

AGENDA ITEM

MARCH 112

DATE: February 1, 2013

TO: Members, Board of Trustees
Members, Board Committee on Operations

FROM: Starr Babcock, General Counsel
Dina E. Goldman, Supervising Sr. Asst. General Counsel

SUBJECT: Open Meeting Rules, Proposed Amendments - Request for Adoption Following Public Comment

EXECUTIVE SUMMARY

In October and November of 2012 the Board Operations Committee released for public comment additional proposed amendments to the Bar's open meeting rules, which were originally amended in July 2011 to provide greater public access in meetings of the Board of Trustees. The proposed additional amendments are intended to provide even more access and transparency by: (1) eliminating the secret ballot vote by the Board in the annual election of the officers of the State Bar; (2) removing the exception for Board Committees to receive advice of counsel in closed session; and (3) limiting attendance and participation in closed Board Committee meetings by Board members who are not members of the committee to meetings where the entire Board is authorized to meet in closed session under Business and Professions Code section 6026.5. It is now recommended that these additional proposed amendments be adopted.

BACKGROUND

In July 2011, the Board of Trustees adopted a set of amendments to the Bar's open meeting rules (Rules of the State Bar, rules 6.50-6.65.). 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 the Public Interest Task Force and the then pending 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 the Board and Board Committees, as well as State Bar committees, commissions, and subcommittees appointed by the Board; 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.

In October and November of 2012, the Board Operations Committee released three additional proposed amendments to the State Bar's open meeting rules for public comment. The proposed rule amendments are attached to this item as Attachment A. The public comment periods have closed. The Bar received one public comment regarding the proposed amendments authored by Julianne D'Angelo Fellmeth, the Administrative Director of the Center for Public Interest Law at the University of San Diego School of Law ("CPIL"). CPIL's comment is summarized below and the full text of the comment is attached to this item as Attachment B.

ISSUE

Should the Board Operations Committee recommend that the Board of Trustees adopt the 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 recently amended open meeting rules still contain a few provisions that if further amended would provide greater public access to Board of Trustees' meetings. Specifically, there are three proposed amendments to the open meeting rules that were released by the Board Operations Committee for public comment.

Elimination of Secret Ballots: The Board's current procedure is for the Board to vote by secret ballot in the election of the President of the State Bar. Beginning in 2012, 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 to the open meeting rules would revise State Bar Rule 6.54 to eliminate, beginning in 2014, voting by secret ballot to elect the State Bar'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 voting by the Board in its election of the officers of the State Bar arguably would provide increased transparency and 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 meet in closed session to consult with its attorneys regarding pending or prospective litigation. The Bar's open meeting rules for Board Committees, however, are broader and allow committees to meet in closed session to receive advice of counsel generally. The open meeting rules

applicable to state and local agencies have restricted 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 Not Authorized by Business and Professions Code section 6026.5/ Allowing Joint Notice of Board and Board Committee Meetings:

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, but not vote, including during closed sessions of the committee. Because the State Bar’s open meeting rules allow Board Committees to meet in closed session on grounds broader than what is permitted for the full Board under Business and Professions Code section 6026.5, this practice can create a situation where a quorum of the Board of Trustees is meeting in a closed session that is prohibited by the statute. Both the Brown and the Bagley Keene Acts allow a majority of the members of a governmental body to attend open and noticed 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.

This item proposes amendments to State Bar Rule 6.50 which will limit Board members who are not members of Board Committees from attending closed sessions of these committees authorized under Rule 6.55 if their attendance would create a quorum of the Board in the committee meeting, but provide that board members may attend closed sessions of committees permitted under Business and Professions Code section 6026.5. In addition, an amendment to Rule 6.51 is proposed to allow joint sessions of the Board and Board Committees to be held when properly noticed under the Rules. Since meetings of the Board of Trustees and its committees are typically scheduled during the same time frame, it is common practice for many members of the Board to attend committee meetings, including committees of which they are not members. This new rule would provide enhanced notice to the public that most or all members of the Board of Trustees will be attending committee meetings and participating in the discussions. The Rules will continue to provide that when a quorum of the Board is

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.”

present at a Board Committee meeting, the meeting is a meeting of the Board as a whole, but no formal action by the full Board may take place. Thus, under the proposed new rules, when a joint session of the Board and a Board Committee is noticed, members of the Board will be allowed to attend and participate in all portions of a Board Committee meeting, except for closed sessions specially authorized under Rule 6.55(A) (1) – (3). Board members who are not members of a committee will not be allowed to attend these closed committee sessions if it would create a quorum of the Board at the committee meeting.

SUMMARY OF PUBLIC COMMENT:

The comment submitted by CPIL comments specifically on the rule amendments released by the Board for public comment and also generally on the Board's open meeting requirements. CPIL's comment begins by quoting the language of Business and Professions Code section 6026.7 (as added by SB 163(Evans) of 2011, effective January 1, 2012). Section 6026.7 provides that the Board "shall ensure that its open meeting requirements, as described in Section 6026.5, are consistent with, and conform to, the Bagley-Keene Open Meeting Act. . . ." CPIL's comment states that the language of 6026.7 unambiguously requires the Bar to conform its rules to all provisions of the Bagley-Keene Act, not amend its rules to be substantially similar to Bagley-Keene. Citing remedies in the Bagley-Keene Act for overturning Board actions that violate open meeting provisions as well as criminal sanctions for willful violations, and exposure to attorney's fees, CPIL's comment states that the Bar's failure to appropriately conform its open meeting rules to Bagley-Keene "casts an unnecessary shadow over the legal finality of Board decisions."

With regard to the specific amendments released for public comment, CPIL has no objection to the amendments which would eliminate the use of the secret ballot in electing State Bar officers and would eliminate "advice of counsel" as a ground for Board committees to go into closed session.

With regard to the 3rd proposed amendment, CPIL's comment opposes the proposal to curtail the ability of non committee members to attend closed sessions of Board Committees, stating that it is inconsistent with Bagley-Keene. CPIL's comment notes that the Bagley-Keene Act does not allow non-committee members to attend closed sessions at all and further, that Bagley-Keene only allows attendance of non-committee members in open session when they attend as observers and refrain from any participation. CPIL also opposes the amendment allowing for notice of a joint session of the Board and a Board committee because there is no similar explicit provision in the Bagley-Keene Act. The Bagley-Keene Act does not explicitly prohibit notice of a joint session of governing bodies and their committees, but rather is silent.

CPIL's comment concludes by cataloguing additional areas where it states that the Bar's open meeting rules are inconsistent with the Bagley-Keene Act. These include the following:

1. Immediate public access to meeting materials distributed to board members in advance of a public meeting. CPIL's comment notes that the Bar's rules, which state that materials distributed at an open meeting are public records, are not explicit in stating that these records must be provided to the public at the meeting. In practice, the Bar makes all materials distributed to Board members at a public meeting available at the meeting.
2. Location of members participating in teleconference meetings. CPIL's comment notes that the Bar's open meeting rules do not require each location of a teleconference meeting to be open and noticed. In July of 2011, the Bar adopted an alternative proposal, which allows members of the public to call in to any teleconference meeting.
3. Participation of non-committee members in committee discussions. CPIL's comment notes that the Bar's rules, unlike Bagley-Keene, do not prohibit non-committee members from participating in committee meeting discussions.
4. Late addition of items on regular meeting agendas. CPIL's comment states that the Bar's rule which allows an item to be added to an agenda after the 10 day notice period with a Board vote determining either a defined emergency or a need for immediate action, is inconsistent with the Bagley-Keene Act. However, Government Code section 1125.3, which allows late addition of agenda items in specified circumstances, is very similar to the Bar's rule.
5. Grounds for closed sessions. CPIL's comment states that the Bar's rules for closed sessions are not consistent with Bagley-Keene because they do not specifically require advance notice of closed sessions and reporting of action in closed session. In practice, the Bar provides specific notice of closed sessions on its agendas and discloses in open session when the Board or a Board committee is going into closed session to discuss an item on the agenda.
6. Different open meeting rules for "board-appointed committees". CPIL's comment notes that the Bagley-Keene Act applies broadly to every state body and multimember subset thereof, including advisory committees, commissions and subcommittees. CPIL's comment states that it is inconsistent with Bagley-Keene for the Bar to have a separate set of open meeting rules for its "board-appointed committees."

FISCAL / PERSONNEL IMPACT:

None

RULE AMENDMENTS:

State Bar Rules 6.50, 6.51, 6.54, and 6.55.

BOARD BOOK IMPACT:

Tab 10, Article 1, Section 3.

RECOMMENDATION

It is recommended that the Board Operations Committee recommend that the Board of Trustees adopt the proposed amendments to Title 6, Chapter 1 of the State Bar Rules, attached as Attachment A.

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 recommends that the Board of Trustees adopt the proposed amendments to Title 6 of the State Bar Rules in the form attached as Attachment A, effective immediately, except for the amendment to Rule 6.54 which will be effective January 1, 2014.

PROPOSED BOARD RESOLUTION:

Should the Board of Trustees agree with recommendation of the Board Operations Committee, the following resolution would be appropriate:

RESOLVED, that upon recommendation of the Board Committee on Operations, the Board of Trustees hereby adopts the proposed amendments to Title 6 of the State Bar Rules in the form attached as Attachment A, effective immediately, except for the amendment to Rule 6.54 which will be effective January 1, 2014.