

AGENDA ITEM

DATE: April 29, 2011

TO: Members, Board Committee on Operations

FROM: Starr Babcock, General Counsel
Dina Goldman, Assistant General Counsel

SUBJECT: Policy on State Bar President and Officers Making Public Communications or Statements in Official Capacity

EXECUTIVE SUMMARY

Rule 6.21 of the Rules of the State Bar provides that, unless expressly authorized by the board or by rule, no State Bar officer may “act, or purport to act, speak or purport to speak for” or “make any public communication on behalf of” the State Bar. Rule 6.21 was adopted in May of 2008 and based on a similar provision that appeared in former article XIV of the Rules and Regulations of the State Bar of California. The President is frequently asked to support particular causes in his or her official capacity under circumstances that make it difficult to determine, if not at least debatable, whether this rule applies — and that, in any event, require the resources of staff and the board to decide whether to grant authority.

Given the discretion provided in the current rule as well as the potential for distracting public relations consequences, this item invites discussion of the issue so that the board can establish clear guidelines on when and under what conditions the President and other officers of the State Bar may make public communications or statements in their official capacity.

BACKGROUND

Public Communications on Behalf of the State Bar

State Bar Rule 6.21 requires that most public communication made on behalf of the Bar be approved by the Board or authorized by the Rules of the State Bar. The rule provides as follows:

Unless expressly authorized by the board or the Rules of the State Bar, a State Bar officer, agent, committee, commission, or other entity must not

(A) act, or purport to act, speak or purport to speak for the State Bar;

(B) make any public communication on behalf of the State Bar; or

(C) circularize, poll, or put to the vote of all or a substantial number of members of the State Bar any matter on which the State Bar has acted or is empowered to act.

Provisions in the Board Book clarify that Rule 6.21 does not prohibit board members or other State Bar representatives from speaking in their individual capacity as long as it is clear that they are not speaking on behalf of the State Bar. Tab 13, section 7 of the Board Book provides as follows:

The provisions of State Bar Rule 6.21 (formerly Article XIV of the Rules and Regulations of the State Bar – see section 6, above) apply to members of the Board of Governors regardless of whether they are officers of the State Bar, provided that nothing in said article shall be construed to prohibit a member of the board from communicating with any one or more members of the State Bar or the public so long as said communication is clearly designated as that board member's individual act, opinion or position and not that of the State Bar; and further provided that no confidential matter or document shall be commented upon and no confidential paper, record, file or other document shall be published or released without prior approval of the board, all such communications to be at the expense of the board member and not the State Bar unless prior board approval has been obtained.

(Source: Board of Governors' Resolution, July 1976.)

Role of the President

The role of the President is also defined in the State Bar Rules and the Board Book. With respect to public communications made by the President, State Bar Rule 6.40(A)(6) provides that the President “makes public statements as appropriate regarding State Bar policy, position and work, with related reports to the board as required by law.” The Board Book further provides that the President “is accountable for what is officially communicated by the Board and Bar to members of the Bar, to the public, and to the government (executive, legislative, and judicial branches). . . [and] [m]ay function as a spokesperson or appoint or empower others to function in that capacity.” (Board Book, Tab 5, Article 2, section 2(a) (7).)

ISSUE

The President of the State Bar is often asked to make statements or support particular causes in his official capacity, often in a written statement. By definition, this requires the President to routinely make judgment calls in consultation with the Office of General Counsel regarding whether he or she can make an official statement or take an official position or whether it is necessary to seek Board approval. The definition of the

President's role empowers him or her to make appropriate public statements regarding "State Bar policy, position and work." Therefore, with any given request, the President would have to decide whether the position he or she is being asked to take represents existing State Bar policy or whether it would be a new position or policy that requires Board approval. In practice, the President makes these calls in consultation with OGC to assist him in determining whether a given position represents existing State Bar policy.

This item presents for discussion and consideration by the Board Operations Committee whether any clarification of the rules and policy regarding public communications by the President is required.