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ADVICE ON STATE COURT ADVISORY OPINIONS

BY JOHN P. MCIVER

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Teachable Moments for Students ... is designed to provide information that can be used for quick and accessible answers to the basic questions that are frequently asked of librarians and those involved in teaching legal research and writing. These questions present a “teachable moment,” a brief window of opportunity when—because he or she has a specific need to know right now—the student or lawyer asking the question may actually remember the answer you provide. The material presented in this column is not meant to be an in-depth review of the topic, but rather a summary of the main points that everyone should know. It is a companion to the Teachable Moments for Teachers column that gives teachers an opportunity to describe a special moment of epiphany that changed their approach to presenting a particular topic to their students. Readers are invited to submit their own “teachable moments for students” to the editor of the column: Barbara Bintliff, University of Colorado Law Library, Campus Box 402, Boulder, CO 80309, phone: (303) 492-1233, fax: (303) 492-2707.

“Your Most Obedient and Most Humble Servants.” So ends the letter of reply from the United States Supreme Court to President George Washington’s request for its opinion on the legality of certain actions of the federal government while the United States remained neutral in the ongoing wars in Europe.¹ Yet “obedient” hardly characterizes the justices’ response. They refused to answer any of the questions Washington posed to them. Indeed, with their letter, the justices began to formalize the interpretation of the “case or controversy” clause of Article III of the U.S. Constitution, taking a stance that would be repeated many times over the succeeding 200 years. In this view, situations requiring an advisory

¹ Letter from the Justices of the Supreme Court to President George Washington, Aug. 8, 1793, reproduced in Stewart Jay, *Most Humble Servants: The Advisory Role of Early Judges* (1997).

opinion do not present either a case or a controversy susceptible to judicial involvement.

The refusal of the U.S. Supreme Court to proffer constitutional opinions outside a case or controversy does not mean that state supreme courts are unwilling to do so. At present, 10 state courts² are required or allowed by their state’s constitution to respond to requests for advisory opinions from the state’s chief executive and, in most instances, its legislature. The most recent—and noteworthy—example of an advisory opinion was issued by the Massachusetts Supreme Judicial Court in February 2004 in response to the Massachusetts Senate’s request for an opinion on the constitutionality of a bill that prohibited same-sex couples from entering into marriage.³ At least another nine states have allowed their courts to render advisory opinions at various points in their history.⁴

What Is an Advisory Opinion?

An advisory opinion is not an opinion in the traditional sense, in which the rights of two or more adversarial parties are adjudicated. It is, in essence, an opinion advising what the law would be, based on a hypothetical set of facts. For example, the Colorado Constitution states the circumstances in which an advisory opinion may be issued as follows: “The supreme court shall give its opinion upon important questions upon solemn occasions when required by the governor, the senate, or the house of representatives.”⁵ Opposing parties are not required.

According to *Black’s Law Dictionary*[®], an advisory opinion is “a nonbinding statement by a court of its interpretation of the law on a matter submitted for that purpose.”⁶ As a rule, advisory

² Supreme Courts in Alabama, Colorado, Delaware, Florida, Maine, Massachusetts, Michigan, New Hampshire, Rhode Island, and South Dakota issue advisory opinions.

³ In re Opinions of the Justices to the Senate, 440 Mass. 1201, 802 N.E.2d 565 (2004).

⁴ At one time or another, the courts of Connecticut, Kentucky, Minnesota, Missouri, New York, North Carolina, Oklahoma, Pennsylvania, and Vermont have issued advisory opinions.

⁵ Colo. Const. Art. VI, § 3.

⁶ *Black’s Law Dictionary*, 8th ed. 2004.

opinions are nonbinding and nonprecedential.⁷ This interpretation is based generally on the theory that advisory opinions are opinions of the individual justices and not of the court itself.

Use of Advisory Opinions

Why, then, would someone other than the governmental official asking for the ruling consult an advisory opinion? The reasons are several. Examining these intragovernmental communications provides significant insights into the thinking of the members of an individual court on specific points of constitutional law. They may allow for some predictability of the outcome of a pending or future case. The advisory opinion may cause the executive branch to refrain from implementation of a law the justices think is unconstitutional, and save the expense of litigating the point later. The text of advisory opinions can explain state policy and governmental direction. It can offer assistance in the legislative drafting process and the development of additional policies with its “expert advice.” A series of advisory opinions may provide guidance on the historical development of a specific doctrine. The text of an advisory opinion may be equally illuminating to those in other states considering similar actions.

Reporting of Advisory Opinions

Reporting of advisory opinions varies from state to state. For example, some advisory opinions are published in the same chronological arrangements as other court decisions, and treated in all respects like other decisions. Some are published in supplements or appendixes to the official court reports. Some states maintain a file of advisory opinions, but the text is not included in a more formal print or electronic source. Some advisory opinions do not seem to have been published at all, or were withdrawn after publication, while others came in the form of letters or other transmittals and not as court decisions. In the earliest days of the nation,

⁷ The exceptions to this rule are Colorado and, to a lesser extent, South Dakota.

advisory opinions were sometimes delivered orally, in person, by a justice. Further, there may be a combination of the publication styles in any one state, as reporting methods varied from year to year.

Because there is no single reporting style, there is no one method that can be used to locate either one or all advisory opinions from the various states. Earlier researchers have compiled lists of some states’ advisory opinions,⁸ but even starting with their results does not guarantee a comprehensive retrieval of all advisory opinions for a specific jurisdiction. Given this situation, it’s easy to see why locating the advisory opinions of a particular court can be a challenge.

Researching Advisory Opinions

The most important thing to know when searching for advisory opinions from a specific state is where (or how) the opinions were reported. Sometimes this is evident from the citation, if one is in hand. If not, the quickest way to find this out is by contacting the state’s clerk of the supreme court, reporter of decisions, or supreme court or state law librarian. One (or all) of these officials should be able to provide details on advisory opinion reporting and may be able to provide information about already existing compilations of advisory opinions, indexes, or other finding aids.

If the advisory opinions are reported with the other opinions of the court, and if a known

⁸ See Albert R. Ellingwood, *Departmental Cooperation in State Government*, App. IV, 269 (1918) for a listing of advisory opinions from 22 states. This remains the definitive work on advisory opinions, despite its date of publication. And see Oliver P. Field, *The Advisory Opinion—An Analysis*, 24 Ind. L.J. 203 (1949), which includes a listing of advisory opinions for Colorado, Maine, Massachusetts, New Hampshire, and South Dakota; John F. Hagemann, *The Advisory Opinion in South Dakota*, 16 S.D. L. Rev. 291 (1971), with a listing of South Dakota’s advisory opinions in Appendix A, p. 306; Terrance A. Smiljanich, *Advisory Opinions in Florida: An Experiment in Intergovernmental Cooperation*, 24 U. Fla. L. Rev. 328 (1972), which lists Florida’s advisory opinions in an appendix, p. 341; Appendix at 227 N.C. 705–726 (1947), which includes a subject matter listing of North Carolina advisory opinions. See also Preston W. Edsall, *The Advisory Opinion in North Carolina*, 27 N.C. L. Rev. 297 (1949), which includes an extensive listing of advisory opinions in its footnotes.

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opinion is needed, then a search as for any other case should return the sought-after advisory opinion. Advisory opinions reported with the court's other decisions should be digested in the West digests. These opinions may be found through the digests' *Descriptive-Word Index*⁹ or via a word search on Westlaw® or LexisNexis®, using the subject of the opinion as the search terms. For example, a researcher seeking an advisory opinion regarding some aspect of the election process might use search terms like “elections,” “balloting,” or “voting.” Similarly, if the state's advisory opinions are treated like other court opinions, and if the subject of the advisory opinion is an existing statute, the state statutes should refer to the advisory opinion in the annotations to the statutory section it construes.¹⁰

If, however, the advisory opinions are published in an appendix or supplement to the state court opinions in an official reporter, they can be much more difficult to locate, even with a citation. These opinions will probably not be included in the West digests or reporters (or not included consistently) and, therefore, most likely they will not be on Westlaw or LexisNexis. To further complicate the quest, it's not uncommon for reprints of the official reports to omit appendix and supplementary materials, making it necessary to have an original or a complete copy of the official reporter (i.e., one that does not omit appendix or supplementary information) to locate advisory opinions.

If the state's advisory opinions are not published with the other opinions of the court or are not included in an appendix or supplement to the official reports, the researcher may have no choice but to contact the state's clerk of the supreme court, reporter of decisions, or supreme

court or state law librarian. One of these officials should be able to assist in locating a locally maintained compilation of the opinions. There is little consistency among the states in their record keeping; however, the more recent the opinion, the more likely it is to be located.

Researching advisory opinions is an adventure in almost every case. Most states that allow for the issuance of advisory opinions do not provide for the uniform or comprehensive publication of the opinions. The information in advisory opinions, however, can be of considerable assistance in a range of situations, making the challenge of finding the documents worth the effort.

Brief Bibliography

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13 Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure* § 3529.1 (Advisory Opinions) (1984 and Supp. 2004).

⁹ Individual state digests may have a *Descriptive-Word Index* entry for “advisory opinion,” but this is for cases dealing with some aspect of the law of advisory opinions and not for the text of the opinions themselves. There is no topic in the West Digest System that collects the text of these opinions.

¹⁰ The annotations to the state's statutes or constitutional provisions that allow for state supreme courts to issue advisory opinions generally do not cite to the advisory opinions themselves. Rather, they cite to cases construing the statutory or constitutional provisions.