

Admin.

July 7, 2021

Memorandum 2021-31

Use of Teleconferencing

This memorandum provides an update to the Commission¹ on the law that governs the use of teleconferencing to conduct state agency meetings — the Bagley-Keene Open Meeting Act.²

Under existing law, that Act imposes special procedural requirements when a member of a state body participates in a meeting of the body by teleconference. In addition to abiding by all other requirements of the Act, an agency holding such a meeting must do all of the following:

- Conduct the meeting in a manner that protects the rights of any party or member of the public appearing before the state body.
- Conduct all votes by roll call.
- List each teleconference location in the meeting notice and agenda.
- Post the meeting notice and agenda in all teleconference locations.
- Make each teleconference location accessible to the public.
- Provide an opportunity for members of the public to address the state body directly at each teleconference location.
- At least one member of the state body must be present at the location stated in the meeting notice and agenda.³

The last five requirements are burdensome. In past years they have effectively precluded the use of teleconferencing in Commission meetings. During the COVID pandemic stay-at-home orders, compliance with those requirements became impossible.

That created an operational crisis. The Commission could not meet in person because it was unsafe and unlawful to do so and the law governing use of

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

2. Gov't Code §§ 11120-11132.

3. Govt' Code § 11123(b)(1).

teleconferencing expressly required gathering in person. That made it impossible to hold safe and lawful meetings.

Many agencies that conduct public meetings (including the Commission) raised that problem with the Government Operations Agency. Shortly thereafter, the Governor promulgated an Executive Order that temporarily waived the requirement that teleconference locations be noticed and held open to the public.⁴

That waiver enabled the Commission to continue meeting lawfully during the pandemic, by holding meetings entirely by teleconference. The recently-created Committee on Revision of the Penal Code (“Committee”) did the same.

The experience of both bodies was generally positive. In the staff’s opinion, the quality of deliberations was not significantly harmed by use of teleconferencing. In fact, the level of public participation in meetings increased significantly (especially for the Committee, which saw its audiences swell from a handful when the meeting was held in person, to around 100 at each teleconference meeting). In addition, the cost to conduct meetings was significantly reduced (e.g., there was no need to arrange meeting space, pay travel costs, or spend time traveling to meetings). That made it possible to meet more frequently.

The Committee enjoyed another significant benefit from teleconferencing. Its meetings usually involve panel discussions, where experts and stakeholders are invited to make presentations and answer questions from Committee members. The ability to have those witnesses attend by teleconference has made it much easier to secure and coordinate the involvement of important voices, especially if a panelist lives far from Sacramento (or even outside of California). In one instance, a panelist participated while incarcerated in State Prison.

One notable drawback of meeting entirely by teleconference is the missed opportunity for members of a state body to meet and socialize in person, which is important to building a good collaborative relationship.

Another problem is the generally acknowledged phenomenon of “zoom fatigue.” Attending a meeting on a computer is mentally taxing and it is hard to sustain high quality deliberative focus for more than a few hours. That disadvantage was mostly offset by scheduling shorter meetings more frequently.

4. See Executive Order N-25-20, later modified by Executive Order N-29-20.

On June 11, 2021, the Governor issued a new Executive Order that, among other things, reframed the prior guidance on the conduct of teleconference meetings.⁵ **The substance of the waiver did not change materially, but it is now set to expire after September 30, 2021.**

Absent any other change in the law, this means that the Commission may continue its existing use of teleconferencing to conduct meetings for the next three scheduled meetings.⁶ The Commission has already decided that it would prefer to follow that practice through the end of this year, or until it becomes unlawful to do so.⁷

The purpose of this memorandum is to discuss how the Commission's meetings might be conducted once the Executive Order's waiver of in-person meeting requirements has expired.

POSSIBLE CHANGES TO THE LAW

It is *possible* that the current waiver of in-person meeting requirements will be extended. That would be most likely if the risk of COVID transmission remains a concern after September 30 and no statutory solution has taken effect by then. An extension could serve as a gap-filler until a permanent reform could take effect.

For a statutory reform to take effect on or before September 30, the enacting legislation would need to be an urgency measure or a budget bill. The staff is not aware of any pending urgency bill that would address the teleconferencing issues discussed here. However, there is a possible budget trailer bill that would do so.

Proposed Budget Trailer Bill Language

Budget "trailer" bills make statutory changes that are needed to implement the State Budget. They take effect on signing.

It is common for the Governor to develop proposed language for budget trailer bills as part of the Governor's proposed budget, in the expectation that the language might eventually be amended into placeholder bills that were introduced for that purpose. When that language is made public, it is posted to the website of the Department of Finance. The fact that trailer bill language is

5. See Executive Order N-08-21; <<https://www.gov.ca.gov/wp-content/uploads/2021/06/6.11.21-EO-N-08-21-signed.pdf>>.

6. Those meetings are scheduled for July 22, 2021; August 26, 2021; September 23, 2021.

7. See Minutes (June 2021), p. 3.

posted to that website is no guarantee that it will eventually be introduced and enacted, but is a good indication of the Governor's intentions.

The Department of Finance has posted trailer bill language that would reform the use of teleconferencing in state agency meetings.⁸ The most significant changes made by that language would be as follows:

- The bill would *require* that all state agency meetings be conducted by teleconference.
- The meeting agenda would be required to include information about how to participate in the meeting by teleconference.
- The existing requirements that (a) remote locations be held open to the public, (b) remote locations be listed in the agenda, and (c) agendas be posted in all remote locations, would be eliminated.
- "Upon discovering that a means of remote access ... has failed for the majority of participants during a meeting" a state body would be required to end its meeting.

The trailer bill language clearly contemplates that a meeting *may* include a physical location for participation of members and the public, in addition to the teleconference component that would be required. However, a physical location would not be required: "No member of the state body shall be required to be physically present at any physical meeting location designated in the agenda of the meeting in order to be deemed present at the meeting."

To the staff's knowledge, this proposal has not yet been amended into an existing bill. It exists only as proposed bill language. However, that could change at any time. It would therefore be prudent to take steps to anticipate the proposed requirements.

Other Possible Legislation

The staff searched for bills that reference or would affect Government Code Section 11123 (the provision that requires an in-person element when using teleconferencing to conduct a state agency meeting). There appears to be only one bill that would at least partly address the problems discussed in this memorandum, Assembly Bill 885 (Quirk).⁹

8. See <<https://esd.dof.ca.gov/trailer-bill/public/trailerBill/pdf/392>>.

9. There are three other bills that touch on Section 11123, but not in ways that would address the problems discussed here. See AB 46 (Lus Rivas), AB 1533 (Committee on Business and Professions), and SB 599 (Hueso).

That bill would eliminate the requirement that all teleconference locations be noticed and held open to the public. However, it would preserve the requirement that a meeting have a primary physical location where members of the public may physically attend. Thus, it would smooth the way for use of teleconferencing in normal situations, but would not address the need to conduct meetings entirely by teleconference in some kinds of emergencies.

AB 885 appears to be dead.¹⁰ However, any bill can be revived through rule waivers and this looks like the most appropriate non-budget bill to address the problems discussed in this memorandum. The staff will keep an eye on it.

GOING FORWARD

At least through the end of September, the Commission should be able to continue its existing practice of holding meetings entirely by teleconference, without an in-person component.

After September, the path forward will depend on the state of the pandemic and any changes that are made to the governing law.

If the public health risk continues to preclude in-person meetings, the Commission will either hold teleconference-only meetings (if the law is changed to permit it) or it will need to suspend its meetings (until an enabling change is made in the law).

If the public risk has abated to the point where in-person meetings are safe and lawful, then the Commission could return to meeting in person. *However, if the trailer bill language is enacted, it would no longer be lawful to hold meetings entirely in person.* Instead, meetings would need to be held either entirely by teleconference or by a “hybrid” method that includes both in-person and teleconference components.

As noted above, if the trailer bill language is introduced and enacted, it would take effect immediately on signing. If this is going to happen, it could happen very soon, perhaps even before the July meeting.

In anticipation of the possibility of conducting hybrid meetings, the staff has acquired some equipment that might be used for that purpose and will be experimenting with it.

10. The bill missed multiple procedural deadlines, including the June 4, 2021, deadline for approval by the house of origin.

This memorandum will be supplemented orally at the next meeting, if there are any new developments before then.

Respectfully submitted,

Brian Hebert
Executive Director