



LEGAL CONSIDERATIONS FOR REMOTE LEGISLATIVE SESSIONS

INTRODUCTION

The Coronavirus (COVID-19) pandemic presents an unprecedented challenge and may require the North Dakota Legislative Assembly to find new ways to conduct business during the next regular legislative session or a potential special session. On March 13, 2020, Governor Doug Burgum declared a state of emergency in North Dakota due to COVID-19 and activated the State Emergency Operations Plan to coordinate the state's response to the pandemic. The Governor has issued several more executive orders, including orders closing schools and nonessential businesses, restricting access to the Capitol and state facilities, suspending some open meetings requirements for remote meetings of public entities, facilitating mail ballot elections, expanding unemployment benefits, and extending worker's compensation coverage. Federal and state officials have urged individuals to practice "social distancing" or "physical distancing," which is described as remaining at least six feet from people not in an individual's immediate family. It would be impracticable if not impossible for members of the Legislative Assembly to adhere to these orders and recommendations while meeting physically at the Capitol. Committee meeting rooms and the legislative chambers are not large enough for physical distancing, and, unlike in many other state capitols, North Dakota legislators do not have individual offices.

Although the Governor and federal officials have begun lifting and revising executive orders related to COVID-19, it likely will be imprudent for all members of the Legislative Assembly to meet physically at the Capitol for a special session or for the 2021 regular session without the ability to practice physical distancing. Despite global efforts to reduce transmission, millions of individuals around the world, including well over 1,000 in North Dakota, have contracted COVID-19. Because widespread testing is not available, public officials have indicated the infection rate in North Dakota may be substantially higher than the official figure. Public health data show the disease disproportionately impacts Americans over 60 years of age, and many North Dakota legislators fall within that demographic. Public health officials suggest there may be a resurgence of COVID-19 cases in the fall and winter of 2020-21. Having legislators, staff, lobbyists, and the general public convene at the Capitol for a legislative session likely would put these people and the individuals with whom they come in contact at a higher risk of illness or death. Despite the risk, the Legislative Assembly will need to address the COVID-19 emergency and carry out its responsibilities under Article IV of the Constitution of North Dakota.

Some state legislatures have opted to conduct business in locations outside their chambers. Legislative bodies in Arkansas and Virginia met in a gymnasium, an outdoor courtyard, and a museum where legislators and staff could exercise physical distancing. The Legislative Assembly may wish to consider making similar arrangements in Bismarck.

Another option for the Legislative Assembly to conduct business in a safe manner is to meet remotely using available technology. Several other states' legislative bodies have used moderated conference calls and online meeting software to meet remotely during the pandemic.¹ This memorandum addresses legal issues related to members of the Legislative Assembly holding remote meetings during a health emergency like the COVID-19 pandemic.

CONSTITUTIONAL PROVISIONS Meeting at the Seat of Government

Section 7 of Article IV of the Constitution of North Dakota requires the Legislative Assembly to "meet at the seat of government" for organizational and orientation purposes in December following the election of the Assembly's members, and then recess until the commencement of the regular legislative session in January. The requirement for the Legislative Assembly to "meet at the seat of government" has been in the Constitution of North Dakota since

¹ National Conference of State Legislatures, "In March, April or May 2020, legislatures or chambers in at least 15 states, the District of Columbia, Guam and the Virgin Islands changed their procedures to allow for remote participation or voting." <https://www.ncsl.org/research/about-state-legislatures/continuity-of-legislature-during-emergency.aspx> (Access May 7, 2020).

its original enactment in 1889. As originally enacted, the requirement was found in Section 53 of Article II, which provided:

The Legislative Assembly shall meet at the seat of government at 12 o'clock noon on the first Tuesday after the first Monday in January, in the year next following the election of the members thereof.

This requirement was moved to its current location in the constitution and amended to include the requirement for the Legislative Assembly to "meet at the seat of government" for the organizational session by House Concurrent Resolution No. 3028 (1983). The language in House Concurrent Resolution No. 3028 appeared as Measure No. 2 on the 1984 primary election ballot. The measure was approved by a vote of 46,500 to 34,039 and became effective on December 1, 1986.

Section 7 of Article IV of the Constitution of North Dakota does not specify the location of the "seat of government." However, Section 215 of Article XIX of the Constitution of North Dakota, as enacted in 1889, designated the permanent location of various public institutions including "[t]he seat of government at the city of Bismarck in the county of Burleigh." This language later was moved to Section 12 of Article IX of the Constitution of North Dakota, where it still resides.

Section 7 of Article IV of the Constitution of North Dakota does not dictate the specific manner in which the Legislative Assembly must meet to fulfil the requirements in this section, nor does it define the word "meet". This raises the question of whether the Legislative Assembly must meet physically to satisfy the requirements of this section or whether the requirements may be satisfied by the Legislative Assembly meeting remotely.

In interpreting the meaning of a constitutional provision, a court may consider the legislative intent of the resolution. In *Kelsh v. Jaeger*, the North Dakota Supreme Court said to "apply general principles of statutory construction" when interpreting the constitution, and set forth the following principles for doing so: (1) determining the intent and purposes of the constitutional provision from the language itself, if possible; (2) giving words in a provision of the constitution their plain, ordinary, and commonly understood meaning; (3) making the overriding objective to give effect to the intent and purposes of the people adopting the constitutional statement; and (4) presuming the people did not intend absurd or ludicrous results in adopting constitutional provisions, and therefore construing provisions to avoid those results.² Although the *Kelsh* principles include determining the intent and purpose behind constitutional language, state constitutions also must maintain relevance to modern life and adapt to changes in technology. As one court said, "[s]tate constitutional provisions must be interpreted within the context of the times and in accordance with the demands of modern society."³ Applying the *Kelsh* principles to the constitution in light of modern technology arguably authorizes a remote session of the Legislative Assembly. However, it is unclear whether a court would agree with that interpretation of the constitution if a person challenged the legality of a remote session or legislation passed during a remote session.

Application of the first *Kelsh* principle does not resolve the inquiry definitively regarding remote meetings. The language in the section implies the purpose is to meet in person in Bismarck. The use of the phrase "meet at the seat of government" specifies the location at which to meet. However, a definitive conclusion regarding intent cannot be reached solely from the language itself due to the modern-day ability to host virtual meetings from a set location. Because the section does not qualify the word "meet" or explicitly prohibit members of the Legislative Assembly from meeting remotely, additional rules of interpretation must be applied to determine the meaning of this constitutional provision.

The second *Kelsh* principle requires consideration of the plain and commonly understood meaning of the requirement to meet in Bismarck and arguably supports the inclusion of remote meetings. Black's Law Dictionary defines a "meeting" as "[a] single official gathering of people to discuss or act on matters in which they have a common interest; esp., the convening of a deliberative assembly to transact business."⁴ While this definition clarifies that a meeting is a gathering, it does not clarify whether a gathering would include a remote gathering. However, further clarity on this point is provided in the definition of a "meeting" in the state's open meeting laws. North Dakota Century Code Section 44-04-17(9) defines a "meeting" as ". . . a formal or informal gathering or a work session, whether in person or through electronic means such as a telephone or videoconference . . ." Section 44-04-17 also

² *Kelsh v. Jaeger*, 641 N.W.2d 100, 104 (N.D. 2002).

³ *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135, 957 A.2d 407 (2008). See also 16 Am. Jur. 2d Constitutional Law § 62 ("[I]t has been said that a court is not bound strictly to accept only the meaning of the language used in a constitution at the time of adoption, and a constitution's provisions will be construed to accomplish in modern society the purposes for which they were adopted by the drafters.").

⁴ Black's Law Dictionary (11th ed. 2019).

defines a "meeting" for purposes of the Legislative Assembly as ". . . any gathering subject to section 14 of Article IV of the Constitution of North Dakota." Section 14 of Article IV of the Constitution of North Dakota requires all sessions of the Legislative Assembly and meetings of legislative committees to be open and public.

The third *Kelsh* principle requires a review of the original intent behind Section 7 of Article IV of the Constitution of North Dakota. The original intent of the people who included the meeting requirement in the constitution would have been limited by the lack of technology at the time. When the requirement to "meet at the seat of government" was placed in the constitution in 1889, no remote means of gathering existed. When the language was moved to Section 7 of Article IV of the Constitution of North Dakota in 1985, technology for large-scale teleconferencing and online meetings still was not available. Technological barriers to the Legislative Assembly meeting remotely no longer are a limiting factor due to the vast number of technological advancements made since 1985. Several platforms are available for use which provide live audio and video capabilities to allow members to meet remotely at the seat of government.

State constitutions must maintain relevance to modern life while serving the intent and purpose of the drafters. Many courts have applied principles of broad and flexible interpretation to constitutions to adapt to advancements in technology not anticipated by drafters. As one court said, "[i]n interpreting the state constitution, the Supreme Court's purpose is not to freeze the meaning of the constitutional provision to the time of its adoption, but is instead to identify, in light of the meaning understood by the framers or voters, relevant underlying principles that may inform application of the constitutional text to modern circumstances."⁵

The Fourth Amendment of the United States Constitution is a prime example of a constitutional provision interpreted broadly to adapt to evolving technology. The Fourth Amendment states, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The manner in which this law has been interpreted has changed on several occasions due to technological advancements in surveillance.

In 1928, the Supreme Court strictly construed the Fourth Amendment in *Olmstead v. United States*⁶ by applying a physical invasion of property analysis holding the wiretapping of phone lines located on public streets did not amount to an illegal search because "[t]here was no entry of the houses of offices of the defendants." The *Olmstead* decision later was overruled by the Supreme Court in *Katz v. United States*,⁷ when the court broadly interpreted the Fourth Amendment as a law that protects an individual's reasonable expectation to privacy by prohibiting the placement of an eavesdropping device in a phone booth. The Supreme Court later reconciled its decisions in *Olmstead* and *Katz* in *United States v. Jones*,⁸ by holding the attachment of a global positioning system (GPS) device to the underside of a vehicle amounted to a search under the Fourth Amendment. In *Jones*, the Supreme Court clarified the reasonable-expectation-of-privacy test in *Katz* had expanded upon, rather than replaced, the common-law trespassory test in *Olmstead*.⁹ In another Fourth Amendment case, the Supreme Court commented on the ability of technology to impact the privacy rights contemplated by the original drafters noting "[i]t would be foolish to contend that the degree of privacy secured to the citizens by the Fourth Amendment has been entirely unaffected by the advance of technology."¹⁰

Many other constitutional provisions have been interpreted similarly. For example, the right to free speech in the First Amendment to the United States Constitution and Section 4 of Article I of the Constitution of North Dakota now protects online communications, and the right to bear arms in the Second Amendment to the United States Constitution and Section 1 of Article I of the Constitution of North Dakota is not limited to arms available in the 18th and 19th centuries. Applying this widely used method of construction to Section 7 of Article IV of the Constitution of North Dakota would permit a remote legislative session based in Bismarck.

When applying the fourth *Kelsh* principle to Section 7 of Article IV of the Constitution of North Dakota, one could argue it would be absurd to strictly construe the word "meet" as requiring legislators to meet in person during an outbreak of a contagious disease such as COVID-19, or the possible outbreak of an even deadlier disease. Other states have acted to allow legislators to meet remotely to avoid the substantial threat COVID-19 poses to the health of legislators and others involved in the legislative process. For instance, on March 16, 2020, the House of Representatives in Pennsylvania adopted temporary rules in House Resolution No. 834, which allow members to

⁵ State v. Lane, 357 Or. 619, 355 P.3d 914 (2015).

⁶ *Olmstead v. United States*, 277 U.S. 438, 464 (1928).

⁷ *Katz v. United States*, 389 U.S. 347 (1967).

⁸ *United States v. Jones*, 565 U.S. 400, 404 (2012).

⁹ *Id.* at 409.

¹⁰ *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001).

vote remotely for the duration of the Governor's COVID-19 disaster declaration. Legislators in Vermont passed House Rule No. 18 and Senate Rule No. 11 to allow legislators to vote remotely during a declared emergency and are using technology¹¹ to ensure member's votes are secure and verified. The Legislative Assembly in North Dakota could take steps to transition to remote voting for the duration of the COVID-19 outbreak to protect the health of legislators.

Broadly interpreting the word "meet" in Section 7 of Article IV of the Constitution of North Dakota to embrace advances in technology which allow members to attend remote meetings hosted from the seat of government arguably is consistent with the principles of constitutional construction. This is especially true considering the lack of any language in Section 7 explicitly requiring meetings be held in person or prohibiting meetings other than in-person meetings. However, it is difficult to predict how a court would decide this issue.

Continuity of Government

Notwithstanding Section 7 of Article IV of the Constitution of North Dakota, there is a specific constitutional provision relating to the continuity of government. Section 7 of Article XI of the Constitution of North Dakota provides operational flexibility for the Legislative Assembly during emergencies resulting from disasters caused by enemy attack. Specifically, it states:

The legislative assembly, in order to ensure continuity of state and local governmental operations in periods of emergency resulting from disasters caused by enemy attack, shall have the power and immediate duty (1) to provide for prompt and temporary succession to the powers and duties of public offices, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such offices, and (2) to adopt such other measures as may be necessary and proper for ensuring the continuity of governmental operations including, but not limited to, waiver of constitutional restrictions upon the place of transaction of governmental business, upon the calling of sessions of the legislative assembly, length of sessions, quorum and voting requirements, subjects of legislation and appropriation bill requirements, upon eligibility of legislators to hold other offices, residence requirements for legislators, and upon expenditures, loans or donations of public moneys. In the exercise of the powers hereby conferred the legislative assembly shall in all respects conform to the requirements of this constitution except to the extent that in the judgment of the legislative assembly so to do would be impracticable or would admit of undue delay.

The phrase "enemy attack" is not defined in the constitution or North Dakota Century Code and there is a question whether it encompasses a pandemic. Applying the *Kelsh* principles to answer the question, we first look to the language of Section 7 of Article XI of the Constitution of North Dakota to decipher the intent and purpose. The wording of the section indicates a need to give the Legislative Assembly flexibility to maintain its operations in times when the traditional way of conducting legislative business is disrupted significantly by outside forces. This purpose seems quite broad and conceivably supports an interpretation of the section allowing flexibility during a pandemic. However, this understanding of the section's purpose is not definitive.

The second *Kelsh* principle is giving words their plain, ordinary, and commonly understood meaning. The Merriam Webster dictionary definition of "enemy" includes "something harmful or deadly . . . [A]cohol was his greatest enemy."¹² A pandemic such as COVID-19 constitutes something harmful or deadly and arguably is an enemy under the dictionary definition. The Merriam Webster dictionary definition of "attack" includes "a fit of sickness" and "the beginning of destructive action (as by a chemical agent)."¹³ These definitions of "attack" seem to encompass the effects of COVID-19 during this pandemic. Based on the dictionary definitions, the pandemic may constitute an enemy attack under the plain meaning of that phrase.

The common understanding of the phrase "enemy attack" may be more limited than the plain meaning of the phrase. Other states, including Arizona, Delaware, Florida, Georgia, Idaho, Kansas, Maine, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, and West Virginia, have similar continuity of government constitutional provisions

¹¹ *Everbridge Powers Secure Remote Voting for Vermont State Legislature as Lawmakers Adhere to COVID-19 Social Distancing Guidelines*, April 27, 2020, <https://www.everbridge.com/newsroom/article/everbridge-powers-secure-remote-voting-vermont-state-legislature-lawmakers-adhere-to-covid-19-social-distancing-guidelines/>

¹² <https://www.merriam-webster.com/dictionary/enemy> (accessed May 5, 2020).

¹³ <https://www.merriam-webster.com/dictionary/attack> (accessed May 5, 2020).

to North Dakota's. Although no other state constitution defines the phrase "enemy attack",¹⁴ some states have statutory definitions of the terms "enemy attack" and "attack". For instance, in Idaho, "enemy attack" is defined as "an actual attack by a foreign nation by hostile air raids, or other forms of warfare, upon this state or any other state or territory of the United States."¹⁵ At least seven states have virtually identical statutory definitions of "attack", namely "any action or series of actions taken by an enemy of the United States resulting in substantial damage or injury to persons or property in this state whether through sabotage, bombs, missiles, shellfire, or atomic, radiological, chemical, bacteriological, or biological means or other weapons or methods."¹⁶ These definitions from other states imply the common understanding of "enemy attack" is limited to acts resulting from human volition with the goal of harming the country. A naturally occurring pandemic would not be an enemy attack under that commonly understood meaning, and the result of applying the second *Kelsh* principle is unclear.

The third *Kelsh* principle says the overriding objective of constitutional construction is effectuating the intent and purpose of the people who adopted the constitutional provision. Unlike the first *Kelsh* principle, this principle requires an examination of the history of the constitutional language to decipher its purpose. Section 7 of Article XI of the Constitution of North Dakota was added to the constitution at the height of the Cold War. During that period, a wave of states amended their statutory and constitutional provisions to provide for continuity of government. The federal government heavily lobbied states to adopt continuity of government provisions and provided the states a model constitutional measure in 1959. In 1961, the Legislative Assembly adopted a resolution to put the language that is now Section 7 of Article XI of the Constitution of North Dakota on the ballot, and the voters approved it in 1962. When passing the resolution, the Legislative Assembly evinced an intent to limit the authority granted under the section to emergency situations involving enemy "nuclear" or "atomic" attacks and "radioactive fallout", not just any type of emergency.¹⁷

Statutory changes enacted in close proximity to the constitutional amendment largely mirrored the restriction on applying Section 7 of Article XI of the Constitution of North Dakota to times of disaster caused by military-type attacks. It was not until the 1970s that statutory civil defense laws were amended to encompass other disasters such as man-made disasters or epidemics. It is unclear why the statutory provisions were updated but the constitutional provisions were not. The answer may be simply that statutory amendments are much easier to enact than constitutional amendments. Regardless of the reason, the intent and purpose of the people who adopted the amendment seems to be providing flexibility to the Legislative Assembly to maintain operations during a nuclear or other attack by humans, not pathogens.

The fourth *Kelsh* principle, avoiding absurd results, does not provide much guidance for interpreting "enemy attack". Neither a limited definition excluding COVID-19 nor an expansive definition including the pandemic would be absurd. However, application of the fourth principle to Section 7 of Article XI of the Constitution of North Dakota is important for purposes of interpreting other provisions of the constitution.

Many courts have held every constitutional provision must be given meaning, and the constitution must make sense when read as a whole.¹⁸ In *State v. Blue*, the North Dakota Supreme Court said:

"We must give effect and meaning to every provision and reconcile, if possible, apparently inconsistent provisions. . . . We presume the people do not intend absurd or ludicrous results in adopting constitutional provisions, and we therefore construe such provisions to avoid those results."¹⁹ (internal citations omitted)

¹⁴ See Ariz. Const. Art. 4, Part 2, Sec. 25; Del. Const. Art. 17, Sec. 1; Fla. Const. Art. 2, Sec. 6; Ga. Const. Art. 3, Sec. 6, Pgh 2; Idaho Const. Art. 3, Sec. 27; Kan. Const. Art. 15, Sec. 13; Me. Const. Art. 9, Sec. 17; Mich. Const. Art. 4, Sec. 39; Minn. Const. Art. 5, Sec. 5; Neb. Const. Art. 3, Sec. 29; Nev. Const. Art. 4, Sec. 37; N.H. Const. Pt. 2, Art. 5-a; N.J. Const. Art. 4, Sec. 6, Pgh 4; N.Y. Const. Art. 3, Sec. 25; Ohio Const. Art. 2, Sec. 42; Okla. Const. Art. 5, Sec. 63; R.I. Const. Art. 6, Sec. 21; S.C. Const. Art. 17, Sec. 12; S.D. Const. Art. 3, Sec. 29; Tex. Const. Art. 3, Sec. 62; Utah Const. Art. 6, Sec. 30; Wash. Const. Art. 2, Sec. 42; and W. Va. Const. Art. 6, Sec. 54.

¹⁵ See Idaho Code Ann. § 67-5503(b).

¹⁶ See Ariz. Rev. Stat. Ann. § 38-382; Idaho Code Ann. § 67-415(a); Kan. Stat. Ann. § 48-1203(d); LA. Rev. Stat. Ann. § 24:63; S.C. Code Ann. § 2-5-20(a); Tex. Gov't. Code Ann. § 304.002(1); W. Va. Code Ann. § 15-7-3(a).

¹⁷ See <https://www.legis.nd.gov/files/resource/36-1959/legislative-management-final-reports/1961finalreport.pdf>.

¹⁸ See 16 C.J.S. Constitutional Law Section 99 ("The presumption and legal intendment is that every clause in a written constitution has been inserted for some useful purpose, and courts should avoid a construction which would render any portion of the constitution meaningless, idle, inoperative, needless, or nugatory. No provision should be construed to nullify or impair another.").

¹⁹ *State v. Blue*, 915 N.W.2d 122, 129 (N.D. 2018); See also *RECALLND v. Jaeger*, 792 N.W.2d 511, 512 (N.D. 2010); *Kelsh v. Jaeger*, 2002 ND 53 (N.D. 2002).

The court in *State v. Blue* also said "[i]n construing statutory and constitutional provisions, we will attempt to give meaning to every word, phrase, and sentence . . ." ²⁰ If constitutional provisions regarding legislative operations are interpreted to permit remote legislative sessions, the function of Section 7 of Article XI of the Constitution of North Dakota would need to be clarified so no part of it is rendered superfluous. For example, Section 7 authorizes the Legislative Assembly to conduct operations someplace other than Bismarck during a disaster caused by an enemy attack. If interpretations of other parts of the constitution allow the Legislative Assembly to meet remotely, is this portion of Section 7 of Article XI of the Constitution of North Dakota unnecessary? If so, the interpretations arguably would violate the principles of constitutional construction described in *Blue*.

There is a colorable argument Section 7 of Article XI of the Constitution of North Dakota is not rendered superfluous by interpreting other constitutional provisions to authorize remote sessions. One key provision is Section 7 of Article IV of the Constitution of North Dakota, requiring the Legislative Assembly to "meet at the seat of government". There are multiple interpretations of the word "meet" permitting remote sessions with a minimal presence in Bismarck or with technology based in Bismarck. Under these interpretations, Section 7 of Article XI of the Constitution of North Dakota arguably would maintain its usefulness in disasters caused by enemy attack because it would allow that presence or the originating technology to be located elsewhere. This ultimately is a matter of interpretation for courts.

Constitutional Amendment

To remove any uncertainty regarding the ability of the Legislative Assembly to meet remotely, the Legislative Assembly may consider amending the constitution to specify the Legislative Assembly's powers, including the authority to hold a remote legislative session, during an emergency related to a public health crisis. Pursuant to the Legislative Assembly's authority under Section 16 of Article IV of the Constitution of North Dakota, the Legislative Assembly could convene in special session to pass a resolution to put a constitutional amendment on the ballot for the November 2020 general election. Because under North Dakota Century Code Section 16.1-01-07, the Secretary of State is required to certify the amendment for the ballot at least 55 days before the election, the Legislative Assembly would need to adopt the resolution before that 55-day deadline. If a majority of voters in the general election approve the amendment, it would become part of the constitution and be effective in time to conduct the 2021 regular legislative session remotely if necessary.

While a constitutional amendment would clarify the authority of the Legislative Assembly to meet remotely for a future session, there remains a question of how the Legislative Assembly would meet to consider and adopt the resolution to place the amendment on the ballot. When the Legislative Assembly adjourned in 2019, the pandemic was unforeseen, and accommodations for remote meetings were not made. Before meeting to consider a resolution for a constitutional amendment or to conduct other legislative business, members of the Legislative Assembly would need to evaluate whether the constitution, statutes, and legislative rules permit a remote session for that purpose under the current circumstances. If the Legislative Assembly deems a constitutional amendment necessary for a future session to be conducted remotely, it may imply a remote session held to adopt the resolution for the amendment would not be authorized by the constitution. On the other hand, if the Legislative Assembly deems the amendment desirable but not necessary, the passage of a resolution for a constitutional amendment would not undermine the legal support for the remote session in which the amendment was passed. For example, if the Legislative Assembly considers the current language in the constitution to be broad enough to authorize remote legislative sessions at any time or under any circumstances, the Legislative Assembly may want to put a constitutional amendment on the ballot to clarify or limit that authority. However, if the Legislative Assembly adopts a resolution to put the amendment on the ballot, and the voters do not approve the amendment, the vote on the amendment may encumber the Legislative Assembly's ability to meet remotely regardless of the legislative history of the resolution.

The legislative history of the resolution would be an important indicator of how the Legislative Assembly gauges its own authority under current law. However, the court would be the ultimate arbiter of the constitutionality of the remote session and would not be bound by the legislative interpretation of the constitution.

Requirements for a Quorum and a Roll Call Vote

To conduct business, the Legislative Assembly must have a quorum. Section 12 of Article IV of the Constitution of North Dakota defines a quorum of the Legislative Assembly, stating in pertinent part:

A majority of the members elected to each house constitutes a quorum. A smaller number may adjourn from day to day and may compel attendance of absent members in a manner, and under a penalty, as may be provided by law.

²⁰ *Blue*, at 133 (N.D. 2018) (internal citations omitted).

Also, Section 13 of Article IV of the Constitution of North Dakota says "a recorded vote on any question shall be taken at the request of one-sixth of those members present." Neither section specifically requires a physical presence of the members to satisfy the quorum requirement or trigger the need for a roll call vote.

Additionally, "attendance", "absent", and "present" are not defined in Article IV of the constitution. The Legislative Assembly defined "absent" and "present" in legislative rules the members can suspend or amend at any time pursuant to their authority under Article IV of the constitution.²¹ According to House Rule 102 and Senate Rule 102, a member is absent if the member is "not present". The rules say a member is present if the member is "physically in the chamber or room where the session or meeting is being held, and for purposes of a committee meeting, includes participation by means of interactive video or teleconference call". While Section 12 of Article IV of the Constitution of North Dakota does not appear to prevent the Legislative Assembly from conducting a remote legislative session, both chambers would need to suspend or amend the portion of Rule 102 requiring a physical presence during floor sessions to accommodate remote attendance.

Requirement for Open and Public Meetings

Section 14 of Article IV of the Constitution of North Dakota states:

All sessions of the legislative assembly, including the committee of the whole and meetings of legislative committees, must be open and public.

Based on the language of Section 14, the purpose of the section is to give the public an opportunity to witness how the Legislative Assembly is conducting business throughout the process of legislating. The section is similar to a "sunshine law" or open meetings law. As long as the public can hear legislative committees, including meetings of the whole, a remote session arguably would not violate the purpose of Section 14.

Making meetings available through technology also is consistent with the plain meanings of "open" and "public". The most relevant definition of "open" is "completely free from concealment . . . exposed to general view or knowledge". Similarly, the most relevant definition of "public" is "exposed to general view . . . open". Another definition of "public" is "accessible to or shared by all members of the community". As advances in technology continue, the "open and public" requirement can be met through electronic and other means. For example, legislative meetings and floor sessions could be videoed or live streamed, testimony could be submitted electronically, notices and agendas could be posted online, constituents could correspond with their representatives in real time, and moderated conference calls could be held for committee meetings. Utilizing such technologies in a remote session could allow for the legislative process to remain open and public to satisfy this constitutional requirement.

The requirements for open meetings of public entities are found mostly in Chapter 44-04 and have been the subject of many Attorney General opinions. A remote meeting satisfies the requirements as long as the public has access to a meeting room with a speaker phone or video monitor providing at least the audio portion of the remote meeting. During the COVID-19 emergency, Executive Order 2020-16 has suspended the requirement for the meeting room. A remote session of the Legislative Assembly can be open and public by giving the public means to hear the meetings of each chamber and the committees.

LEGISLATIVE RULES

In addition to House Rule 102 and Senate Rule 102, several legislative rules of procedure would need to be suspended or amended to accommodate a remote legislative session. The Legislative Assembly has discretion over when and how to make those rule changes. As one court noted, "It is entirely the prerogative of the legislature, however, to make, interpret, and enforce its own procedural rules, and the judiciary cannot compel the legislature to act in accordance with its own procedural rules so long as constitutional questions are not implicated." *Moffitt v. Willis*, 459 So.2d 1018, 1022 (Fla.1984). Additionally, a failure of the Legislative Assembly to comply with its own procedural rules would not threaten the validity of any legislation. "[T]he legislature has complete control and discretion whether it shall observe, enforce, waive, suspend, or disregard its own rules of procedure, and violations of such rules are not grounds for the voiding of legislation." *Des Moines Register and Tribune Co. v. Dwyer*, 542 N.W.2d 491, 496 (Iowa 1996).

OTHER CONSIDERATIONS

Interpreting the relevant constitutional provisions broadly enough to authorize a remote session would satisfy the current need to conduct legislative business safely during the COVID-19 pandemic but also could open the door

²¹ Section 12 of Article IV of the Constitution of North Dakota says, in part, "Each house shall determine its rules of procedures . . ."

to meeting remotely under nonurgent circumstances. The constitution and North Dakota Century Code are silent regarding legislative operations during public health emergencies, so authorization for a remote session would have to be found in generally applicable provisions. An interpretation of generally applicable provisions which authorizes a remote session arguably would permit the Legislative Assembly to meet remotely whenever the members choose. The Legislative Assembly may wish to consider the impact of setting a precedent before deciding whether to meet remotely.