

AGENDA ITEM

DATE: March 16, 2011

TO: Members, Stakeholder Relations Committee

FROM: Starr Babcock, General Counsel
Dina Goldman, Staff Attorney

SUBJECT: Proposed Revisions to State Bar Rules Title 6, Division 2,
Chapters 1 and 2 -- State Bar Open Meeting Rules Release for
Public Comment

EXECUTIVE SUMMARY

In considering proposals for change in the governance structure of the State Bar, the Governance in Public Interest Task Force (Bus. & Prof. Code, § 6001.2) has discussed whether the State Bar should be subject to the provisions of the Bagley-Keene Open Meetings Act (“Bagley-Keene Act”) (Cal. Gov. Code § 11120 et seq.). The State Bar, as a judicial branch agency, is exempt from the Bagley-Keene Act, but Bagley-Keene open meeting requirements could be applied to the Bar by revising the Bar’s open meeting rules. (Cal. Gov. Code § 11121.1(a).) Because application of these additional open meeting requirements would affect not only the Board of Governors, but also State Bar committees and Bar operations outside of core regulatory functions, this issue has been referred to the Board. This item presents for discussion proposed revisions to the State Bar’s open meeting rules that would incorporate some of the requirements of the Bagley-Keene Act. If the Stakeholder Relations Committee decides to pursue these revisions, the committee may authorize release of the proposed revisions for a 45 day public comment period.

BACKGROUND

Open Meeting Provisions Governing the State Bar

Business and Professions Code section 6026.5 was enacted in 1975, incorporating the requirements of open meeting laws applicable to state and local agencies and applying them to meetings of the Board of Governors of the State Bar. Prior to this, the State Bar, as an agency in the judicial branch, was expressly exempted from the Bagley-Keene Act and thus was not subject to open meeting requirements. (Cal. Gov. Code

§11121.1(a).¹ Section 6026.5 requires full meetings of the Board to be open and contains a list of specified situations when closed sessions are allowed.

Although section 6026.5 did not apply to meetings of board committees, in 1985 the Board of Governors adopted rules which extended open meeting requirements to its board committees, with additional exceptions for meeting in closed session. These rules also established notice and agenda requirements for the Board and board committees. Between 1989 and 1990, the Board adopted additional rules which extended open meeting requirements to regulatory and special committees such as the Committee of Bar Examiners, the Board of Legal Specialization, and the Client Security Fund as well as other specified committees which act in an advisory capacity to the Board. All of the open meeting rules were drafted based on comparable provisions for committees of the governing body and advisory committees of local agencies under the Brown Act and state agencies under the Bagley-Keene Act, as well as case law and opinions of the Attorney General interpreting those provisions.² Thus, the State Bar has complied with open meeting requirements for the last 35 years. During that time there have been no major challenges to the Bar's compliance with its open meeting rules.

In 2008, as part of the State Bar's plain English rule revision project, all of the open closed meeting rules were updated and consolidated in Title 6 of the State Bar Rules. State Bar Rules 6.50 – 6.54 contain open meeting requirements for the Board and board committee meetings ("Open Meeting Rules"). State Bar Rules 6.60-6.63 contain open meeting requirements for specified Board-appointed committees, including the Committee of Bar Examiners, the Board of Legal Specialization, and the Client Security Fund Commission.

Bagley-Keene Act

The Bagley-Keene Open Meetings Act applies to a broad range of state boards, commissions, or similar bodies created by statute or executive order, including advisory bodies consisting of 3 or more members. (Cal. Gov. Code § 11121.) The Act expressly exempts judicial branch agencies from its provisions. (Cal. Gov. Code § 11121.1(a).) Despite this exemption for the judicial branch, the California Rules of Court contain provisions regarding open meeting rules and agendas for the Judicial Council. (Cal. Rules of Court, rules 10.5, 10.6.) Business meetings of the Judicial Council are open to the public unless they fall within a list of exceptions in which meetings are allowed to be held in closed session. (Cal. Rules of Court, rule 10.6.) While the Bar's Open Meeting Rules require notice and agendas to be posted in advance and meetings generally to be held in open, the Bagley-Keene Act contains additional and more detailed provisions

¹ The Ralph A. Brown Act (Gov. Code § 54950 et seq.) contains the specific open meeting requirements for local government and agencies. Although the Brown Act does not contain an express exemption for judicial branch agencies, the California Attorney General has opined that it does not apply to the judicial branch of government or boards and commissions which are an adjunct to the judiciary. (See Cal.Atty.Gen., Indexed Letter, No. IL 75-109 (June 3, 1975); Cal.Atty.Gen., Indexed Letter, No. IL 62-46 (May 15, 1962); Cal.Atty.Gen., Indexed Letter, No. IL 60-16 (February 14, 1960).)

² See e.g., Freedom Newspapers v. Orange County Employees Retirement System Board, 6 Cal. 4th 821, 825 (1993).

that will result in significant operational changes for the State Bar if they are adopted. Since the Bar has successfully complied with open meeting requirements and developed corresponding rules that are tailored to the Bar's operational needs, this item presents selected requirements of the Bagley-Keene Act that can be added to the Bar's existing open meeting requirements.

ISSUE

Should the State Bar amend its open meeting requirements to conform to selected requirements of the Bagley-Keene Open Meeting Act? A redlined version of Chapters 1 and 2 of Title 6 of the State Bar Rules is attached as Exhibit A to this item.

DISCUSSION

The redlined version of the Bar's Open Meeting Rules contain proposed revisions which conform the Bar's Open Meeting Rules to the following provisions of the Bagley-Keene Act. The major changes in the Bar's rules are summarized below.

Definition of Board Committee

- *Would expand the definition of a board committee subject to open meeting rules to include advisory committees, commissions or subcommittees consisting of three or more persons.*
 - Under the existing rules, board committees are defined as standing committees of the board of Governors appointed by the President.

Notice

- *Would require 10 days notice for regular meetings, instead of the current 5 days.*
- *Would prohibit adding any item to an agenda after the 10 day notice period except in an emergency, as defined in other provisions of the rules, or upon a two-thirds vote of the board or board committee that there is a need to take immediate action on specified matters that arose after the notice period.*

Special and Emergency Meetings

- *A special meeting of the Board or board committee with less than ten days notice may only be called in specified circumstances and with a finding that urgency is required.*
 - The Board or board committee must at the beginning of a special meeting make a finding by two-thirds of its members or by unanimous vote if two-thirds are not present that compliance with the 10 day notice period would impose substantial hardship or immediate action is required to protect the public interest.
 - At least 48 hour notice of the special meeting is still required.
 - Currently, special meetings, like regular meetings, may be called with 5 days notice.

- *Emergency meetings may be called without the 10-day or 48 hours notice.*
 - Limited to natural disaster, work stoppage or other activity that severely impairs public health or safety.
 - Requires a finding by a majority of the Board or board committee before or at the beginning of the emergency meeting.
 - One-hour notice by telephone to news media that have requested notice of meetings.
 - Currently State Bar rules allow for emergency meetings when there is a need for immediate action before the next board meeting.
 - Current rules also allow for fax polls if an emergency matter requires no discussion and can be acted on by unanimous consent.

Public Attendance, Address, and Audio or Video Recording

- *Would prohibit any requirement that members of the public attending meetings register their names or otherwise fulfill any condition precedent to attending the meeting.*
- *Would provide the right to any person attending a meeting to record the proceedings.*
- *Would allow members of the public to directly address the Board or board committee on each agenda item at a time in the meeting designated by the President or committee chair.*
 - Currently public participation is allowed in discretion of President or board committee chair.

Open Meetings

- *Would prohibit any votes of the board and board committees by secret ballot.*

Board-Appointed Committees

- *Amendments to Board and board committee rules will apply new requirements to Board-appointed committees currently subject to open meeting rules.*
 - Committees currently subject to Bar's open meeting provisions:

Committee of Bar Examiners
 Committee on Group Insurance
 Committee on Professional Liability Insurance
 Council of State Bar Sections
 Executive Committee of Antitrust and Unfair Competition Section
 Executive Committee of Business Law Section
 Executive Committee of Criminal Law Section
 Executive Committee of Environmental Law Section
 Executive Committee of Family Law Section
 Executive Committee of Intellectual Property Law Section
 Executive Committee of International Law Section

Executive Committee of Labor and Employment Law Section
Executive Committee of Law Practice Management and Technology
Section
Executive Committee of Litigation Section
Executive Committee of Public Law Section
Executive Committee of Real Property Law Section
Executive Committee of Solo and Small Firm Section
Executive Committee of Taxation Section
Executive Committee of Trusts and Estates Section
Executive Committee of Workers Compensation Section
Client Security Fund Commission
Lawyer Assistance Program Oversight Committee
Legal Services Trust Fund Commission
California Board of Legal Specialization

- *Also expands definition of Board-appointed committee to include any committee, commission, or task force of 3 or more persons appointed by the Board.*
 - This addition would impose open meeting requirements on the following Board-appointed bodies that currently are not covered by open meeting rules:

Administration of Justice
Federal Courts
Alternative Dispute Resolution
Appellate Courts
Mandatory Fee Arbitration
Delivery of Legal Services
Professional Responsibility and Conduct
Access to Justice
CYLA
Council on Access and Fairness
Legal Specialization Advisory Committees

FISCAL / PERSONNEL IMPACT:

None.

RULE AMENDMENTS:

State Bar Rules 6.50 – 6.56, 6.60 – 6.63

BOARD BOOK IMPACT:

Tab 9, Article 1, Section 4
Tab 10, Article 1
Tab 10, Article 2, Sections 1 and 2

RECOMMENDATION

If the Stakeholder Relations Committee decides that the State Bar should consider revising its Open Meeting Rules to add specified provisions of the Bagley-Keene Open Meeting Act, it would be appropriate to release the proposed revisions to the State Bar Rules for a 45 day public comment period.

PROPOSED BOARD COMMITTEE RESOLUTION:

Should the Stakeholder Relations Committee agree with the above recommendation, the following resolution would be appropriate:

RESOLVED, that the Stakeholder Relations Committee authorizes for publication, in the form attached as Exhibit A, proposed revisions to Title 6 of the State Bar Rules for a forty-five day public comment period; and it is

FURTHER RESOLVED, that publication of the foregoing is not, and shall not be construed as, a recommendation of approval by the Board Committee.