4 MRSA 9-A
16 MRSA 56

~~Retirement Widow~~ deposition

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David S. Silsby, Director
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Augusta, Maine 04333

Re: State v. Pinkham, 383 A.2d 1355 (Me., 1978).

Dear Dave:

This responds to your request for an opinion as to the appropriateness of further legislation regarding 16 M.R.S.A. § 56 in light of the opinion in the above-captioned case that § 56 is of no further force and effect. Basically you ask:

1. Since the subject matter of 16 M.R.S.A. § 56 is now controlled by Rule 609 of the Maine Rules of Evidence, is it advisable for the Legislature to appeal or amend that section of the law?

2. Whether 4 M.R.S.A. § 9-A is constitutional?

In response to your first question, it would appear that since the Court has addressed 16 M.R.S.A. § 56, the matter should be considered by the Legislature to either repeal or reaffirm* the provisions of § 56. Simply leaving the law on the books, unaddressed, would have the same effect as repeal, because the Court has determined that the law is of no further force and effect.

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* Reaffirmance, if it is to be considered, should be approached with caution in light of the reservations about § 56 expressed by the Court in State v. Toppi, 275 A.2d 805 (Me., 1971) and State v. Peaslee, 287 A.2d 588 (Me., 1972).

The response to your second question is somewhat more difficult. The Court, in holding 16 M.R.S.A. § 56 of no further effect in State v. Pinkham, has based its authority on 4 M.R.S.A. § 9-A. In so doing, it has, at least by implication, presumed the constitutionality of 4 M.R.S.A. § 9-A. In light of this, it would be difficult to suggest, by opinion, that 4 M.R.S.A. § 9-A is unconstitutional. Cf. Ex parte Davis, 41 Me. 38 (1856). However, I would note that review of the record before the Court did not indicate that the issue of constitutionality of 4 M.R.S.A. § 9-A was addressed in the briefs of the parties.

The effect of 4 M.R.S.A. § 9-A is that the Legislature delegates to the Court the power, by adoption of rules of evidence, to amend or repeal statutory law. I am not familiar with any doctrine of law that would permit such a delegation consistent with standards normally applied to the doctrines of delegation or separation of powers. See: State v. Fixaris, 327 A.2d 850 (Me., 1974); Opinion of the Justices, 278 A.2d 693 (Me., 1971); Curtis v. Cornish, 109 Me. 384 (1912); Pressman v. Barnes, 121 A.2d 816 (Md. 1956); and Cromwell v. Jackson, 52 A.2d 79 (Md., 1947). See also a detailed discussion of the separation of powers doctrine, though addressed as an appointments clause* matter, in Buckley v. Valeo, 424 U.S. 1 (1976). The separation of powers is made very explicit by Article III of the Maine Constitution. The effect of § 9-A is to permit the Court to perform legislative acts by effectively amending or repealing statutes.

Thus, while it would be unusual for the Courts to permit the Legislature to delegate such basic legislative activities, this office is not in a position to issue an opinion that § 9-A is unconstitutional in light of the Court's recent tacit acceptance of § 9-A'S constitutionality. See Ex parte Davis, supra.

I would note further that under the doctrine of separation of powers and Article III of the Maine Constitution, the Maine Courts could determine that it is solely within their power, not the Legislature's, to determine the standards of admissibility of evidence presented to the Courts. This could occur because the Courts view matters which are judicial in nature as matters which the Courts can control to the exclusion of legislative involvement if they wish. Cf. Application of Feingold, 296 A.2d 492 (Me., 1972); District Court for District IX v. Williams, 268 A.2d 812 (Me., 1970); Petition of Tennessee Bar Association, 532 S.W.2d 224 (Tenn., 1975); Adams v. Rubinow, 251 A.2d 49 (Conn., 1968) and Opinion of the Justices, 133 A.2d 792 (N.H. 1957).

In fact, in State v. Pinkham , the Court noted:

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* United States Constitution, Article II, § 2.

> "When it considered adopting Maine Rules of Evidence, the Court continued the practice it had begun when it enacted the Maine Rules of Civil Procedure in 1959 of seeking legislative authorization to promulgate such rules. (P.L. 1957, c. 15). However, we reaffirm that the Court has inherent power 'to establish rules for the orderly conduct of business before it.' Fox v. Conway Fire Insurance Co., 53 Me. 107, 110 (1865); Parker v. Hohman, Me., 250 A.2d 698, 700 (1969). See also, Annot., 110 A.L.R. 22 (1937); Annot., 158 A.L.R. 705, 706 (1945) and cases cited therein; Joiner and Miller, Rules of Practice and Procedure: A Study of Judicial Rule Making, 55 Mich. L. Rev. 623 (1957). The Court considers that when it exercises its inherent rule-making power, consultation with and approval of the Legislature is advisable as a matter of policy." 383 A.2d 1356, fn. 2.

Therefore, absent § 9-A, it is entirely possible that the Courts could independently develop a rationale to reach the same conclusion as was reached in State v. Pinkham, based on § 9-A.

I hope this information is helpful.

Sincerely,

DONALD G. ALEXANDER
Deputy Attorney General

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