

# **AGENDA ITEM**

**704 OCTOBER 2015**

**DATE:** October 7, 2015

**TO:** Members, Board of Trustees

**FROM:** Vanessa Holton, General Counsel  
Dina Goldman, Acting Chief Assistant General Counsel

**SUBJECT:** State Bar Board of Trustees - Compliance with Bagley-Keene Open Meeting Act

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## **EXECUTIVE SUMMARY**

Compliance with the Bagley-Keene Open Meeting Act will require the Board of Trustees to modify some of its existing open meeting practices. First, the Board would decide whether it should cease its practice of jointly meeting with committees of the board during regularly scheduled meetings because Bagley-Keene prohibits a quorum of Board members who are not committee members to participate in committee meetings. To modify current practice and ensure compliance with Bagley-Keene, Board committees would either meet separately before a regular meeting; or if a standing committee meets during the regular meeting of the board, trustees who are not members of the standing committee may only observe and not participate in the discussion. Another option is to eliminate the standing committee structure and have the entire Board meet either as a regularly constituted body, or as a committee of the whole. Second, the Board will have to change its existing practice regarding teleconference meetings. When the Board or Board committee meets by teleconference, trustees will no longer be able to participate via teleconference from their offices, homes, or other convenient location unless those locations are identified in the notice and agenda, and the public is permitted to attend at those locations.

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## **BACKGROUND**

Senate Bill No. 387, approved by the Governor and chaptered by the Secretary of State on October 6, 2015, at Chapter 537, Statutes of 2015, will subject the State Bar to the Bagley-Keene Open Meeting Act, Government Code sections 11120-11132 ("Bagley-Keene"), commencing April 1, 2016. The existing provision of Business and Professions Code section 6026.7 requires that the board "ensure that its open meeting requirements ... are consistent with, and conform to [Bagley-Keene]." As amended by SB 387, section 6026.7 states in relevant part: "The State Bar is subject to the Bagley-Keene Open Meeting Act ... and all meetings of the State Bar are subject to the Bagley-Keene Open Meeting Act."

The State Bar's new President would like the board to begin following the requirements of Bagley-Keene on January 1, 2016, in advance of the April 1 effective date of the amendment to section 6026.7. This item discusses some of the changes to how the Board of Trustees may conduct its meetings, to permit the Board to begin complying now with Bagley-Keene.<sup>1</sup> At the next meeting in November, the board will approve any necessary changes to the State Bar Rules.

## DISCUSSION

### *Committee Meetings.*

Bagley-Keene allows attendance by a majority of members of a board at an open and noticed meeting of a committee of the board, provided the members of the board who are not members of the committee attend only as observers. (Gov. Code §11122.5, subd. (c)(6).) An Attorney General opinion of a comparable provision governing "observers" in the Brown Act concluded that "[m]embers of the legislative body of a local public agency may not ask questions or make statements while attending a meeting of a standing committee of the legislative body 'as observers.'" The opinion further concluded that such members of the legislative body may not sit in special chairs on the dais with the committee. (81 Ops.Cal.Atty.Gen. 156.)

Unlike Bagley-Keene, current State Bar Rule 6.50(F) permits board members who are not committee members to participate but not vote in a board committee meeting. If a quorum of board members is present, the meeting is a meeting of the board as a whole but no formal action by the full board may take place. However, these joint sessions of the board and board committees may be held only when properly noticed. State Bar Rule 6.51(A)(4)&(5). This provision was drafted with the belief that it complied fully with the intent of Bagley-Keene by providing notice to the public when the full Board would be present and discuss matters at a committee meeting. However, the Center for Public Interest Law ("CPIL") has consistently stated that this provision in fact violates Bagley-Keene because Bagley-Keene does not contemplate or permit joint meetings of the full board and a board committee. Thus, continuing this practice risks a challenge by CPIL, which could be made under the enforcement provisions of Bagley-Keene.

### Possible Alternatives To Joint Sessions

- *Committees of the Whole* This approach would be to dissolve the current committee structure and instead have the Board meet to discuss the subject matter areas that are currently handled by the Board committees as a committee of the whole. A committee of the whole is a structure recognized by Robert's Rules of Order (see RONR (11th ed.) , p. 489, ll. 30-33) and many legislative bodies, including the California Legislature (National Conference of State Legislatures, *Mason's Manual of Legislative Procedure* (2010 ed.), §§ 683-91, pp.463-68.) The Board's recommendations as a committee of the whole would be forwarded to the full Board at its formal meeting for action. The Bagley-Keene Act is silent on this approach. A committee of the whole comprised of the entire

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<sup>1</sup> Conforming amendments to the provisions of the Rules of the State Bar, tit. 6, div. 2, ch. 1 & 2, governing meetings of the Board, Board Committees, and State Bar committees will be presented at the regular meeting of the Board in November. Since Bagley-Keene applies broadly both to subcommittees and any advisory body created by formal action of the board and consisting of 3 or more persons, all Board appointed committees and task forces will be required to comply with its provisions.

Board would meet the definition of a “state body” subject to Bagley-Keene, but the statute does not specifically discuss the committee of the whole concept. However, it is likely that since committees of the whole are not expressly authorized by Bagley-Keene, CPIL would state that this approach is not authorized by the Act and could potentially challenge it.

- *Separate Meeting of Committees* An alternative to having committees meet during the regular Board meeting, with non-committee members attending only as observers, is to have the committees meet in advance of regular Board meetings. These committee meetings would have to be noticed in compliance with Bagley-Keene and teleconference meetings would be subject to the restrictions described below.
- *Elimination of Committee Structure* Another alternative would be to eliminate committees altogether and have the Board meet as a whole at all times. These meetings would be noticed as full Board meetings and the Board would be able to act on any resolutions before it.

#### *Teleconference Meetings.*

Bagley-Keene authorizes meetings by teleconference. (Gov. Code, § 11123, subd. (b).) Like Bagley-Keene, State Bar Rule 6.51(A)(2) currently permits the board to meet by telephone conference provided that notice of the meeting includes “the location at the State Bar’s San Francisco and Los Angeles offices where the public may access the teleconference and a call-in number to allow interested members of the public to join the teleconference.” However, in 2001, the Legislature amended subdivision (b) of Government Code section 11123 to require that every teleconference meeting location be identified in the notice and agenda and be open to the public. Most importantly, at least one of the members of the agency must attend the meeting at each of the locations noticed and open to the public. Thus under Bagley-Keene, members of the board will no longer be able to attend the meeting via teleconference from their offices, homes, or other convenient location unless those locations are identified in the notice and agenda, and the public is permitted to attend at those locations.