

# AGENDA ITEM

**701 OCTOBER 2, 2016**

**DATE:** September 8, 2016

**TO:** Members, Board of Trustees

**FROM:** Vanessa Holton, General Counsel

**SUBJECT:** Board of Trustees Participation in the Regulation and Discipline Committee

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## **EXECUTIVE SUMMARY**

At its meeting on June 23, 2016, the Board of Trustees approved a resolution to provide that the Regulation and Discipline Committee (RAD) shall consist of all members of the Board of Trustees through the end of the current Board term.<sup>1</sup> Under California Rules of Court, rule 9.11(a)(2), however, the two members of the Board serving on the Supreme Court's Applicant Evaluation and Nomination Committee (AENC) may not be from RAD. The AENC recruits, screens, and evaluates all applications for appointment or reappointment to positions of judge of the State Bar Court. The Board then amended the original resolution to except from RAD the two trustees currently serving on the AENC. This item would make permanent the reconstituted membership of RAD, which would include all members of the Board of Trustees less any members of the AENC.

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## **BACKGROUND**

Previously, under the State Bar's rules governing open meetings of the Board of Trustees and Board Committees all members of the Board could participate in meetings of RAD. With the enactment of Business and Professions Code (hereinafter, "B&P Code") section 6026.7 and other amendments last year in Senate Bill No. 387 (2015-2016 Regular Session) (Statutes of 2015, Chapter 537) (hereinafter, "SB 387"), providing that the State Bar is subject to the Bagley-Keene Open Meeting Act (Article 9 (commencing with Section 11120) of Chapter 1 of Part 1 of Division 3 of Title 2 of the Government Code) (hereinafter "Bagley-Keene"), members of the Board who are not members of RAD could no longer participate in RAD meetings. To permit involvement of all Board members on the policy matters affecting public protection discussed in RAD, the Board at its meeting on June 23, 2016, approved a resolution confirming the Bar President's appointment to RAD of all members of the Board of Trustees. California Rule of Court 9.11(a)(2), however, provides that the two trustees serving on the AENC may not come

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<sup>1</sup> The motion by Board member Krinsky adopted on June 23, 2016 reads:  
"To confirm the President's appointment of all members of the Board of Trustees to the Regulation and Discipline Committee effective immediately and through the end of the current board term."

from RAD.<sup>2</sup> Therefore, on July 21, 2016, the resolution was modified to except those two trustees from RAD. The resolution provided that it was “effective immediately and through the end of the current board term.” This resolution will confirm and ratify that the composition of RAD henceforth will include all Board members less members of AENC.

## DISCUSSION

RAD is the Board’s committee responsible “for monitoring the operational and financial performance of the State Bar’s Regulation and Discipline functions.” (Board Book, Tab 9, Art. 4.) Under Business and Professions Code section 6079.5(a), RAD “or its successor committee on attorney discipline” oversees the Chief Trial Counsel. Former Rule 6.50(F) of the Rules of the State Bar provided that “trustees who are not members of a board committee may attend and participate in a committee meeting, but they may not vote.” This provision permitted all Board members to participate in the discussion of RAD. Given that the State Bar’s highest priority is public protection (Bus. & Prof. Code § 6001.1) and the State Bar’s discipline function is key to this mission, attendance and participation in the discussions and deliberations of RAD by all trustees allows for their full involvement in furthering this mission.

In 2015, the Legislature enacted new section 6026.7 of the Business and Professions Code and other amendments to subject meetings of the State Bar, including the Board and Board Committees, to the requirements of the Bagley-Keene Open Meeting Act. Unlike former Rule 6.50(F), Government Code section 11126.5(c)(6) in Bagley-Keene allows the attendance of the members of a state body at an open and noticed meeting of a committee of that body, “*if the members of the state body who are not members of the standing committee attend only as observers.*” The Office of the Attorney General has addressed in a formal opinion a provision in the Brown Act relating to the attendance of “observers” at a committee meeting. The Attorney General 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) Thus, under the provisions of section 11122.5(c)(6), and the opinion of the California Attorney General, if a majority of members of the full Board are present at a committee meeting, Board members who are not members of the committee that is meeting may attend that meeting only as observers. (Department of Consumer Affairs, Guide to the Bagley-Keene Open Meeting Act (rev. January 15, 2016), p.3.)

To conform the State Bar’s procedures for open meetings to the requirements of Bagley-Keene under SB 387, the Board at its meeting on November 20, 2015, amended the Rules of the State Bar to repeal the provisions of Rules 6.50-6.56. (Agenda Item 111 November 20, 2015.) As a result, trustees who are not members of RAD have been sitting in the audience during RAD meetings and have not been permitted to participate in the discussions, to address the committee or to ask questions. To allow full participation under Bagley-Keene, the Board at its meeting on June 23, 2016, approved a resolution to state: “To confirm the President’s appointment of all members of the Board of Trustees to the Regulation and Discipline Committee effective immediately and through the end of the current board term.”

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<sup>2</sup> Rules of Court 9.11(a)(2) provides in part: “Two members of the [AENC] committee must be present members of the Board of Governors of the State Bar (neither of whom may be from the Board’s Discipline Committee.)”

After the June 23<sup>rd</sup> meeting, staff was alerted that the Supreme Court's current AENC, which recruits, screens, and evaluates all applications for appointment or reappointment to any appointive position of judge of the State Bar Court, had not completed its evaluation for this year's appointments or reappointments. The role of the AENC is to determine whether appointees possess not only the statutorily enumerated qualifications, but also any qualifications that may be required by the Supreme Court to assist in the exercise of its ultimate authority over the discipline and admission of attorneys (Cal. Rules of Court, rule 9.11; see *Obrien v. Jones* (2000) 23 Cal.4th 40). Under Rule 9.11(a)(2), two members of the AENC must be present members of the Board of [Trustees] of the State Bar (neither of whom may be from the Board's Discipline Committee). Consequently, in order for the two trustees serving on the AENC to continue until the committee completed the evaluation of applicants and made recommendations to the Supreme Court, the Board approved a resolution to except the two trustees from RAD. The resolution approved by the Board provided as follows: "To confirm the President's appointment of all members of the Board of Trustees to the Regulation and Discipline Committee, except for the two members appointed and serving on the Supreme Court's Applicant Evaluation and Nomination Committee until that committee has completed its evaluation of applicants and made its recommendations to the Supreme Court. This resolution is effective immediately, and through the end of the current board term."

The proposed resolution will confirm and ratify that the composition of RAD will include all Board members less any members appointed and serving on the Supreme Court's Applicant Evaluation and Nomination Committee.

#### **FISCAL / PERSONNEL IMPACT**

None

#### **RULE AMENDMENTS**

N/A

#### **BOARD BOOK IMPACT**

Tab 9, Article 4, Section 2

#### **RECOMMENDATION**

It is recommended that the Board of Trustees approve the following resolution:

**RESOLVED**, "To confirm the President's appointment of all members of the Board of Trustees to the Regulation and Discipline Committee, except for any Board members then appointed and serving on the Supreme Court's Applicant Evaluation and Nomination Committee and until such time as the members are no longer serving on that committee."

#### **ATTACHMENT(S) LIST**

None