

OFFICIAL OPINION NO. 88-35, Meeting requirements

September 1, 1988

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Executive Secretary
S.D. Board of Nursing
304 S. Phillips Ave.
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Official Opinion No. 88-35

Meeting requirements

Dear Ms. Stuart:

You have requested my opinion concerning certain practices utilized by the _South Dakota Board of Nursing in performing its duties.

FACTS:

The South Dakota Board of Nursing establishes each year its meeting schedule which includes five regular meetings for the conduction [sic] of business and the option to call special meetings as needed. Several of the eleven Board members travel significant distances for such meetings which are generally held in Sioux Falls. On occasion, however, an emergency issue or urgent matter arises which the Board cannot simply place on 'hold' until the next scheduled meeting.

In the past when such a circumstance arose, the Board President has requested the scheduling of a conference call to expedite Board discussion and decision making.

1. In May 1987, a Conference Call was held regarding a request for information on the process to appeal a notice of deficiencies issued by the Board. Contact between attorneys had occurred and the Board's legal counsel was included in the conference call to provide information on legal considerations/implications related to the issues. By consensus, the Board then agreed to schedule a special meeting with representatives of the party in question to negotiate terms related to the Notice of Deficiencies.

2. In November 1987, a conference call was held to adopt an emergency rule which accommodated the nurse anesthetists who wrote the national certifying examination in December 1987. The regular administrative rule process was later followed to make this revision a permanent rule change.

3. The last conference call was conducted in February 1988, to reconsider the Board's position regarding the current \$50.00 reinstatement fee. It was essential to clarify the Board's position prior to the Senate Commerce Committee hearing on S.B. 301 during which testimony was presented by the Executive Secretary. Although the Board had just met in regular session the preceding week, all the issues that developed during the legislative session could not be anticipated.

Also, in the past when certain circumstances require a Board decision prior to the next scheduled meeting, a mail poll voting procedure was used.

1. This procedure has authorized travel expenses for Board members and staff to attend meetings and conferences when notice of these conferences was not received in sufficient time to obtain approval during a regular Board meeting.

2. It [the mail poll voting procedure] was most recently used to give final approval to a revised refresher course used by nurses to reinstate a license. At the preceding Board meeting, discussion of this course was on the agenda; but, because of some identified deficiencies which had to be addressed before approval could be given, the final decision was postponed. The Executive Secretary was directed to communicate the concerns to persons revising the course and then review all subsequent material submitted and, on the basis of this analysis, make a recommendation to the Board. The decision to expedite this process was based on the fact that a significant number of persons were ready to start the refresher program and were simply waiting for this final approval.

Historically, as these examples illustrate, there have been no requests for notice of meeting by local news media in accordance with SDCL 1-25-1.1 and the Board has reserved the use of conference calls and mail poll votes to times when a decision was deemed necessary and it was not possible for Board members to gather in one location in order to conduct business. It should be noted, also, that minutes of all conference calls are compiled by the Board's designated secretary and, following Board approval at the next scheduled meeting, made available for public review as our regular Board meeting minutes. Likewise, mail poll

votes are retained and the results are recorded at the next scheduled meeting. They are discussed and ratified at that time and the ratification appears in the Board minutes.

Based upon the foregoing facts, you have asked the following questions:

QUESTIONS:

1. May the South Dakota Board of Nursing consistent with SDCL 1-25, conduct telephone conference calls as discussed in the above factual situations?
2. May the South Dakota Board of Nursing consistent with SDCL 1-25, implement mail poll voting procedures as discussed in the above factual situations?
3. If not, how can the Board respond to such matters needing attention between regularly scheduled meetings and without Board members gathering at one location for the necessary discussion and decision making?

GENERAL DISCUSSION:

SDCL ch. 1-25 is commonly referred to as the "open meeting law." SDCL 1-25-5 requires that all official meetings of the State, its political subdivisions, and all related boards and commissions shall be open to the public. SDCL 1-25-1.1 provides:

All public bodies shall provide public notice, with proposed agenda, prior to any meeting, by posting a copy of the notice, visible to the public, at the principal office of the public body holding the meeting, and, for special or rescheduled meeting, delivering, in person, by mail or by telephone, the information in the notice to members of the local news media who have requested notice.

SDCL 1-25-2 describes how and under what circumstances public meetings can be closed. SDCL 1-25-3 requires that minutes of meetings of boards and commissions of the State be kept by the board or commission and be filed with the Auditor General of the State within fifteen days of the meeting. The final section of the statute, SDCL 1-25-4, provides for certain exemptions from the requirements to file minutes not relevant to this discussion.

What is relevant to this discussion, and any discussion of our open meeting law is the purpose of that law. According to the South Dakota Supreme Court in a case entitled Olson v. Cass, 349 N.W.2d 435, 437 (S.D. 1984) "That purpose is to prohibit actions being taken

at secret meetings where it is impossible for the interested public to become fully informed and to detect improper influences." Accordingly, that provision should be the polestar guiding any public agency as it conducts the public's business.

Review of the South Dakota Code, reveals that it is silent upon the subject of the use of telephonic communication by boards and commissions to conduct official business. The South Dakota Supreme Court has authorized certain hearings to be conducted by telephone. Within the past several years, at least one attempt has been made to persuade the Legislature to enact statutes allowing Boards and agencies to conduct meetings by conference call under certain specified conditions. The Legislature declined to enact any such statutes.

The failure of the Legislature to enact a statute has no particular legal significance. One may speculate the reason the Legislature may have declined to act is because it felt it was unnecessary in that public agencies could already conduct meetings in this manner, or the Legislature may have concluded that direct authorization was poor public policy. In any event, there is no legislative guidance on the matter. Nevertheless, some of your questions can be answered based upon generally accepted legal principles.

IN RE QUESTION NO. 1:

Your first situation involves a conference call in order to consult with legal counsel regarding certain steps to be taken in performance of the Board's quasi-judicial duties. Since there was no pending request for notification by the local news media, no particular notice requirements had to be met. SDCL 1-25-2(3) allows a meeting such as you describe to be closed to the public. The statute does, however, require that an executive or closed meeting "shall be held only upon a majority vote of the members of such body present and voting ..." The word "present" is not otherwise defined in the section. One of the numerous definitions of the word "present" found in Webster's unabridged dictionary is "being before, in view of, or at hand; being within reach, sight or call, or within certain contemplated limits." Black's Law dictionary defines "presence" as "act, fact, or state of being in a certain place and not elsewhere, or within sight or call, at hand, or in someplace that is being thought of." Citing an early Minnesota case. Given the legal maxim that words in the Code are to be given their plain and ordinary meaning, I cannot conclude that board members participating in a meeting by telephone are "present" for the purpose of taking official

actions including a determination of quorum, closure of the meeting, or any other matter requiring a vote.

Under these facts, a discussion was held, the consensus of the board was determined, and no official action was taken. I can determine nothing illegal about this procedure except that in keeping with the spirit of the open meeting law such a discussion should be treated as a meeting. That means notice should be posted if required and given to local media if requested. In addition, at the place where the meeting is called there must be facilities such as a speaker phone that would allow members of the press and public to hear what is said and to make comments if appropriate. Since the situation you describe is not an official meeting the Board can take no action including passage of the resolution necessary to go into an executive or closed session. Accordingly, the usefulness of the procedure for discussions with legal counsel is seriously limited.

The second scenario you describe involves adoption of an emergency rule. You indicate that a permanent rule was later adopted at a meeting where a quorum was physically present. In my opinion, as discussed above, the Board cannot take official action, including adopting emergency rules, when a quorum of the board is not physically present in the place where the meeting is called.

Your third scenario deals with a conference call to reconsider the Board's position regarding fees for legislative purposes. Once again, as discussed above, this is a Board discussion, that is open to the public, and cannot involve any official action of the Board. Since its purpose was to determine attitudes and no official action was taken, the statute was not violated.

My answer to question number one is that the South Dakota Board of Nursing may not, consistent with SDCL ch. 1-25, conduct any official business by conference call where a quorum of the members is not actually or physically present in the place where the meeting is called. Such discussions by conference call are not illegal if proper notice is given and arrangements are made at the place where the meeting is called for members of the public and press to listen and participate in the discussion.

IN RE QUESTION NO 2:

The Code does not provide for "mail poll voting procedures" for the South Dakota Board of Nursing. Neither can the general authority in SDCL ch. 1-26 be read to authorize an agency

to take official action by mail. I am unaware of any recent action in the Legislature on this question.

The first situation you describe deals with authorization of travel expenses for board members and staff to attend meetings and conferences. Given that your Board meets at least five times a year, it seems unlikely that the necessity for this sort of emergency action would arise very often. I do note that SDCL 36-9-15 contains a very broad grant of authority. "The board may delegate to the executive secretary those activities that will expedite the functions of the board." On the basis of that statute, the Board could authorize the executive secretary to approve travel of the type described.

Your second factual scenario describes final approval via mail poll for a "revised refresher course" used for reinstatement of expired nursing licenses. You do not identify the particular statute in SDCL ch. 36-9 relating to refresher courses as a prerequisite to reinstatement of a license. I assume that the Board has adopted rules to that effect. I infer from the facts you present that the Board discussed the particular requirements for the course in some detail at a meeting but felt that additional material was needed prior to granting final approval. The statute set out above regarding delegation to the executive secretary would have allowed the Board to identify with particularity the material needed to complete the application for a refresher course and the objective requirements that material must meet as conditions upon approval. The Board could then have allowed the executive secretary to give notice of final approval when the conditions attached to the Board's conditional approval had been met.

Bearing in mind the admonition in the Olson case regarding the prohibition of secret meetings, I find the "mail poll voting procedure" even less satisfactory than the conference call routine discussed above. Under this procedure there simply is no way in which any members of the public could participate in the decision-making process used by the Board. Accordingly, my answer to question number two is that mail poll voting procedures are not authorized.

IN RE QUESTION NO. 3:

In the absence of definitive legislative action on this question, I have only one suggestion regarding rules of practice and procedure adopted by the South Dakota Board of Nursing. SDCL 36-9-11.1, enacted as part of governmental reorganization, provides that the Board of Nursing retains all of its functions including administrative functions. SDCL ch.

1-32, the Executive Reorganization chapter, defines numerous terms including the various "functions" executive agencies may exercise. SDCL 1-32-1(10) defines "quasi-judicial function" and includes within the definition the function of adopting procedural rules. Subdivision (11) defines the "quasi-legislative functions" an agency may exercise and specifically includes the power to make and promulgate rules as defined in SDCL 1-26-1(7).

What I take the foregoing to imply is that an agency, which has authority to exercise its quasi-judicial, quasi-legislative, and administrative functions has the authority to enact rules of procedure. These rules could include the procedure to be used in conducting conference calls or determining a quorum to be "present." The statutes identified above contain sufficient guidelines for exercise of this power by an agency and so long as the rules ultimately produced were consistent with the aims of the open meeting law as enacted by the Legislature and defined by the Supreme Court, there is a reasonable probability that a court would uphold the agency's authority. I express no opinion regarding whether the Legislature would allow such an administrative action by an agency to pass unscathed.

Respectfully submitted,

Roger A. Tellinghuisen
Attorney General