



STATE OF CALIFORNIA
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To: Chair Miadich, Commissioners Cardenas, Hatch, and Hayward

From: Dave Bainbridge, General Counsel, Legal Division
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Subject: Commissioners' Remote Participation Via Teleconference Meetings

Date: July 8, 2019

QUESTION PRESENTED

What, if any, legal impediments are there with respect to commissioners who seek to participate in Commission meetings remotely (e.g., via Skype, telephone, etc.)?

SHORT ANSWER

Under the Bagley-Keene Act, a Commission meeting conducted via teleconference generally needs to comply with the same rules applicable to an ordinary Commission meeting. Just like a meeting conducted in a single location, the address of each teleconference location must be included in the notice and agenda, the location must be accessible to the public (including persons with disabilities), and the public must be given the opportunity to directly address the Commission at each meeting location. Because each teleconference location must be ADA-compliant, participating via teleconference from a private residence is inadvisable. Ideally, a government building should be used for each teleconference location.

FACTS

The Bagley-Keene Act (“Bagley-Keene” or “the Act”) provides that “[a]ll meetings of a state body shall be open and public and all persons shall be permitted to attend any meeting of a state body except as otherwise provided in this article.” (Section 11123(a).) The exceptions to this general rule are referred to throughout the Act as “closed sessions,” and generally concern a narrow range of matters such as personnel decisions, examinations, individual privacy, and administrative discipline. (See Section 11126.) Unless the meeting falls into one of those narrow exceptions, a closed session is not authorized. (Section 11132.)

Bagley-Keene expressly anticipates the possibility of meetings being conducted via “teleconference,” meaning “a meeting of a state body, the members of which are at different locations, connected by electronic means, through either audio or video or both audio and video.” (Section 11123(b)(2).) Bagley-Keene does not prohibit a state body from conducting an open or closed session by teleconference, but the teleconference meeting “shall otherwise comply with all applicable requirements or laws relating to a specific type of meeting or proceeding” (Section 11123(b)(1).) Among these requirements, a state body that elects to hold a meeting or proceeding by teleconference must:

- Comply with all requirements of the Act applicable to other meetings—e.g., notice of the meeting must be given and made available on the Internet at least 10 days in advance (Sections 11123(b)(1)(A), 11125(a));
- Ensure that the portion of the teleconferenced meeting that is required to be open to the public shall be audible to the public at the location specified in the notice of the meeting (Section 11123(b)(1)(B));
- Post agendas at all teleconference locations (Section 11123(b)(1)(C));
- Conduct teleconference meetings in a manner that protects the rights of any party or member of the public appearing before the state body (*Ibid.*);
- Identify each teleconference location in the notice and agenda of the meeting or proceeding;
- Make each teleconference location accessible to the public (*Ibid.*);
- Provide an opportunity for members of the public to address the state body directly at each teleconference location (*Ibid.*; see also Section 11125.7);
- Ensure the open portion of the teleconferenced meeting is audible to the public at the location specified in the notice of the meeting (Section 11123(b)(1)(B); and
- Ensure that at least one member of the state body is physically present at the location specified in the notice of the meeting. (Section 11123(b)(1)(F).)

Additionally, although the Act does not prohibit closed sessions during a teleconference meeting (see Section 11123(b)(1)(B)), it does prohibit a closed session *emergency* meeting conducted via teleconference. (Section 11123(b)(1)(E).)

With regard to “writings” received and considered by the Commission, Bagley-Keene requires: “agendas of public meetings and other writings, when distributed to all, or a majority of all, of the members of a state body by any person in connection with a matter subject to discussion or consideration at a public meeting of the body, are disclosable public records under the California Public Records Act . . . and shall be made available upon request without delay.” (Section 11125.1(a).) Additionally, “[w]ritings that are public records under subdivision (a) and that are distributed to members of the state body prior to or during a meeting, pertaining to any item to be considered during the meeting, shall be made available for public inspection at the meeting if prepared by the state body or a member of the state body, or after the meeting if prepared by some other person.” (Section 11125.1(b).) “These writings shall be made available in appropriate alternative formats,” as required by the ADA and related federal rules and regulations. (*Ibid.*)

Bagley-Keene also has numerous provisions ensuring that public meetings are not discriminatory, regardless of whether they are conducted with all state body members attending in person or via teleconference. Bagley-Keene provides, “[n]o person shall be required, as a condition to attendance at a meeting of a state body, to register his or her name, to provide other information, to complete a questionnaire, or otherwise fulfill any condition precedent to his or her admittance.” (Section 11124.) Bagley-Keene requires that public meetings “meet the protections and prohibitions contained in Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Section 12132), and the federal rules and regulations adopted in implementation thereof.” (Section 11123.1.) Lastly, Section 11131 provides:

No state agency shall conduct any meeting, conference, or other function in any facility that prohibits the admittance of any person, or persons, on the basis of ancestry or any characteristic listed or defined in Section 11135, or that is inaccessible to disabled persons, or where members of the public may not be present without making a payment or purchase. As used in this section, “state agency” means and includes every state body, office, officer, department, division, bureau, board, council, commission, or other state agency.

Section 11135, in turn, prohibits discrimination “on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, genetic information, marital status, or sexual orientation” (Section 11135(a).) Similar to Section 11123.1, Section 11135 also provides, “[w]ith respect to discrimination on the basis of disability, programs and activities subject to subdivision (a) shall meet the protections and prohibitions contained in Section 202 of the federal Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132)” (Section 11135(b).)

ANALYSIS

In general, a Commission teleconference meeting may permissibly be conducted by complying with the rules applicable to an ordinary Commission meeting, as specified above. The majority of Bagley-Keene’s requirements are fairly simple to comply with when setting up a teleconference meeting. For example, as with an ordinary Commission meeting, any teleconference location must be accessible to the public, and the public must be permitted to address the Commission directly at each location. (See Section 11123(b)(1).) Similarly, just as the notice and agenda for a meeting would ordinarily include the address where the meeting will take place, the notice and agenda should also include the address of any teleconference location. (*Ibid.*) Additionally, if the FPPC or a commissioner has prepared a “writing” for a meeting, including the meeting agenda, then that writing should be made available for public inspection at each meeting location. (Section 11125.1(b).) Accordingly, written materials may simply need to be printed out and made available at a teleconference location.

Conducting a teleconference meeting can involve some logistical challenges, however. For instance, if a member of the public brought photographs as a visual aid to supplement his or her speech, a commissioner participating remotely via audio would obviously be unable to see those photographs. Ordinarily, the fact that Bagley-Keene does not require a teleconference to use a webcam or some other visual connection would reasonably indicate that, in such a scenario, a remotely-participating commissioner is not prohibited from taking normal actions, such as voting on the related matter. Such analysis is reinforced by Section 11125.1(a)’s requirements with respect to making “writings” publicly available. That statute pertains to “writings, when distributed to all, *or a majority of all*, of the members of a state body,” indicating that a writing need not be distributed to every member of a state body at a meeting. However, Section 11425 of the 1974 Administrative Procedure Act (“APA”) provides, “[o]n the date and at the time and place designated in the notice the state agency shall afford any interest person . . . the opportunity to present statements, arguments, or contentions *in writing* The state agency shall consider all relevant matter presented to it before adopting, amending or repealing any regulations.” Accordingly, when the agenda item pertains to the regulation process governed by the APA, a remotely-participating commissioner would need to consider any written materials contemporaneously presented at another meeting location. A system would need to be established that

would ensure each commissioner would have access to written meeting materials, at least for regulatory agenda items. However, this could conceivably be as simple as quickly scanning and emailing the written materials, so that the remotely-participating commissioner could access the materials on his or her cell phone. This could also potentially be avoided through the use of video teleconferencing, rather than audio-only teleconferencing. In any case, the writings will have to be made available to the public after the conclusion of the meeting.

Perhaps the most complex consideration in planning a teleconference meeting is ensuring that the meeting is not discriminatory, particularly with respect to persons with disabilities. (See Sections 11123.1; 11131; 11135.) Bagley-Keene essentially prohibits the use of any facility with discriminatory practices or a discriminatory effect. For instance, the selected facility must not prohibit the admittance of any person, or persons, on the basis of sex, race, color, or religion, along with several other protected characteristics, and must not require any payment or purchase as a condition of entry. Perhaps the most logistically complex consideration that must be made, however, is ensuring that the teleconference location is accessible to disabled persons. As noted above, Section 11131 prohibits the use of any facility “is inaccessible to disabled persons,” and Sections 11123.1 and 11135 require that meetings “meet the protections and prohibitions contained in [the ADA].” Ensuring compliance with Bagley-Keene and the ADA, such that a meeting is sufficiently accessible to persons with disabilities, can involve numerous technical and logistical challenges. Accordingly, ADA-compliance and accessibility must be kept in mind when selecting a potential teleconference meeting location.

It would be impractical to list all of the ways a teleconference meeting location could potentially violate the ADA, or to list all accommodations potentially necessary for ADA-compliance. In general, however, “[t]he ADA prohibits public entities from isolating, separating, or denying people with disabilities the opportunity to participate in the programs that are offered to others. Programs, activities, and services must be provided to people with disabilities in integrated settings.”¹ “Sometimes a practice that seems neutral makes it difficult or impossible for a person with a disability to participate. In these cases, the ADA requires public entities to make ‘reasonable modifications’ in their usual ways of doing things when necessary to accommodate people who have disabilities.” (*Ibid.*) In some cases, compliance with the ADA is relatively straightforward. For instance, the ADA provides, “[a] public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability.” (28 C.F.R. § 35.136(a).) In such instances, the attendee with a service animal would simply be allowed to bring the animal to the teleconference meeting location.

Under other circumstances, however, compliance with the ADA may not be feasible at a particular venue. For example, the ADA provides, “[a] public entity shall permit individuals with mobility disabilities to use wheelchairs and manually-powered mobility aids, such as walkers, crutches, canes, braces, or other similar devices designed for use by individuals with mobility disabilities in any areas open to pedestrian use.” (28 C.F.R. § 35.137(a).) Likewise, with respect to planning public meetings, the California Department of Rehabilitation has explained, “[a]ll public meetings must take place in locations that are accessible to persons with disabilities. All parts of the building do not need to

¹ https://www.ada.gov/regs2010/titleII_2010/title_ii_primer.html

be accessible but the parking (if provided), the path of travel into and through the facility, the meeting area, and the restrooms must be.”²

Under such circumstances, the feasibility of ADA-compliance is largely dependent on the building selected for the teleconference meeting location. For example, government buildings generally would provide near-certainty that a teleconference meeting conducted from that location would be ADA-compliant and accessible to those with disabilities, including those who use wheelchairs or similar devices. Similarly, businesses open to the public are legally required to be ADA-compliant, and certain businesses, such as hotels, may have designated areas where meetings involving an audience (that may include persons with disabilities) could practicably be held. The advisability of using a private business as a teleconference meeting location will vary from location to location. In any case, the location chosen for a teleconference location must permit the meeting to be conducted in compliance with Bagley-Keene and the ADA, which would include posting the meeting agenda at the location. (See Section 11123(b)(1)(C).)

In the vast majority of cases, a private residence would not be ADA-compliant if used for a government meeting. ADA standards generally do not apply to private residences, as they are not built with the intention of being open to the public. Accordingly, private residences usually are not built to be ADA-compliant. That is, most private residences would not immediately be ADA-compliant if used as a temporary governmental building. Rather, compliance would likely require structural modifications, such as implementing ramps, widening doorways and halls, installing handrails, or altering the grading of a sloped driveway, among many other requirements. Ultimately, the logistical impracticability, along with the wide variety of ways in which the ADA could be violated, render it inadvisable to consider a private residence as a potential teleconference meeting location. Instead, as previously mentioned, a teleconference meeting location would ideally be in a government building where ADA-compliance and accessibility could more easily be ensured.

CONCLUSION

In general, a Commission meeting conducted via teleconference simply must follow the same requirements of an ordinary Commission meeting, including allowing the public to access each teleconference meeting location. When selecting a teleconference meeting location, physical accessibility and ADA compliance can present difficult legal and logistical problems and make the use of certain types of venues, such as private residences, unfeasible and inadvisable. Accordingly, when setting up a Commission teleconference meeting, a government building is ideal for ensuring that the meeting complies with the requirements of Bagley-Keene and the ADA.

² <https://www.dor.ca.gov/Home/PlanningAccessiblePublicMeetings>