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MEMORANDUM

TO: Members of the General Assembly

FROM: Office of Legislative Legal Services

DATE: February 16, 2011

SUBJECT: Guidelines for members when they receive court or administrative papers that appear to relate to exercise of legislative duties; considerations when asked to provide evidence of legislative intent

Because of the possibility of lawsuits against the General Assembly and some of its members and because many members are asked to give oral testimony or provide affidavits relating to legislative intent in judicial proceedings, the Committee on Legal Services has developed written guidelines to advise the members when they receive court or administrative papers that appear to relate to the exercise of their legislative duties.¹

GUIDELINE NO. 1. What to do when you receive court or administrative papers - immediate notice to the director of the Office of Legislative Legal Services. When a member receives any papers relating to a court or administrative proceeding, i.e., summons and complaint, subpoena, affidavit, or other court or administrative paper, and the paper or proceeding relates to the exercise of the member's legislative duties or if a member receives an oral or written request to testify in a court or an administrative proceeding, the member should notify the director of the Office of Legislative Legal Services or the director's designee immediately (303-866-2045). Section 2-3-1001, C.R.S., authorizes the Committee on Legal Services to retain counsel or otherwise render legal services for the General Assembly or its

¹ The Colorado Supreme Court has recognized two relatively minor exceptions to the doctrine of legislative immunity in *Colorado Common Cause v. Bledsoe*, 810 P.2d 201 (Colo. 1991) and *Romer v. Colorado General Assembly*, 810 P.2d 215 (Colo. 1991). Perhaps no further exceptions will be recognized; however, members should understand that the limits of immunity are subject to redefinition at any time in a case in which the issue is raised and addressed by the court.

members in connection with performance of legislative powers, duties, and functions.

GUIDELINE NO. 2. What to do when you are asked to testify or to sign an affidavit relating to legislative intent to be used in a court or administrative proceeding. The ultimate decision about whether an individual member testifies in a court or an administrative proceeding should be made by the individual member. In making this decision, the Committee suggests that the member take into account the following considerations and carefully balance his or her view of legislative accountability and responsiveness with the points made in the considerations.²

Consideration No. 1. Speech and Debate clause. The speech and debate clause of the Colorado Constitution (Art. V., Section 16) protects legislators from being required to answer for their legislative actions in court. The purpose behind the speech and debate clause is to protect members so that they are able to express themselves openly and freely without worrying about being asked to later account for statements made in debate or discussion about a bill. Another aspect to consider is the time-consuming nature of responding to such requests. Requests to appear in court during the time that the General Assembly is in session could interfere with the performance of a member's legislative duties. In the case of potential interference with the legislative process the constitution recognizes that a legislator's legislative duties take precedence.

Consideration No. 2. Subsequent statements about legislative intent generally not admissible. In making a decision about whether or not to testify in court about legislative intent, the Committee suggests that members take into account the Colorado Supreme Court's decision in *Colorado Department of Social Services v. Board of County Commissioners*, 697 P.2d 1 (Colo. 1985). The court held that where contemporaneous recorded legislative history was available, the exclusion of post-enactment recollections of members of the legislature that enacted the statute was proper. Courts generally hold that subsequent comments about legislative intent are not admissible to establish the legislative intent of a statute. When legislators have taken the time to attend court proceedings to testify, their testimony has often been ruled inadmissible on this basis.

² Courts often avoid the issue of whether legislative immunity can be waived, see *United States v. Helstoski*, 442 U.S. 485 (1979), and have held that a waiver was incorrectly allowed, see *Holmes v. Farmer*, 475 A.2d 976 (R.I. 1984).

Consideration No. 3. Best evidence is debate itself. Ultimately the best evidence of legislative intent is the debate itself and not someone's recollection about prior events. The Committee recommends that legislators respond to such inquiries by asking the parties to use the tape recordings of legislative proceedings.

Consideration No. 4. Member should testify as an individual only. If a member does decide to testify in a legal proceeding, the Committee recommends that the member indicate that he or she is testifying solely as an individual and make clear that he or she is not representing the views of the General Assembly as a whole.