorize the legislature or the governor and council to require advice from the justices on a question affecting private rights alone on which interested persons are entitled to be heard, and justices will refuse to give advice when such questions are propounded. Opinion of the Justices (1949) 95 NH 557, 66 A2d 76; Opinion of the Justices (1883) 62 NH 704.

The justices will decline, as far as possible in the performance of their advisory duties imposed by this article, to express their views upon questions involving private rights, or to make any answer unless the official power or official duty of the body making the inquiry is clearly involved by the question submitted. Opinion of the Justices (1911) 76 NH 597, 79 A 490.

13. —Questions of law or fact

Opinions of the justices are to be given on questions of law only and not upon questions of fact in any form, and the court in such opinions will not weigh the evidence with any view of settling disputed questions the decision of which depends upon evidence alone. Opinion of the Justices (1864) 45 NH 607.

Generally, this section does not permit the supreme court to advise the legislature as to the meaning and scope of existing statutes. Opinion of the Justices (1959) 102 NH 187, 152 A2d 872.

This provision does not apply to constitutional questions involving existing laws. Opinion of the Justices (1955) 99 NH 524, 113 A2d 542.

14. —Unnecessary answers

The court will not undertake to answer the second of two questions submitted as to the constitutionality of proposed legislation, where the answer to the first will serve the present legislative purpose, and adjournment of the legislature is impending. Opinion of the Justices (1959) 102 NH 240, 154 A2d 184.

15. Effect of opinions

In giving an opinion on a question propounded to them by the legislature the justices do not act as a court, but as the constitutional advisors of either branch of the legislature requiring their opinion, and it is not essential that the question proposed should be such as might come before them in their judicial capacity. Opinion of the Court (1881) 60 NH 585; Opinion of the Justices (1906) 73 NH 625, 63 A 505, 6 Ann. Cas. 689; Opinion of the Justices (1911) 76 NH 597, 79 A 490.

An opinion of the justices on proposed legislation is not binding upon the court in case the proposed legislation should become law and a case should arise requiring its construction. Opinion of the Justices (1852) 25 NH 537.

An opinion of the justices does not amount to a judicial decision. Re School Law Manual (1885) 63 NH 574, 4 A 858; Opinion of the Justices (1911) 76 NH 597, 79 A 490.

16. Dissent

Where the opinion of one or more justices is opposed to the opinion expressed by the majority of the justices on a question submitted to them it is the duty of the minority to express their opinion in the same manner as that of the majority. Opinion of the Justices (1915) 77 NH 611, 93 A 311.

17. Cited

Cited in Wyman v. De Gregory (1957) 101 NH 171, 137 A2d 512; Opinion of the Justices (1958) 101 NH 549, 137 A2d 726.

[Art.] 75. [Justices of Peace Commissioned for Five Years.] In order that the people may not suffer from the long continuance in place of any justice of the peace who shall fail in discharging the important duties of his office with ability and fidelity, all commissions of justice of the peace shall become void at the expiration of five years from their respective dates, and upon the expiration of any commission, the same may if necessary be renewed or another person appointed as shall most conduce to the well being of the state.

DELAWARE CODE ANNOTATED

REVISED 1974

With Provision for Subsequent Pocket Parts

Prepared under the Supervision of
The Delaware Code Revisors
JOSEPH WHITMORE MAYBEE AND DANIEL F. WOLCOTT, JR.
by
The Editorial Staff of the Publishers
Under the Direction of
D. P. HARRIMAN, A. D. KOWALSKY
AND A. E. ESTES

VOLUME 16

1981 Replacement Volume

Including Legislation Enacted Through December 31, 1981 by the 131st General Assembly and annotations taken from Atlantic Reporter 2d through Volume 432 (p. 327)

THE MICHIE COMPANY
Law Publishers
CHARLOTTESVILLE, VIRGINIA
1981

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1984 Cumulative Supplement

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Annotated through ... 226. For complete scope of annotations, see ... in supplement to Volume 1.

THE MICHIE COMPANY
Law Publishers
CHARLOTTESVILLE, VIRGINIA
1984

RULE 44.

ADVISORY OPINIONS UPON REQUEST FROM THE GOVERNOR OR FROM THE GENERAL ASSEMBLY

(a) Request for an Opinion. A request from the Governor or from the General Assembly shall be regarded as confidential for a period of 5 days after receipt thereof, or until the request becomes public information, whichever first occurs.

(b) Briefing and Oral Argument. The request shall be docketed with the Clerk of the Court and, after designation of counsel, shall be processed through briefing and argument in the same manner as an appeal or as an original proceeding in the Supreme Court. Correspondence between the Governor, or the Speaker of the House and the President Pro Tempore of the Senate, as the case may be, and the Justices about the request shall be included in the docket which is public information.

(c) Delivery and Publication. After the opinions are prepared, they shall be hand-delivered to the Governor or to the Speaker of the House and the President Pro Tempore of the Senate, as the case may be, and shall be regarded as confidential for a period of 5 days thereafter, or until the Governor or the Speaker of the House and the President Pro Tempore of the Senate, as the case may be, has released them, whichever first occurs.
(Amended, effective Dec. 15, 1983.)

Commentary. The rule amendment implements recent legislation amending § 141 of title 10 to permit the General Assembly as well as the Governor to request advisory opinions of the Supreme Court.

Effect of amendment. — The 1983 amendment, effective Dec. 15, 1983, added "or from the General Assembly" in the title of the rule, inserted "or from the General Assembly" in paragraph (a), substituted "5" for "10" in that paragraph, inserted "or the Speaker of the House and the President Pro Tempore of the Senate, as the case may be" in the second sentence of paragraph (b), and in paragraph (c), deleted "the office of" following "hand-delivered to," inserted "or to the Speaker of the House and the President Pro Tempore of the senate, as the case may be" and substituted "5" for "10" and "or the Speaker of the House and the President Pro Tempore of the Senate, as the case may be, has released" for "releases."

PART V. ATTORNEYS

Subpart A — Board of Bar Examiners

RULE 52.

ADMISSION TO THE BAR — GENERAL

(a) Requirements for Admission. Except as to persons admitted under Rule 53, no person shall be admitted to the Bar unless he shall have qualified by producing evidence satisfactory to the Board:

(5) That he has been regularly graduated with a baccalaureate degree or its equivalent from a law school which at the time of conferring such

degree was listed on the A
schools.

(6) That he has been exa
of law, equity, legal ethics a
Responsibility and has bee
as an attorney. The Board'
its discretion and shall b
scoring standard to be pro

(7) That he is a domicilia
if he passes the examina
admission, either his domi

(8) That he has served
service for at least 5 mon

(i) In the office of or
Preceptor, or under t
member of the Bar o
and has been in prac

(ii) As a law clerk
State or of a United

(iii) In the office o
the United States At
Legal Aid Society, In
tion approved by the
of a member of the
certified by the Boa

(9) That he has sati
instruction called by the
Court or the Board shal
instruction for those see
$75 to the Clerk of the

(c) Clerkship. No perso
served a satisfactory clerksh
of this rule. The 5-month pe
a clerkship shall qualify un
shall have matriculated at a
graph (a) of this rule. The
desiring to qualify for admi
practical experience to be a
Prior to the admission of
applicant and his Preceptor
completed the required list

(d) Certification. Upon
admission to the Bar, the E
of his qualification for adm

An applicant for admissi
for admission, including e
domicile or his principal of

MICHIGAN RULES OF COURT: 1986 STATE

With Amendments
Received Through April 15, 1986

ST. PAUL, MINN.
WEST PUBLISHING CO.
1986

(5) 50¢ per page for a copy of an opinion; however, one copy must be given without charge to each party in a case.

A person who is unable to pay a filing fee may ask the court to waive the fee by filing a motion and an affidavit disclosing the reason for the inability.

(H) Rule Applicable. Except as provided in this rule, MCR 2.625 applies generally to taxation of costs in the Court of Appeals.

(I) Violation of Rules. The Court of Appeals may impose costs on a party or an attorney when in its discretion they should be assessed for violation of these rules.

[Amended January 31, 1985.]

Note

MCR 7.219 is based on GCR 1963, 822.

Subrules (F) and (G) carry forward the provisions of GCR 1963, 822.2 and 822.3 regarding the fees and expenses that may be collected and taxed. The fee for a copy of a Court of Appeals opinion is changed to 50¢ per page, to conform with MCL 600.321(4); MSA 27A.321(4).

New subrules (A)–(E) provide the procedure for taxation of costs, formerly covered by reference to the rule governing taxation of costs in trial courts. See GCR 1963, 822.1.

Subrule (I) adds explicit authorization for the Court of Appeals to impose costs on a party or attorney for violation of the rules.

SUBCHAPTER 7.300 SUPREME COURT

RULE 7.301 JURISDICTION

The Supreme Court may:

(1) review a Judicial Tenure Commission order recommending discipline, removal, retirement, or suspension (see MCR 9.223–9.226);

(2) review by appeal a case pending in the Court of Appeals or after decision by the Court of Appeals (see MCR 7.302);

(3) review by appeal a final order of the Attorney Discipline Board (see MCR 9.122);

(4) give an advisory opinion (see Const 1963, art 3, § 8);

(5) respond to a certified question (see MCR 7.305);

(6) exercise superintending control over a lower court or tribunal (see, *e.g.*, MCR 7.304);

(7) exercise other jurisdiction as provided by the constitution or by law.

Colorado
Art 6 - §3
Mass - Chap 3 part 2 Art 2
New Hamp - Part 2 Art 74

STATE OF ALASKA
THE LEGISLATURE

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907·465·3800

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

H. JUD. 1-18-88 1:30p.m.

Introduced: 4/8/87
Referred: State Affairs,
Judiciary and Finance

5-0420A

BY DONLEY, MILLER, MARTIN AND BOUCHER

IN THE HOUSE

Separation of Power

HOUSE JOINT RESOLUTION NO. 26

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

Proposing an amendment to the Constitution of the State of Alaska relating to advisory opinions of the Supreme Court on the request of the governor or legislature.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. Article IV, Constitution of the State of Alaska, is amended by adding a new section to read:

SECTION 17. SUPREME COURT OPINIONS ON THE REQUEST OF THE GOVERNOR OR LEGISLATURE. The Supreme Court has jurisdiction to render an advisory opinion on an important question of law submitted to the court by the legislature, by either house of the legislature, or by the governor. The Supreme Court shall accept briefs addressing the question on behalf of the legislature, a house of the legislature, the governor, or another interested person.

* Sec. 2. The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

Proposed amendment:

more ⇒ 1890 in constitution since 1890

by man by state since 1923

constitutional convention ⇒ ???

mandatory ≠ discretionary

speculative ~~not~~ resolution of hypothetical situations.

REPRESENTATIVE DAVE DONLEY

ALASKA STATE LEGISLATURE
DISTRICT ELEVEN - SPENARD

P.O. BOX V, JUNEAU 99811
(907) 465-3892

CHAIRMAN
LABOR AND COMMERCE
COMMITTEE

MEMBER
STATE AFFAIRS COMMITTEE
HEALTH, EDUCATIONAL
AND SOCIAL SERVICES COMMITTEE
INTERNATIONAL TRADE
SUB-COMMITTEE

DATE: JANUARY 18, 1987

TO: All Members
Alaska House of Representatives, Judiciary Committee

FROM: Representative Dave Donley, Sponsor DD

SUBJECT: HJR 26 backup

HJR 26 is a resolution authorizing the Alaska Supreme Court to issue an advisory opinion on questions of law submitted to the court by the legislature or by the Governor.

HJR 26 would ask Alaskan voters to decide whether the Legislature and Governor could seek advice from Alaska's Supreme Court when considering critical issues to the state such as bidders preference, local hire, and preference for local products.

Under current practice, the Legislature is forced to play a guessing game with the courts and the Constitution. The system costs the state money, time and credibility when we adopt laws that cannot meet a constitutional challenge.

Under HJR 26, we could request some guidance from the courts before we pass legislation that could potentially be struck down, so that we can adopt legislation that is both fair and constitutionally sound. Currently nine other states have similar laws which have proven to be successful and effective.

HJR 26 would not require the legislature to request opinion but rather would give the legislative body another tool to assist in the development of constitutionally sound legislation.

INTERIM IN ANCHORAGE
1024 WEST SIXTH AVENUE • ANCHORAGE, ALASKA 99501 • (907) 561-8234

Litigation has become a part of legislative life. In the past, legislatures have relied exclusively on the state attorney general to represent them—as the law often says they must. Now, some of them are hiring their own legislative counsels. That trend is likely to grow.

From The Last Frontier

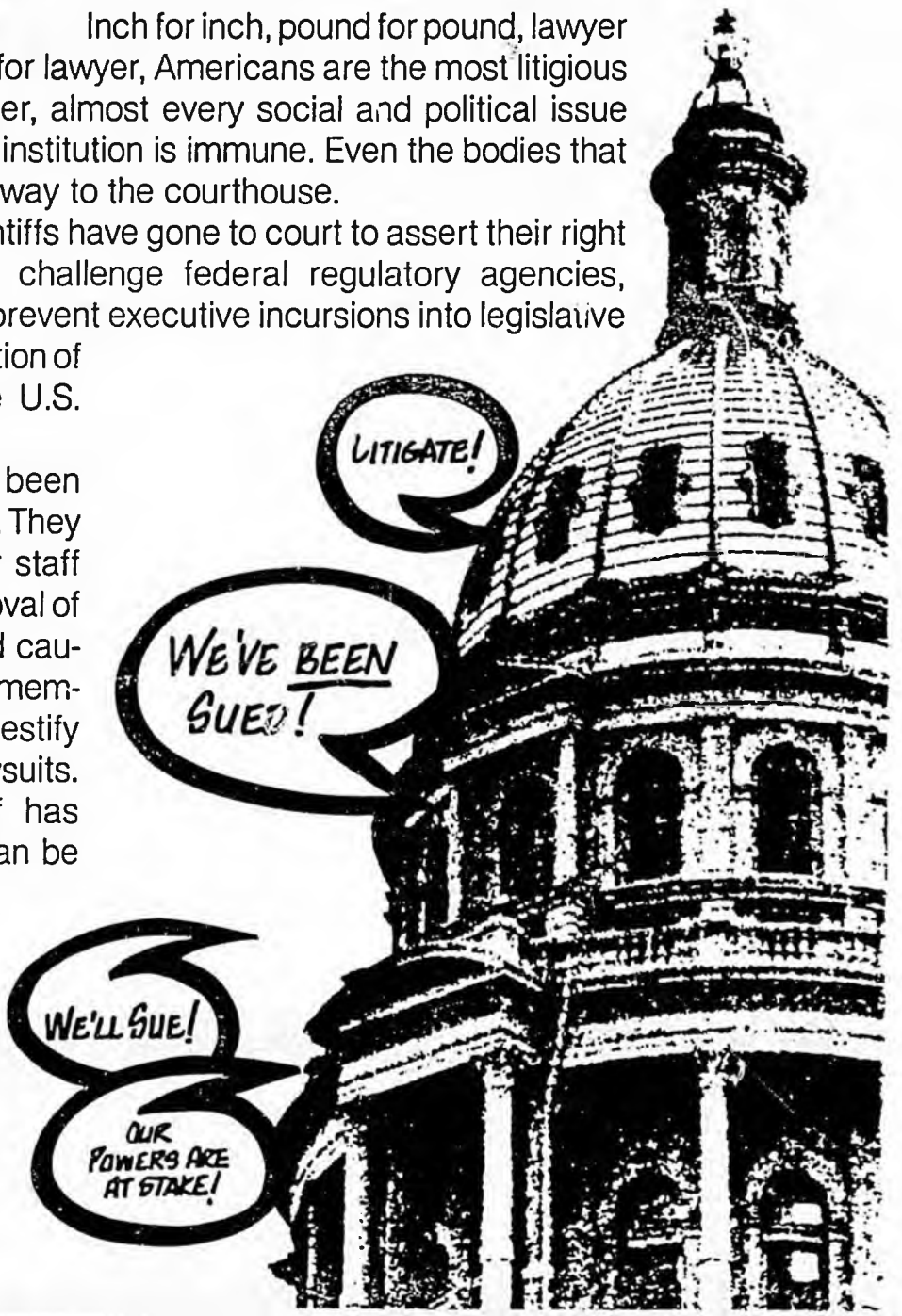
Rep. Terry Martin
State Capitol, Pouch V
Juneau, AK 99811

The State Legislature in Court

Inch for inch, pound for pound, lawyer for lawyer, Americans are the most litigious people on earth. Sooner or later, almost every social and political issue ends up in court. No person or institution is immune. Even the bodies that write the laws are finding their way to the courthouse.

State legislatures as plaintiffs have gone to court to assert their right to appropriate federal funds, challenge federal regulatory agencies, regulate the initiative process, prevent executive incursions into legislative prerogatives, and seek clarification of the process for amending the U.S. Constitution.

Legislatures have also been hauled into court as defendants. They have been told to explain their staff hiring practices and justify removal of legislators from committee and caucus positions. Legislative staff members have been subpoenaed to testify before grand juries and in lawsuits. The legislative process itself has been assaulted. No tradition can be taken for granted.



Lanny Proffer

U.S. Court of Appeals for the District of Columbia that an allegedly improper Presidential veto sufficiently infringed the power of the Senate, and his rights as a senator, to establish his standing to sue.

Aside from its opinion in *Coleman* v. *Miller*, the Supreme Court has not ruled on the question of legislator standing. And although the *Coleman* ruling has been cited repeatedly, it has limited value as precedent, since the standing of the legislature was not directly at issue when the Supreme Court decided the case. Their comments on the legislators' right to sue were superfluous to the decision.

Traditionally, legislatures have relied on the state attorney general for legal assistance. There are only a handful of states where the attorney general is not specifically directed to give legal opinions to the legislature when asked to do so. In some states, such as Oklahoma and South Carolina, the attorney general is available as a bill drafter for the legislature. In New Hampshire, the attorney general can be asked for legal advice in addition to drafting assistance.

In some cases, however, relying on the attorney general to advocate and defend legislative priorities is unwise. Worse still, the attorney general may be confronted with a conflict of interest. In the Colorado case cited above, where members of the legislature challenged the Environmental Protection Agency, and in Pennsylvania, where the legislature challenged the power of the governor to spend federal funds without a legislative appropriation (*Shapp* v. *Sloan* 391 A.2d 602), the attorney general opposed the legislature. In both cases, the legislature retained outside counsel and was ably represented. Nevertheless, these examples show that legislatures cannot rely on the state attorney general to represent their interests in all cases.

Congress has encountered similar problems in disputes with the executive branch. A case now on appeal to the Supreme Court (*Chada* v. *Immigration and Naturalization Service* [No.-1932]) tests the validity of the legislative veto. The U.S. Department of Justice, on behalf of President Reagan, argues that the legislative veto is an unlawful intrusion by Congress into an executive function. The recently established Office of Legal Counsel in the Senate is arguing the Senate position.

From time to time, every legislature faces an issue that requires it to assert its position in court. If these occasional lawsuits were the only basis for legislative counsel, it might be economic to retain outside counsel on a case-by-case basis. But many legislatures have found that legal questions now arise almost daily.

Legislatures have become big enterprises with large budgets, broad powers and extensive responsibilities. They operate in a highly charged, contentious atmosphere. One would have to search to find any official legislative action that did not raise one or more legal questions. In similar circumstances, a private concern would have a battalion of lawyers. To be effective, the legislature must not only defend its prerogatives from all sides, but also exercise them to the fullest extent. A power not asserted is abdicated.

The legislative power to investigate, which lies at the heart of the lawmaking function, has been the subject of entire texts and innumerable court cases. The legislatures of Kentucky, Montana, Nebraska, and other states without statutory authority to litigate, *do* have express authority to go to court to enforce their subpoena power.

Not all threats to the legal authority of a legislature necessarily arise in the state or federal courts of the home state. Federal precedent applies in all cases under the federal system. A decision in a distant federal court may have profound effects beyond the parties to the litigation.

As mentioned earlier, the power of the Congress to veto certain administrative rules of federal agencies is before the U.S. Supreme Court. The same concerns that prompted Congress to provide for review of agency rules and regulations have been apparent in state legislatures, some of which have established procedures to review the administrative rules of state agencies. If the Supreme Court curtails congressional power in this area, attacks on similar state statutes are inevitable. Thus it can be important for the legislature to be heard even when it is not a party to the litigation.

The law recognizes the importance of such third parties and provides for their participation as *amicus curiae* or

In some cases, relying on the attorney general to advocate and defend legislative priorities is unwise. Worse still, the attorney general may be confronted with a conflict of interest.

The State Legislature

Legislators have always believed that what was said or done in the legislature could not be questioned elsewhere, and their view was supported by a tradition of immunity that can be traced back to the 17th century. Yet in 1980 the U.S. Supreme Court held that immunity did not apply when the federal government was investigating a state legislator (*U.S.* v. *Gillock* 445 U.S. 360 [1980]). Legislators also believed that their power to raise and appropriate money was absolute. Today, federal judges instruct legislatures under threat of contempt to appropriate whatever sums are necessary to implement judicial decrees.

It is clear from a reading of the state statutes governing the operation of the legislatures and the attorneys general of the states that legislatures were not considered potential litigants. This seems incongruous, since American political theory relies so heavily on the notion of carefully calculated checks and balances. From a contemporary perspective, it seems inevitable that arguments between branches of government occasionally ripen into lawsuits.

Many states have absolute prohibitions against any state agency, institution or individual representing the state or its officials. Arizona statutes designate the attorney general as the only legal counsel for the state. Outside counsel can be retained only with the attorney general's consent. The Connecticut attorney general is specifically directed to defend members of the legislature if any of their official acts are challenged.

In 1966, the Utah Legislature passed a bill that authorized the legislature to retain its own counsel. The attorney general challenged the statute, and it was declared unconstitutional by the state supreme court. Not until 1972, when the legislative article of the state constitution was amended, could the Utah Legislature hire its own attorney.

Six state legislatures have statutory authority to litigate issues of concern to them: California, Georgia, Kansas, Nevada, Oregon and Utah.

Exclusion of the legislatures as litigants may have been based on the assumption that disputes between branches of government should be resolved by the political process rather than the courts. It may also have seemed that any sort of enforcement role, even if only to enforce a legislative prerogative, was inconsistent with the legislative function. Whatever the reason, the courts still have difficulty with legislatures as litigants.

Robert Coldsnow, legislative counsel for the Kansas Legislature, argues that without its consent the legislature has no existence for purposes of litigation. Individual members may sue or be sued; the legislature may not. Certain entities within the legislature have a legal existence; the legislature does not.

This lack of a clear party in interest causes confusion in the courts. When the Colorado General Assembly entered a suit against the Environmental Protection Agency, the U.S. Court of Appeals for the Tenth Circuit ruled that the named members of the legislature could not speak for the state and they lacked the requisite interest or "standing" in the case to be heard as individuals (*Mountain States Legal Foundation* v. *Costle* 630 f. 2d 754 [1980]). To quote the court: "Even if state law permitted the petitioner legislators to press the state's constitutional claims . . . this court should not allow the legislators standing to raise claims that the state itself declines to raise and in fact opposes."

In that case, the legislature and the governor took contradictory positions. Governor Richard D. Lamm instructed Attorney General John D. MacFarlane to enter the case as his advocate. The court ruled that "the attorney general has the exclusive right to represent the state in actions to enforce its interest." It held that the legislators could not represent the interests of the state because to do so would be to pre-empt the power of the attorney general and the governor.

The court either did not understand or chose to ignore the claim that uniquely *legislative* powers were being threatened. Legislatures may not have standing to compel enforcement of the statutes they pass, but they definitely have the requisite interest in preserving legislative authority. Issues that fall into this category include confirmation of certain state officials, ratification of constitutional amendments, and the legislature's investigatory and information-gathering functions.

In *Coleman* v. *Miller* (307 U.S. 433 [1939]), the U.S. Supreme Court made it clear that state legislators challenging the procedure for ratification of constitutional amendments had sufficient interest in the outcome of the case to have their claim resolved. Similarly, U.S. Senator Edward Kennedy (D-Mass.) successfully argued before the

U.S. Court of Appeals for the District of Columbia that an allegedly improper Presidential veto sufficiently infringed the power of the Senate, and his rights as a senator, to establish his standing to sue.

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The law recognizes the importance of such third parties and provides for their participation as *amicus curiae* or

In some cases, relying on the attorney general to advocate and defend legislative priorities is unwise. Worse still, the attorney general may be confronted with a conflict of interest.

"friend of the court." An institution, group or person with an interest in the outcome of a case may file a brief with the court, explaining its point of view and bringing to the court's attention the potential effects of the decision.

State attorneys general regularly join their colleagues in other states as *amici* in lawsuits when the outcomes might affect them. A recent Supreme Court case raised the question whether a local government might be subjected to punitive damages under a U.S. civil rights law (*City of Newport* v. *Fact Concerts, Inc.* 49 USLW4860 [1981]). Many states intervened in the case as *amicus curiae* and the Court ruled that punitive damages could not be imposed upon the city. Because few legislatures have offices set up to handle such tasks, their participation in such cases is limited.

In states where the legislature has no legal counsel of its own, the main difficulty is that an outside counsel, who has been retained for a limited time and purpose, may not understand the nuances of the legislative process. Legislatures with legal counsels are able to accumulate legislative

States with In-House Legislative Counsels

State	Statutory Authority	Agency Approving Litigation	Scope of Litigating Authority	Other Duties	Authority to Retain Outside Counsel
California	Annotated California Code 10200 et seq.	Joint Rules Committee or legislature by resolution.	No specific limitation other than authorization by Joint Rules Committee.	Bill drafting; and advice and counsel to legislature, drafting and advice for governor and state judges, code revision, preparation of initiative measures; statutory indexing and codification.	Yes
Georgia	Georgia Code Annotated 46-1203	Legislative Services Committee.	"Represent the interests of the Legislative branch in matters involving litigation."	Bill drafting; assist committees, advisory opinions; statutory and code revision; research.	Yes
Kansas	Kansas Statutes Annotated 46-1224	Legislative Co-ordinating Council when legislature is out of session. Either house by resolution when legislature is in session.	May represent legislature in "any cause or matter." Legislative Council has same mandamus and quo warranto powers and standing as attorney general.	Advisory opinions, counsel to special committees of legislature; provide investigative assistance upon request of committee chairpersons.	Legislative Coordinating Council may provide legal, investigative and clerical assistance to legal counsel as needed.
Nevada	Nevada Revised Statutes 218.690 et. seq.	Legislative Commission.	"To protect the official interests of the legislature or one or more legislative committees."	Bill drafting; advisory opinions; code revision; digest and annotate Supreme Court opinions; service on Commission on Uniform State Laws.	May contract for necessary services.
Oregon	Oregon Revised Statutes 173.111 et. seq.	Legislative Counsel Committee.	"To protect the official interests of the legislative Assembly, one or more committees, or one or more members."	Bill drafting; research; assist in preparation of initiative measures; code revision.	Yes
Utah	Utah Revised Statutes 36-12-14	Legislative Management Committee.	"Represent the legislature, any of its committees or subcommittees, or the professional legislative staff in cases or controversies before courts, administrative agencies and tribunals.	Bill drafting; advice and counsel to legislature; code revision; bill status.	No statutory authority.

experience and knowledge to complement legal experience. This experience and knowledge can be brought to bear in litigation even if outside counsel is retained for the actual trial.

Six state legislatures have statutory authority to litigate issues of concern to them: California, Georgia, Kansas, Nevada, Oregon and Utah. In each case, the selection of the legal counsel is nonpartisan and professional. The Kansas statute describes the qualifications and the selection process in detail. The Nevada statute requires membership in the state bar and expertise in "political science, parliamentary practice, legislative procedure, and the methods of research, statute revision and bill drafting."

Before the counsel in any state can initiate an action or enter his appearance in a lawsuit, the legislature must consent. In most states, the legislative counsel is a part of the legislative service agency and the supervising committee of legislators must give its consent before any action can be brought.

The legislatures have given their counsels broad power to litigate. The Oregon statute is typical: Legal action may be brought "when deemed necessary or advisable to protect the official interests of the legislative assembly, one or more legislative committees, or one or more members of the legislative assembly." The authorizing legislation for the Georgia counsel is broad and succinct: "to represent the interests of the legislative branch in matters involving litigation." Georgia and Oregon specifically provide for outside counsel as necessary; presumably the other states would permit such counsel as well if the particular litigation called for it.

Legislatures with offices of legal counsel have managed to get a lot of mileage out of them. Their duties, as spelled out in each state's enabling legislation, include far more than litigation. All are asked to provide legal counseling to legislators and legislative committees. Most are involved with bill drafting and service to investigative committees. The Nevada legislative counsel works with the National Commission on Uniform State Laws. In Oregon and California, the counsels are involved in the initiative processes. California, Utah and Nevada specifically assign code revision duties, including the development of recommendations for improvement and reform. Other states, such as Georgia and Nevada, assign "such other authority and duties as the committee may provide."

The office of legal counsel in the legislature is essentially analogous to that of the general counsel in a large corporation. Although there may be lawyers in many divisions, the ultimate responsibility in legal matters resides in the office of the general counsel. All litigation is channeled through that office.

Some states have stopped short of creating an official legislative counsel but have assured that they have other knowledgeable counsel on legislative issues. New Jersey is an example. The New Jersey Senate and General Assembly retain majority and minority counsel who spend a substantial portion of their time representing the respective legislative bodies. During the remainder of their time they carry on the private practice of law. Their legislative responsibilities keep them current on legislative issues and the private practice gives them regular and continuous courtroom experience. These counsels do not, however, handle bill drafting and other legislative chores assigned to in-house counsels.

This kind of legal representation provides more flexibility for the leadership, according to Robert Smartt, deputy director of the New Jersey General Assembly. "Issues sometimes arise where only the majority has a substantial interest at stake," he said. "In those instances, counsel to the majority can respond quickly and effectively." Lawrence Marinari, majority counsel to the General Assembly, sees litigation as a growth industry in the state. "The more modernized and co-equal the legislature becomes," Marinari said, "the more often it is likely to be drawn into lawsuits. Representing the legislature could become a full-time job."

Perhaps the most important function of the legal counsel in a legislature is also the most subtle. Creation of the office signals to the other branches of state government and to the public at large that the legislature is prepared to defend its prerogatives and assert its powers to the fullest extent possible.

The legislature must be prepared to defend itself as an institution when it is challenged in a court of law. As a co-equal branch of government, the legislature must be prepared to use the courts as a sword as well as a shield. When necessary, legislatures must bring actions as well as defend them. They must also extend their vision beyond their own states to federal courts throughout the nation, and, as issues warrant, to let those courts know how their rulings might affect the states.

If there was ever a time when the legislature was a cloistered institution, that time has passed. In tomorrow's state legislatures, there may be fewer cries of "there oughta be a law"—and more of "I'll see you in court."

Lanny Proffer is counsel to NCSL.

STATE OF ALASKA 1988 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST: Bill Version: HJR 26
Publish Date:

Revision Date: 1-6-88
Title: Advisory opinions of the supreme court
Sponsor:
Requestor:

Agency Affected: Alaska Court System
BRU: Appellate Courts
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
Personal Services	. . . .	41.3	41.3	41.3	41.3	41.3
Travel	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Contractual	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Supplies	. . . .	1.9	1.9	1.9	1.9	1.9
Equipment	. . . .	2.8	. . . .	. . . .	. . . .	. . . .
Land & Structures	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Grants & Claims	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
TOTAL OPERATING	0.0	46.0	43.2	43.2	43.2	43.2
CAPITAL	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
REVENUE	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .

FUNDING: (Thousands of Dollars)

General Funds	0.0	46.0	43.2	43.2	43.2	43.2
Federal Funds	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Other	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
TOTAL	0.0	46.0	43.2	43.2	43.2	43.2

POSITIONS:

Full-time	. . . .	1.0	1.0	1.0	1.0	1.0
Part-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Temporary	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .

ANALYSIS: (Attach a separate page if necessary)

See attached fiscal analysis.

Prepared by: Jan Strandberg, General Counsel — Phone: 264-8228
Division: Alaska Court System — Date: 1-6-88

Approved by: Arthur H. Snowden, II, Administrative Director — Date: 1-6-88
Agency: Alaska Court System

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management & Budget
- Impacted Agency(ies)
- Senate Secretary

Fiscal Analysis - HJR 26

It is difficult to predict with complete accuracy the number of advisory opinion requests which could be anticipated if this measure becomes law. Given the substantial number of constitutional issues which have concerned the legislature and the governor's office in recent years, this note is calculated based upon an assumptions of 25 requests annually.

The primary impact on the supreme court would be in time spent researching, analyzing and drafting the opinions. The research and analysis function is performed by law clerks. Without a lower court ruling or appellate record for a law clerk to review, the appellate clerk indicates that at least two weeks will be expended preparing materials for the justices. As is the case in other appellate matters, law clerks will also proofread and check technical aspects of the opinion.

The appellate clerk estimates a total of 260 days of law clerk time spent on these requests. An additional law clerk III position would be required.

Although additional judicial and clerical support staff time will also be expended in these matters, it appears that existing resources are adequate to absorb the additional workload.

ALASKA COURT SYSTEM
HJR 26 - Fiscal Analysis

Personal Services:

	Salary	Benefits	Total
Law Clerk II, Range 15A, Anchorage, PFT - 12 months	$30,372	$10,941	$41,313
Supplies			1,875
Equipment: (one-time cost)			
Desk, chair, typewriter, filing cabinet, statutes, and rules of court			2,823
Total First-Year Cost			$46,011

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

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Sponsor:
Requestor:

Agency Affected: Alaska Court System
BRU: Appellate Courts
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
Personal Services		40.3	40.3	40.3	40.3	40.3
Travel						
Contractual						
Supplies		1.9	1.9	1.9	1.9	1.9
Equipment		2.8				
Land & Structures						
Grants & Claims						
TOTAL OPERATING	0.0	45.0	42.2	42.2	42.2	42.2
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

General Funds	0.0	45.0	42.2	42.2	42.2	42.2
Federal Funds						
Other						
TOTAL	0.0	45.0	42.2	42.2	42.2	42.2

POSITIONS:

Full-time		1.0	1.0	1.0	1.0	1.0
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached fiscal analysis.

Prepared by: Karla Forsythe, General Counsel — Phone: 264-8228
Division: Alaska Court System — Date: 4-30-87

Approved by: Stephanie J. Cole, Deputy Director — Date: 4-30-87
Agency: Alaska Court System

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management & Budget
- Impacted Agency(ies)
- Senate Secretary

ALASKA COURT SYSTEM
HJR 26 - Fiscal Analysis

Personal Services:

	Salary	Benefits	Total
Law Clerk II, Range 15A, Anchorage, PFT - 12 months	$30,372	$9,966	$40,338
Supplies			1,875
Equipment: (one-time cost)			
Desk, chair, typewriter, filing cabinet, statutes, and rules of court			2,823
Total First-Year Cost			$45,036

Fiscal Analysis - HJR 26

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Although additional judicial and clerical support staff time will also be expended in these matters, it appears that existing resources are adequate to absorb the additional workload.

(7)

HOUSE COMMITTEE REPORT

Date referred: 4/8/87

FURTHER REFERRALS: Judiciary
Finance

DATE: 4-29-87

The State Affairs Committee has considered HJR 26

Proposing an amendment to the Constitution of the State of Alaska relating to advisory opinions of the Supreme Court on the request of the governor or legislature.

RECOMMENDS:

[ ] replace with ______________ [ ] the same title
[ ] a new title

[ ] attached amendment(s)

[X] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the ______________ Committee

ADOPTS: [ ] __________ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[X] fiscal impact

[ ] zero fiscal note

[ ] zero with analysis

[ ] same as previous fiscal note published ______________

[ ] same as previous zero fiscal note published ______________

SIGNING DO PASS:

[signature]

[signature]

Terry Martin

SIGNING OTHER RECOMMENDATIONS:

[signature] No Rec

[signature] No Rec

[signature]

Chairman's signature