

AGENDA ITEM

III.A NOVEMBER 3 2015

DATE: October 27, 2015

TO: Members, Board Executive Committee

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

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

EXECUTIVE SUMMARY

Under the provisions of the recently enacted fee bill, the State Bar will be required to comply with the Bagley-Keene Open Meeting Act, effective April 1, 2016. While the Bar's existing open meeting rules are largely compliant with Bagley-Keene, full compliance will require the Board of Trustees to modify some of its existing open meeting practices.¹ The Bar's existing rules on open meetings will be superseded by the provisions of Bagley-Keene and should be repealed. This item summarizes the requirements of Bagley-Keene and highlights areas in which the Bar's existing open meeting practices must change to conform with the provisions of Bagley-Keene. First, the Board 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. 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.

BACKGROUND

Existing law requires that every meeting of the Board of Trustees must be open to the public, with only specific exceptions for closed session. (Bus. & Prof. Code, § 6026.5) In 2011, the Legislature added section 6026.7 to the Business and Professions Code to

¹ State Bar President David Pasternak would like the Board to begin following Bagley-Keene on January 1, 2016, in advance of the April 1 effective date of the amendment to section 6026.7, at the same time as compliance with required with the Open Records Act.

require that the Board “ensure that its open meeting requirements ... are consistent with, and conform to Bagley-Keene Open Meeting Act (Article 9 (commencing with Section 11120) of Division 3 of Title 2 of the Government Code).”² The Board has enacted rules to govern meetings of the Board and Board committees (Rules of the State Bar, tit. 6, div. 2, ch. 1 (commencing at Rule 6.50) and meetings of specified State Bar Committees (Rules of the State Bar, tit. 6, div. 2, ch. 2). With some minor exceptions, meetings of the Board, its committees, and applicable State Bar committees have generally followed the requirements of Bagley-Keene.

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, (“SB 387”) will subject the State Bar to all requirements of Bagley-Keene, commencing April 1, 2016. SB 387 will also retain the grounds for closed sessions permitted by Business and Professions Code section 6026.5 and these provisions, pursuant to Bagley-Keene, would be applicable to all committees of the Board and the State Bar.³

This item summarizes the provisions of Bagley-Keene and discusses some of the changes required for the Bar to fully comply with Bagley-Keene. The Bar’s existing rules on open meetings will be superseded by the provisions of Bagley-Keene and should be repealed.

DISCUSSION

The State Bar Rules governing open meetings of the Board are contained in the provisions of Rules 6.50 through 6.55. These rules largely include language based on that contained in the Bagley-Keene Act. Historically, we have looked to Bagley-Keene for guidance in administering and implementing the Bar’s open meeting rules. As noted in Item 704 OCT 2015 of the Board’s agenda for its October 11 meeting, the major changes required under Bagley-Keene will be how the Board conducts its committee meetings, who may participate in committee meetings, and how the locations from which trustees may call in to teleconference meetings.⁴

To begin following Bagley-Keene on January 1, 2016 in advance of its effective date, the Board will need to modify its current practices as follows: 1) cease its current practice of holding joint sessions of Board and committee meetings because Bagley-Keene prohibits a quorum of Board members who are not committee members to participate in committee meetings; 2) post appropriate notices at all teleconference sites and make these all open to the public.

² Hereinafter, “Bagley-Keene.” A copy of Bagley-Keene is attached as Attachment A.

³ SB 387 amended Business and Professions Code section 6026.5, which contains the existing permissible grounds under which the Board may go into closed session to provide that the meetings of the Board under the statute are “[p]ursuant to [new] Section 6026.7,” which states that “... all meetings of the State Bar are subject to the Bagley-Keene Open Meeting Act...” (SB 387, §§ 3, 5.)

⁴ Bagley-Keene also requires that the vote on each Board action be publicly announced, which is current practice, and that employment decisions made in closed be reported out in open session.

The Board should also repeal the existing State Bar Rules governing open meetings, effective April 1, 2016, in the form suggested in the resolution.

The provisions of Bagley-Keene are summarized below.

Summary of Bagley-Keene Requirements

Public Policy

Bagley-Keene opens with a broad statement of public policy in favor of transparency:

It is the public policy of this state that public agencies exist to aid in the conduct of the people's business and the proceedings of public agencies be conducted openly so that the public may remain informed. In enacting this article the Legislature finds and declares that it is the intent of the law that actions of state agencies be taken openly and that their deliberation be conducted openly. The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

The State Bar Act at Business and Professions Code section 6026.5 contains a simple provision stating that “e]very meeting of the board shall be open to the public”

Entities Covered

Bagley-Keene broadly defines the entities (“state body”) covered by the Act:

- Every state board or commission created by statute or executive order;
- Board or commission that exercises authority delegated by a state body;
- Advisory boards, committees or commissions of 3 or more persons, created by formal action of a state body or member thereof;
- Official representatives of state bodies on other boards or commissions that are supported in whole or in part, by funds provided by the state body.

(Gov. Code §11121.)

Under this definition, Bagley-Keene will apply to the Board and its committees, to other Bar entities created by statute, and to other committees, commissions or task forces of 3 or more persons formed by the Board, the President, or another Trustee.

Appointees or Officials Not Yet in Office

Bagley-Keene applies to persons appointed or elected to serve on a state body who have not yet assumed the duties of office. (Gov. Code §11121.95.)

Action Taken

This definition is broader than just a decision, and includes an actual vote taken by members of a state body as well as a “collective decision” made by the members or a “collective commitment or promise by the members. . . to make a positive or negative decision.” (Gov. Code §11122.)

Meeting

The definition of meeting applies broadly to “any congregation of a majority of the members” of a body “at the same time and place to hear, discuss, or deliberate upon any item” within the jurisdiction of the body. This section also contains the prohibition on serial meetings, specifying that a majority of the members of a body shall not use a series of communications of any kind, directly or through intermediaries, to “discuss, deliberate, or take action” on any item. (Gov. Code §11122.5.)

The definition of meeting includes several exclusions, including:

- Individual contacts between board members and others that do not otherwise violate the Act;
- Attendance of a majority of the members of a body at a conference or similar gathering open to the public, or at an open and publicized meeting regarding a topic of state concern organized by an outside entity, or at a purely social or ceremonial occasion as long as business is not discussed among the members of a body;
- Attendance of a majority of the members of a body at an open and noticed meeting of a standing committee if the members who are not members of the standing committee attend only as observers.

Committee Meetings

Bagley-Keene’s definition of a meeting impacts how Board Committee meetings are handled. Under current practice, Board members who are not committee members may 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). In contrast, Bagley Keene allows attendance by a majority of members of a board at an open and noticed meeting of a committee of the board only if 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.)

To modify current practice and ensure compliance with Bagley-Keene, Board committees should 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.

Teleconference Meetings

Bagley-Keene authorizes meetings by teleconference, but only when every teleconference meeting location is identified in the notice and agenda and open to the public. (Gov. Code, § 11123, subd. (b).) In addition, consistent with current Board practice, all votes must be taken by roll call and any action taken and votes recorded must be publicly announced.

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.” 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.

ADA Compliance

Bagley-Keene requires that all public meetings of a covered body comply with the American with Disabilities Act and the federal rules and regulations adopted in implementation thereof. (Gov. Code § 11123.1.) This provision impacts proposals to webcast meetings, since any webcast technology would have to have closed captioning and other accommodations.

Use of Facility Allowing Discrimination

Meetings shall not be conducted in any facility that prohibits admittance of any person in a discriminatory manner, that is inaccessible to disabled persons, or where members of the public may not be present without making a payment or purchase. (Gov. Code § 11131.)

Conditions to Attendance

Members of the public may not be required to register their name or provide any other information, complete a questionnaire or otherwise fulfill any condition precedent to their attendance. (Gov. Code § 11124.)

Audio or Video Recording

Any person attending a meeting has the right to make an audio or video recording absent a reasonable finding by the state body that the recording cannot continue without constituting a persistent disruption of the proceedings. State body shall not prohibit or restrict the broadcast of a public meeting absent the reasonable finding of disruption. Any audio or video recording of an open meeting made at the direction of the body is subject to inspection under the California Public Records Act (“CPRA”), but may be erased or destroyed 30 days after recording. (Gov. Code § 11124.1.)

Notice

10 days' notice of meetings shall be provided to any person who requests notice in writing and shall also be posted on the internet. Notice shall include contact person who can provide additional information, but does not need to list all witnesses. The notice shall include a specific agenda for the meeting, containing a brief description (need not exceed 20 words). Notice of closed meetings must include the specific statutory cite that allows the closed session. Notice shall include the internet site where notices are published. Notices must comply with the ADA. (Gov. Code § 11125.) The citations in the notices of meetings of the Board and Board committees would have to be changed to include those under Bagley-Keene, as well as those that remain applicable under the State Bar Act at Business and Professions Code section 6026.5.

Agendas and Other Writings Distributed for Public Meeting Are Public Records

Agendas and other writings distributed to all or a majority of all of the members of a state body, in connection with a matter to be discussed at a public meeting, are public records under CPRA and shall be made available upon request without delay. Writings that are public records and distributed to members of the body prior to or at a public meeting shall be made available at the meeting if prepared by the state body, or after it if prepared by another person. The state body may charge a fee for copies of public records. (Gov. Code § 11125.1.)

Action on Items Not Appearing on the Agenda

A body may take action on items of business not appearing on the posted agenda if: 1) a majority of the body determines that an emergency exists; or 2) upon a determination by a 2/3 vote of the body, or a unanimous vote of those present if less than 2/3 that there exists immediate need to take action that came to the attention of the body subsequent to the timely posting of the agenda. Notice shall be provided of the additional item as soon as possible, but at least 48 hours in advance. (Gov. Code § 11125.3.)

Special Meetings

A special meeting may be called on specified topics only, where compliance with the 10 day notice period would impose a substantial hardship on the body or where immediate action is required to protect the public interest. Topics allowed for consideration are: 1) pending litigation; 2) proposed legislation; 3) issuance of a legal opinion; 4) disciplinary action against an officer or employee; 5) real estate purchase or lease; 6) license examinations and applications; 7) response to a confidential final draft audit report; and 8) appointing an interim executive officer. Notice shall be provided as soon as practicable, but to allow 48 hours' notice. Members may waive notice.

At the start of any special meeting, the body must make a specific finding in open session that posting regular notice would cause substantial hardship or that immediate action is needed to protect the public, adopted by a 2/3 vote of the body, or a unanimous vote of those present if less than 2/3. (Gov. Code § 11125.4.)

Emergency Meetings

Emergency meetings can be held without notice only on matters of true emergency (activity or crippling disaster that severely impairs public health or safety, or both). The press that has requested notices shall be notified one hour prior to the emergency meeting. Internet notice shall be posted as soon as practicable. Minutes shall be posted for a minimum of 10 days as soon as possible after the meeting. (Gov. Code § 11125.5.)

Opportunity for Public Comment

A state body shall provide an opportunity for members of the public to directly address the body on each open session agenda item before or during the discussion or consideration of the item. This is not required if public comment was allowed during a committee's consideration of substantially the same item. A state body may adopt reasonable regulations to govern public comment, including limiting the time for particular issues and individual speakers. Non-English speakers using a translator must be given twice the amount of time as other speakers. State body shall not allow public criticism of the state body. (Gov. Code § 11125.7.)

Closed Sessions

Bagley-Keene allows closed sessions to be held to discuss the following matters. (Gov. Code §§ 11126, 11126.2.)

- Appointment, employment, evaluation, or dismissal of a public employee, unless employee requests a public hearing.
- To prepare, approve, grade or administer examinations of persons engaging in businesses or professions.
- For an advisory body that administers licensing to discuss matters that it has found would constitute an unwarranted invasion of the privacy of an individual licensee or applicant, provided advisory body does not constitute a quorum of body it advises.
- To consider conferring of honorary degrees, or gifts, donations or bequests that donor has requested be kept confidential.
- To give instructions to negotiator prior to purchase, sale, exchange, or lease of real property, however real property shall be identified in open session prior to closed session.
- To discuss investment decisions regarding retirement, pension or endowment funds.
- To hold sessions with representatives regarding salaries, salary schedules, or fringe benefits.
- To consider matters posing a threat or potential threat of criminal or terrorist activity.
- To receive advice of counsel regarding pending litigation – advice memo from counsel required to state specific reasons for closed session, including title of litigation or facts and circumstances supporting finding of significant exposure. All other expressions of lawyer-client privilege are abrogated.

- To discuss response to confidential final draft of audit report from the Bureau of State Audits. After public release of audit report, discussions shall be held in open session.

In the State Bar Act, Business and Professions Code section 6026.5 provides for meetings in closed session for the following reasons:

- Consultation with counsel concerning pending or prospective litigation.
- Involuntary enrollment of active members as inactive members due to mental infirmity or illness or addiction to intoxicants or drugs.
- The qualifications of judicial appointees, nominees, or candidates.
- The appointment, employment or dismissal of an employee, consultant, or officer of the State Bar or to hear complaints or charges brought against such employee, consultant, or officer unless such person requests a public hearing.
- Disciplinary investigations and proceedings, including resignations with disciplinary investigations or proceedings pending, and reinstatement proceedings.
- Appeals to the board from decisions of the Board of Legal Specialization refusing to certify or recertify an applicant or suspending or revoking a specialist's certificate.
- Appointments to or removals from committees, boards, or other entities.
- Joint meetings with agencies provided in Article VI of the California Constitution.

Bagley-Keene states that it shall not be construed to prevent a state body or its committees or advisory bodies as defined in Government Code section 11121 “from conducting a closed session to consider any matter that properly could be considered in a closed session by the ... state body.” (Gov. Code, § 11126(f)(4)-(6).) Accordingly, under SB 387, the Board, its committees, and other State Bar entities can all meet in closed session under the grounds in Bagley-Keene, as well as the existing grounds provided under Business and Professions Code section 6026.5.

Existing Rules of the State Bar, rules 6.55(A) and 6.64(A), which provide for additional closed meeting exceptions for Board committees and for other State Bar committees and commissions, will no longer apply and should be repealed.

Closed Session Minute Book

State body shall designate a clerk or other officer or employee to attend closed session and keep a record of topics discussed and decisions made at the meeting. Minute book is not subject to disclosure under CPRA and shall be kept confidential. Shall be available to members of the body or to court in event of challenge. (Gov. Code § 11126.1.)

Reporting Out of Closed Session

State bodies shall report at a subsequent public meeting any action taken, and any roll-call vote thereon, to appoint, employ or dismiss a public employee, made during a closed session. (Gov. Code § 11125.2.) The Bar’s current open meeting rules do not

contain any requirements that closed session matters be reported in open session. Under current practice, the State Bar does announce the Board's appointments to State Bar committees and other entities, which are made in closed session. Personnel decisions are handled by staff, with the exception of the hiring of the chief executive officer and the general counsel, which are also made public. Gov. Code § 11126.3(f) requires the Board now to "...reconvene into open session prior to adjournment and shall make any reports ... required by Section 11125.2 of action taken in the closed session," which are reports of action taken in closed session to appoint, employ or dismiss a public employee.

Open Session Disclosures Before/After Closed Session

Prior to holding closed session, the body shall disclose in open session, the general nature of the item or items to be discussed in closed, including name of litigation proceeding, unless such disclosure would jeopardize ability to effectuate service of process, or release information that would constitute an invasion of privacy or that is prohibited by law. In closed session, only matters on the agenda may be discussed. After closed session regarding employment or dismissal of a public employee, required disclosure of action taken must be made in open session. (Gov. Code § 11126.3.)

Time of Closed Session

Closed sessions may only be held during a regular or special meeting of the body. (Gov. Code § 11128.)

Disorderly Conduct

Room may be cleared and meeting continue in session if meeting is willfully interrupted by a group or groups which renders the meeting unfeasible, and order cannot be restored by removing disruptive individuals. Non-disruptive individuals may be readmitted. (Gov. Code § 11126.5.)

Adjournment

Body may adjourn a meeting to a time and place specified in order of adjournment. Copy of notice of adjournment shall be conspicuously posted on or near the door where the meeting was held within 24 hours of the adjournment. (Gov. Code § 11128.5.)

Continuance

Hearings held or noticed by body can be continued to any subsequent meeting in the same manner as adjournments. (Gov. Code § 11129.)

Enforcement

Attorney General, district attorney or any interested person can commence an action by mandamus, injunction or declaratory relief to stop or prevent violations of Bagley-Keene Act, or to determine applicability of Act to past actions or future threatened actions, or to determine whether any rule or action by a body to penalize or discourage expression of one or more of its members is valid, or to compel audio recording of closed sessions as may be ordered by a court.

Interested person may also commence action to seek a judicial determination of whether an action taken in violation of the Act is null and void.

Court may award costs and attorney's fees where a violation if found.
(Gov. Code §§ 11130, 11130.3, 11130.5.)

Violation is a Misdemeanor

Members who attend a meeting that violates the Act and where the member intends to deprive the public of information they know or have reason to know the public is entitled to are guilty of a misdemeanor. (Gov. Code § 11130.7.)

FISCAL/PERSONNEL IMPACT

Not applicable, however the Board will need to consider the expense of staff time, travel, off-site meetings in the preparation of the State Bar's 2016-2018 budget as a result of estimated additional meetings of committees of the Board and State Bar required to comply with Bagley-Keene.

RULE AMENDMENTS

Title 6, Division 2, Chapters 1 and 2

BOARD BOOK IMPACT

Tab 10, Article 1, Sections 1-3, Pages 1-10

BOARD COMMITTEE RECOMMENDATIONS

The Board Executive Committee recommends that the Board of Trustees approve the following resolution:

RESOLVED, that the Board of Trustees hereby amends Title 6, Division 2, Chapters 1 and 2 of the Rules of the State Bar, containing Rules 6.50-6.56 and 6.60 – 6.65, in the form attached hereto.

ATTACHMENT(S) LIST

- A. Bagley-Keene Open Meeting Act
- B. Proposed Rule 6.57 and Rule 6.66 of the Rules of the State Bar