The Michigan Supreme Court has held that a detour, legally established by the highway commissioner as part of the trunkline highway, becomes part of the main road. *Sivak v. Swan Ice Cream Company,* 335 Mich. 651. The Michigan court has also ruled in *Shoniker v. English,* 254 Mich. 76, that a detour established by the state highway department under statutory authority becomes part of the trunkline highway.

I therefore, conclude that detours established by the Michigan State Highway Commission as a necessary incident to construction and reconstruction of state trunkline highways are but continuations of the trunkline highway and, in the maintenance of such detours by the highway commission, the commission is subject to the statutory liability created by Act 170, P.A. 1964.

660316.1

FRANK J. KELLEY,
Attorney General.

LEGISLATURE: Attorneys at law serving in the legislature.
ATTORNEYS AT LAW: As officers of the court – not prohibited from serving in the legislature.

Attorneys who are officers of the court upon their admission to practice are not exercising the powers of the judicial branch of state government and are not prohibited under the Constitution of 1963 from serving in the legislature if duly elected and otherwise qualified. A lawyer-legislator may vote on matters before the legislature involving the judicial branch of government without violating the State Constitution. The State Constitution does not prohibit a lawyer-legislator from practicing law on behalf of his clients before boards, commissions, and agencies of the state government; however the legislature could consider this matter, if it wishes, as a question of public policy.

No. 4522 March 16, 1966.

Hon. E. D. O'Brien
State Representative
The Capitol
Lansing, Michigan

Your decent letter contains a statement of your understanding that "attorneys legally authorized to practice law in the state of Michigan are officers of the court." You point out that a substantial number of attorneys have been elected to and are now serving in each house of the current legislative session. You direct my attention to Article III, Section 2, Constitution of 1963, which you quote as follows:

> "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

You also direct my attention to Sections 8, 9 and 10 of Article IV, Constitution of 1963, which read as follows:

"Sec. 8. No person holding any office, employment or position under the United States or this state or a political subdivision thereof, except notaries public and members of the armed forces reserve, may be a member of either house of the legislature.

"Sec. 9. No person elected to the legislature shall receive any civil appointment within this state from the governor, except notaries public, from the legislature, or from any other state authority, during the term for which he is elected.

"Sec. 10. No member of the legislature nor any state officer shall be interested directly or indirectly in any contract with the state or any political subdivision thereof which shall cause a substantial conflict of interest. The legislature shall further implement this provision by appropriate legislation."

You request answers to the following three questions:

"1. Can an attorney, as an officer of the court, serve as a legislator in the legislative branch of government without violating the state constitution?

"2. Can a lawyer-legislator, as an officer of the court, but in his capacity as a legislator, vote on matters before the legislature involving the judicial branch of government without violating the state constitution?

"3. Can a lawyer serve as a legislator and also practice law before agencies of state government in the Executive branch of government without violating the state constitution?"

Section 901 of the Revised Judicature Act of 1961[1] provides in part:

"The members of the state bar of Michigan are officers of the courts of this state, * * *.[2]

Shortly after the close of the Civil War the Supreme Court of the United States had occasion to pass on the status of an attorney as an officer of the court in the case of *Ex parte In the Matter of A. H. Garland, Petitioner* (1867), 4 Wall 333, 18 L. ed. 366. Congress had passed a law which required every person elected or appointed to any office of honor or profit under the government of the United States to take and subscribe to a loyalty oath which contained *inter alia* a statement that the subscriber had never sought nor accepted, nor attempted to exercise, the functions of any office whatever under any authority or pretended authority in hostility to the United States. Subsequently, by Act of Congress, this oath was extended to attorneys and it was there provided that no person should be permitted to practice in the Supreme Court or in any District or Circuit Court or in the Court of Claims even if he was previously an attorney of

[1] The Revised Judicature Act of 1961 is Act 236 P.A. 1961, being C.L.S. 1961 § 600.101 et seq., M.S.A. 1962 Rev. Vol. § 27A.101 et seq. Section 901 has not been amended and appears at C.L.S. 1961 § 600.901, M.S.A. 1962 Rev. Vol. § 27A.901.

[2] Rule 908 of the Michigan General Court Rules of 1963 recites in part: "Attorneys and counselors are officers of the courts of this State and as such are subject to the summary jurisdiction of such courts."

such court unless he should take the required oath. Petitioner was a resident of the state of Arkansas and had been admitted to practice before the Supreme Court of the United States at a time prior to the commencement of the Civil War. The state of Arkansas passed an ordinance of secession which purported to withdraw the state from the Union and afterwards by another ordinance undertook to attach the state to the Confederacy. Afterwards petitioner became a member of the lower house and then in the Senate of the Congress of the Confederacy. At the close of the Civil War he sought to reestablish his right to practice before the Supreme Court of the United States but was confronted with the loyalty oath which he could not lawfully subscribe. The Supreme Court held the Act of Congress unconstitutional as applied to the petitioner. In the course of its opinion the Court said:

> "The profession of an attorney and counselor is not like an office created by an Act of Congress, which depends for its continuance, its powers and its emoluments, upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution. Attorneys and counselors are not officers of the United States; they are not elected or appointed in the manner prescribed by the Constitution for the election and appointment of such officers. They are officers of the court; admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. * * * They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded. (citation omitted) Their admission or their exclusion is not the exercise of a mere ministerial power. It is the exercise of judicial power, and has been so held in numerous cases." (18 L. ed. at page 370)

The Supreme Court of Minnesota in its opinion in the proceedings entitled *In re Disbarment of John D. Greathouse* (1933), 189 Minn. 51, 248 N.W. 735, 737, said:

> "An attorney is not an officer of the state, in a constitutional or statutory sense of that term, but he is an officer of the court, exercising a privilege during good behavior. This privilege is granted by the court in the exercise of judicial power, not as a mere ministerial power. (citations omitted)."

Our Supreme Court quoted with approval the foregoing extract from the opinion of the Supreme Court of Minnesota in the case of *Ayres v. Hadaway*, 303 Mich. 589, at 597.

The nature of the relationship of attorneys as officers of the court is well described in the case of *Potter v. Hutchison Manufacturing Company*, 87 Mich. 59, at page 60, in the following words:

> "Attorneys are officers of the court, and are subject to its summary jurisdiction. They are, as has been said, as essential to the successful working of the court as the clerks and sheriffs, and perhaps as the judges themselves. They are, for the convenience, not only of them-

selves, but of the other officers of the court, clothed with certain privileges, an abuse of which would be visited with severe punishment. They have access to files and records, they draft all orders and decrees, and generally enter rules and motions. There is no reason why the mere filling out of a summons by an attorney after the signature of the clerk, where no abuse is shown, should vitiate the writ."

The attitude of the Michigan Supreme Court as expressed in the foregoing cases has been followed in subsequent decisions. See:

Ann Arbor Bank v. Weber, 338 Mich. 341;
Johnson v. DiGiovanni, 347 Mich. 118;
White v. Sadler, 350 Mich. 511, 525, 526.

I shall next consider your first question and the application thereto of the proscription appearing in Article III, Section 2, Constitution of 1963, quoted above. Foregoing Section 2 is a revision of Sections 1 and 2 of Article IV of the Constitution of 1908. Notice is to be taken that the revision is a significant one. Section 2 of Article IV, Constitution of 1908, specified that no person belonging to 1 department shall exercise the powers properly belonging to another; but under the Constitution of 1963 the corresponding language has been revised to read: "No person exercising powers of one branch shall exercise powers properly belonging to another branch * * *."

It appears from the position of the courts as outlined in the cases cited above that an attorney as an officer of the court does not hold any constitutional or statutory office in the judical branch of government but retains his status as a private attorney licensed to practice his profession. This conclusion was brought clearly into focus by the Supreme Court of Minnesota in a proceeding before that Court entitled *In re Miles Lord, William B. Randall, George M. Scott, and Robert W. Johnson as officers of the court* (1959), 255 Minn. 370, 97 N.W. 2d 287. The Minnesota Supreme Court had under investigation the professional conduct of Miles Lord who was then Attorney General of the State of Minnesota, the other parties being county attorneys. The issue was whether the Attorney General had violated an alternative writ of prohibition theretofore issued by the Supreme Court. The Attorney General refused to appear before the Court claiming he was acting on the advice of the governor. It was contended on behalf of the Attorney General that when he appeared in a legal matter pending in the Supreme Court he was acting in an executive capacity. The Court rejected this contention and said (page 289):

"While the attorney general is a part of the executive branch of government, as an attorney he is also an officer of this court. When he appears in court in a legal matter, he is acting as an attorney. The fact that he may belong to the executive branch of the government makes it no less so."

Upon analysis of the foregoing court pronouncements I find nothing to indicate that an attorney, because he is designated as an officer of the court, is thereby exercising the powers of the judicial branch of state government. His responsibility to the court as an attorney to abide by

the rules of the court and to conduct his professional relationship with his clients and with the court in an ethical manner does not require the exercise of any part of the judicial power. It necessarily follows that an attorney who exercises a portion of the legislative power as a member of the legislature does not violate Section 2 of Article II, Constitution of 1963, solely because as an attorney he is an officer of the court. I therefore answer your first question in the affirmative.[3]

The logic of the case law as developed in reaching the answer to your first question likewise controls the answer to your second question. Since I have concluded that an attorney is not prohibited from serving as a member of the legislature solely on the ground that he is an officer of the court, I also conclude that in his capacity as a legislator he may lawfully vote on matters before the legislature involving the judicial branch of government. I therefore answer your second question in the affirmative

In answering your third question, I shall first comment on Sections 8, 9 and 10 of Article IV, Constitution of 1963, to which your letter made reference.

Section 8.

The proscription appearing in Section 8 heretofore quoted does not apply to an attorney in his capacity as an officer of the court for the reason that the attorney is not an officer of the state nor does he occupy a state office in the constitutional or statutory sense as discussed in the foregoing cases. It necessarily follows that he is not holding any office, employment or position under the United States or this state or a political subdivision thereof solely because his admission to practice as an attorney constitutes him an officer of the court.

Section 9.

I had occasion to consider the meaning of Article IV, Section 9, Constitution of 1963, in Opinion No. 4169 which I issued on June 17, 1963 (O.A.G. 1963-64, page 121). It was concluded in that opinion that the word "appointment" as it appears in Section 9 includes an "election"; that the prohibition of Section 9 is applicable to persons appointed or elected to any state office inasmuch as they receive their "appointment" from "state authority"; and that the prohibition of Section 9 is not applicable to appointments or elections to purely local offices. Adopting the construction placed on Section 9 in my Opinion No. 4169, I reach the conclusion that a member of the legislature who is or becomes an attorney admitted to practice in this state does not violate Section 9 of Article IV, Constitution of 1963, by virtue of his designation as an officer of the court.

Section 10.

The test of applicability of Section 10 is the existence of a contract with the state or any political subdivision thereof which shall cause a substantial conflict of interest with the duties owed to the state by a member of the legislature or a state officer. Your third question does not assume

[3] In the case of *Doyle v. City of Dearborn,* 370 Mich. 236, 239, 240, the Supreme Court said: "It hardly need be said that the only valid limitations upon qualifications for membership in the State legislature are those imposed by State law."

the existence of any contract between the attorney and the state or any political subdivision thereof and any contract of employment of an attorney to appear before state agencies would normally be a contract with the client whom the attorney had been engaged to repesent. Such a contract does not fall within the prohibitory language of Section 10.

Although the legislature is not free from all constitutional restraint should it undertake to control the conduct of an attorney in the practice of his profession, the legislature has the power, should it choose to exercise it, to prohibit its own members from appearing on behalf of others before state agencies, boards and commissions, at least during the time they are serving as such members and for a reasonable time thereafter. A diligent search has been made for such statutory restraint and no law has been found. I direct your attention, however, to Section 750.411b C.L. 1948, M.S.A. 1954 Rev. Vol. § 28.643(2), which prohibits members of the legislature from accepting employment at excessive compensation by persons affected by proposed legislation and prohibits the payment for services in connection with passage or defeat of legislation. I do not consider the language of this statute to be sufficiently broad to reach the situation described in your third question.

Therefore, although the supervision of attorneys in the practice of law in this state is given to the Supreme Court and the organized Bar, the question of lawyer-legislators practicing before state agencies is also a question of public policy which may be considered by the legislature.

FRANK J. KELLEY,
Attorney General.

660406.1

COUNTIES: Board of supervisors — Maximum tax levy for road purposes.
TAXATION: County road purposes — Maximum tax levy.

The amount of taxes for county road purposes which may be levied in each county is subject to the limitation prescribed by the statute. Such limitation is not subject to increase by vote of the electors authorizing increase in the maximum millage limitation for the levy of taxes.

No. 4518 April 6, 1966.

Honorable Robert Richardson
State Senator
The Capitol
Lansing, Michigan

Transmitted with your recent request for opinion is copy of an opinion rendered by Edward G. Durance, prosecuting attorney of Midland County, with respect to future county road millage in that county stating in part:

> "Michigan Statutes Annotated Section 9.120 provides that the tax for road purposes shall not exceed $2.00 on each $1,000.00 of assessed valuation according to the roll of the last preceding year in counties