

AGENDA ITEM

DATE: October 10, 2012

TO: Members, Board Committee on Operations

FROM: Starr Babcock, General Counsel
Dina E. Goldman, Senior Assistant General Counsel

SUBJECT: Open Meeting Rules, Proposed Amendments, Request for Release for Public Comment

EXECUTIVE SUMMARY

In July of 2011, the Board of Trustees adopted numerous amendments to the State Bar Rules governing open meetings of the Board and Board Committees. These amendments were designed to provide greater public access to Board of Trustees' meetings. As amended, the Bar's new open meeting rules still contain a few provisions that could be further revised to provide better public access to meetings of the Board. To address these areas, this item proposes releasing additional amendments to the Bar's open meeting rules for public comment in three areas: elimination of the secret ballot for election of State Bar President, Vice-President and Treasurer; elimination of the exception which allows Board Committees to go into closed session for "advice of counsel"; and amendment of the rule which allows Board members who are not members of a Board Committee to attend and participate in committee meetings to prohibit those non-committee members from attending and participating in closed sessions of the Board Committees if their attendance creates a quorum of the Board in the committee meeting.

BACKGROUND

In July 2011, the Board of Trustees adopted a set of amendments to the Bar's open meeting rules. The amendments adopted were designed to provide greater public access to the Board's meetings. The Board's action implemented recommendations of the State Bar's Governance in Public Interest Task Force and then pending legislative proposal in Senate Bill No. 163 (2011-2012 Reg. Sess.), as amended July 13, 2011, § 28, that "the board shall ensure that its open meeting requirements ... are consistent with, and conform to, the Bagley-Keene Open Meeting Act." The amendments included: expansion of the coverage of the open meeting rules to a greater range of Board committees, commissions, and subcommittees; lengthened notice period for meetings; tightened requirements for adding agenda items to existing agendas and for

special and emergency meetings; expanded public access to participation in meetings; and repeal of an existing provision allowing action by fax poll in emergencies. Since the enactment of these amendments, some members of the Board and external stakeholders have urged even greater conformity to provisions of the Bagley-Keene Act.

ISSUE

Should the Board Operations Committee release for public comment proposed *additional* amendments to the Bar's open meeting rules which would create greater public access to Board of Trustees' meetings?

DISCUSSION

The Bar's newly amended open meeting rules still contain a few provisions that if further amended may provide greater public access to Board of Trustees' meetings. Specifically, there are three amendments to the open meeting rules that this item proposes be released for public comment.

Elimination of Secret Ballots: The Board's current practice is to vote for Board President by secret ballot. Beginning this year, pursuant to the provisions of Business and Professions Code section 6021(a)(1), the Board will elect three officers: a President, a Vice-President, and a Treasurer. The first proposed amendment would revise State Bar Rule 6.54 to eliminate, beginning in 2014, the use of a secret ballot to elect the Board's officers. Secret ballots have largely been eliminated by various local and state open meeting acts. The Ralph Brown Act, which governs meetings of local governmental agencies, prohibits secret ballots, whether preliminary or final. Cal. Govt. Code § 54953(c). Also, the California Attorney General has interpreted the Bagley-Keene Act, which governs meetings of state agencies, to prohibit secret ballots. 68 Ops. Cal. Atty. Gen. 65 (1985). Elimination of secret ballots in the Board election process may increase public access to the Board's governance process.

Elimination of Open Meeting Exception at Board Committee Meetings for "Advice of Counsel": Under the closed session exception allowed by Business and Professions Code section 6026.5(a), the full Board of Trustees may only meet in closed session to consult with its attorneys when the consultation concerns pending or prospective litigation. The Bar's open meeting rules for Board Committees allow committees to go into closed session to obtain advice of counsel on any topic. The open meeting rules applicable to state and local agencies also restrict meetings with counsel in closed session only to consultation regarding pending or prospective litigation. See Cal. Govt. Code §§ 54956.9, 11126(e)(1). In addition, under both the Brown and Bagley Keene Acts, the term "pending litigation" is narrowly defined. This item proposes revisions to State Bar Rule 6.55 to eliminate the broader closed meeting exception for advice of counsel at the Board Committee level. Elimination of this exception may increase public access to discussions at Board meetings, while allowing closed sessions on other enumerated topics within the State Bar open meeting rules.

No Longer Allowing Non-Committee Members to Participate in Board Committee Closed Sessions: The Bar's open meeting rules for Board Committees allow Board of Trustees members who are not members of a committee to attend and participate in committee meetings, including closed sessions of the committee. When significant numbers of non members attend a closed session in this fashion, it can create a situation where a majority of the Board of Trustees is meeting in closed session under an exception that is allowed for Board Committees but would not be allowed for the Board of Trustees itself. Both the Brown and the Bagley Keene Acts allow a majority of the members of a governmental body to attend meetings of a standing committee of that body, but only if they attend as observers and do not participate. Cal. Govt. Code §§ 54952.2(c)(6)¹, 11122.5(c)(6)². Neither Act has different closed session exceptions for standing committees as opposed to the entire legislative body, so there are no provisions dealing with that possibility. This item proposes amendments to State Bar Rule 6.50 to restrict board members who are not members of particular committees from attending closed sessions of those committees if their attendance would create a quorum of the Board in the committee meeting, while preserving their ability to attend and participate in open sessions.

FISCAL / PERSONNEL IMPACT:

None

RULE AMENDMENTS:

State Bar Rules 6.50, 6.54, and 6.55.

BOARD BOOK IMPACT:

Tab 10, Article 1, Section 3.

RECOMMENDATION

It is recommended that the Board Operations Committee release the proposed amendments to Title 6 of the State Bar Rules, attached as Exhibit A, for public comment.

¹ Gov. Code § 54952.5(c)(6) permits "[t]he attendance of a majority of the members of a legislative body at an open and noticed meeting of a standing committee of that body, provided that the members of the legislative body who are not members of the standing committee attend only as observers."

² Gov. Code § 11122.5(c)(6) permits "[t]he attendance of a majority of the members of a state body at an open and noticed meeting of a standing committee of that body, if the members of the state body who are not members of the standing committee attend only as observers."

PROPOSED BOARD COMMITTEE RESOLUTION:

Should the Board Committee on Operations agree with the above recommendation, the following resolution would be appropriate:

RESOLVED, that the Board Committee on Operations releases the proposed amendments to Title 6 of the State Bar Rules, attached as Exhibit A, for a 45 day public comment period; and it is

FURTHER RESOLVED, that this authorization for public comment circulation shall not be construed as a statement of approval of the proposed revisions.