OPEN RECORDS AND MEETINGS OPINION
2005-O-19

DATE ISSUED: November 22, 2005

ISSUED TO: Supreme Court Gender Fairness Implementation Committee

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Roland Riemers asking whether the North Dakota Supreme Court Gender Fairness Implementation Committee violated N.D.C.C. § 44-04-19 by holding a meeting that was not open to the public.

FACTS PRESENTED

In 1994 the North Dakota Supreme Court created the North Dakota Commission on Gender Fairness in the Courts to study gender fairness in the court system and recommend rule changes to address gender fairness in a final report. This process was completed in 1996. In 1997, the Gender Fairness Implementation Committee (hereafter, "Implementation Committee") was established by the North Dakota Supreme Court by administrative order.[1] The purpose of the Implementation Committee is to oversee the implementation of the recommendations made in the final report of the North Dakota Commission on Gender Fairness in the Courts, monitor the progress of the judicial branch in eradicating gender bias in the courts, make recommendations on related issues, and submit progress reports.[2] The Implementation Committee consists of seven members of the bench and bar appointed by the chief justice, in consultation with the president of the State Bar Association. Justice Mary Maring is the current chair. The Implementation Committee is funded through an allocation of funds for general judicial system committee activity which is included in the general fund appropriation for the judicial branch. Agendas and minutes of Supreme Court advisory committees are regularly posted on the Supreme Court's website, but the Supreme Court has never treated the committees as subject to the open meetings law.

During August 2005, the Implementation Committee conducted a series of focus group discussions in order to gauge whether the judicial system had made any progress in addressing the bias-related issues outlined in the 1996 final report of the Commission on Gender Fairness in the Courts. Lawyers practicing in the areas of criminal and

[1] Administrative Order 7 of the North Dakota Supreme Court (1997).
[2] Id.

domestic law were invited by the Implementation Committee to the group discussions. Others who were invited were domestic violence advocates, those who appear in court proceedings under Supreme Court Administrative Rule 34, individuals involved in victim and witness assistance, and child support enforcement personnel. Public notice was not given of the meeting.

Prior to the August 24, 2005, meeting in Grand Forks, Justice Maring was contacted by an associate of Mr. Riemers, who asked to attend the meeting. He was told that the meeting was only for specific invitees and that it was not a meeting for the general public. Mr. Riemers and his associate arrived at the meeting in Grand Forks demanding to attend and address the committee. Justice Maring refused to allow them to attend the meeting at that time. Instead she arranged for Mr. Riemers and his associate to present comments to the Implementation Committee at a later time that day.

ISSUE

Whether the Gender Fairness Implementation Committee is subject to the open meetings law.

ANALYSIS

The open meetings law generally requires all meetings of a public entity to be open to the public.[3] In 1997 the open meetings law was amended in order to strengthen and clarify the law.[4] Even though at that time the definition of "public entity" was expanded to include "any entity created or recognized by the Constitution of North Dakota . . . ,"[5] nothing in the legislative history from the 1997 amendments indicates that it was ever intended to apply to the judicial branch. Most notable is a conspicuous absence of testimony from the court and exceptions in the law that the court would logically want addressed if subject to the law. For instance, there is no exception for deliberations of the Supreme Court.

The Georgia Supreme Court, in a decision with almost identical facts as presented here, refused to apply the Georgia open meetings law to the Georgia Commission on Gender Bias in the Judicial System, based on the separation of powers between the judicial and executive branches of government and because, like North Dakota, the law did not specifically reference the judicial branch, nor otherwise apply it to the judiciary in clear and unmistakable terms.[6]

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[3] See N.D.C.C. § 44-04-19.
[4] See 1997 N.D. Sess. Laws ch. 381.
[5] N.D.C.C. § 44-04-17.1(12)(a).
[6] Fathers are Parents Too, Inc. v. Hunstein, 415 S.E.2d 322, 323 (Ga. 1992).

The North Dakota Constitution creates the legislative, executive, and judicial branches as coequal branches of government, thus creating the separation of powers doctrine.[7] Because each branch is supreme in its own sphere[8] it is unlikely that the Legislature could subject the judicial branch, or a judicially created committee to the requirements of the open meetings law. The separation of powers doctrine prohibits the Legislature from applying the open meetings law to the judiciary's rule-making function. The North Dakota Supreme Court is constitutionally vested with the authority to promulgate rules of procedure, including appellate procedure, to be followed by all the courts of this state.[9] According to the Supreme Court, it almost exclusively uses committees to carry out its rule-making function.[10] The Implementation Committee is acting under the rule-making authority of the Supreme Court by assessing the rules promulgated to address gender bias in the courts.

Courts in other jurisdictions with state constitutions that explicitly grant rule-making authority to the judiciary have found it unconstitutional to apply an open meetings law to the judiciary's rule-making functions.[11] A Florida Attorney General's opinion explained that a court-related committee created by the Legislature was subject to the open meetings law, but that a "substantial question exists as to whether the Legislature could subject the judiciary or a judicially-created committee to the requirements of the Sunshine Law because of the separation of powers doctrine and because the Supreme Court is constitutionally vested with the power to adopt rules for the practice and procedure in all courts. . . ." [12]

This office has never addressed whether the separation of powers doctrine prohibits the open meetings law from applying to the courts. However, in 1990, this office issued an opinion concluding that the open meetings law applied to the State Bar Board.[13] The State Bar Board had power and duties relating to the admission of applicants to the bar. There are two important facts that distinguish that opinion from this situation. First, the

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[7] N.D. Const. art. XI, § 26; State v. Meiers, 403 N.W.2d 392, 394 (N.D. 1987). See also Brett L. Bornsen, Comment, *Constitutional Law – Separation of Powers: The North Dakota Supreme Court Invalidates a Discovery Statute that Conflicted with a Rule of Procedure* State v. Hanson, 558 N.W.2d 611 (N.D. 1996), 74 N.D. L. Rev. 775 (1998).

[8] State v. Hanson, 558 N.W.2d 611, 614 (N.D. 1996).

[9] N.D. Const. art. VI, § 3.

[10] The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, sets forth rule-making procedures, but applies only to the executive branch. See N.D.C.C. § 28-32-01(2).

[11] See In re 42 PA.C.S.S. 1703, 394 A.2d 444 (Pa. 1978); In re the "Sunshine Law", 255 N.W.2d 635 (Mich. 1977).

[12] Florida AGO 83-97 (Dec. 13, 1983).

[13] See N.D.A.G. 90-04.

State Bar Board was established by the Legislature. Here, the Implementation Committee is solely created by the Supreme Court. Second, art. VI, § 3 of the state constitution provides that the Supreme Court has the authority to promulgate rules and regulations regarding the admission to practice law and the conduct, disciplining, and disbarment of attorneys at law, unless otherwise provided by law.[14] The court's authority, therefore, was not exclusive, allowing for the application of the open meetings law.[15] Here, the authority to promulgate rules of procedure is solely vested in the Supreme Court.[16]

The statutory open meetings law is similar to a provision in the North Dakota Constitution. The constitutional provision states "[u]nless otherwise provided by law, all meetings of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be open to the public."[17]

This provision was proposed in the 1973 legislative session by Senate Concurrent Resolution No. 4010 and approved by the electors in 1974.[18] Almost identical language had been discussed during the 1972 Constitutional Convention but was not included in the proposed constitution at that time.[19] Because the language in the two provisions is so similar, the legislative history from the constitutional convention is helpful to illustrate the intent behind the open meetings provision in article XI, § 5. The legislative history indicates that the language was meant to only pertain to the executive branch:

> Delegate Rundle: "…I would like to explain, first, that we took out the courts. I had originally had one include courts, and there were so many exemptions that had to be in that I withdrew that the other day. . . . And then the Committee put the word "executive bodies" in here to make sure this didn't include the courts…"[20]
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> Delegate Maxwell: ". . . This proposal deals with the executive branch…"[21]

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[14] N.D. Const. art. VI, § 3 (emphasis added).
[15] N.D.A.G. 90-04.
[16] See N.D. Const. art. VI, §3.
[17] N.D. Const. art. XI, § 5.
[18] See 1973 N.D. Sess. Laws ch. 530, § 1; 1975 N.D. Sess. Laws ch. 604.
[19] See 1973 N.D. Sess. Laws ch. 529.
[20] Debates of the North Dakota Constitutional Convention of 1972, vol. II, pg. 1021, (January 31, 1972).
[21] Id. at 1024.

Nothing in the legislative history of Senate Concurrent Resolution No. 4010 proposed one year later, in 1973, suggests that its application was any broader than the similar proposal considered by the constitutional convention.

CONCLUSION

It is my opinion that the Implementation Committee is not subject to the open meetings law because applying the open meetings law to an exclusive function of the Court is prohibited by the separation of powers doctrine. Thus, the Implementation Committee of the Supreme Court did not violate the law when it failed to follow the notice requirements of the open meetings law and refused to allow the requestor in to the meeting on August 24, 2005.

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