

# AGENDA ITEM

JULY 161

**DATE:** July 13, 2011

**TO:** Members, Board of Governors  
Members, Stakeholder Relations Committee

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

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

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## 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) (“Governance Task Force”) discussed whether the State Bar should be subject to the provisions of the Bagley-Keene Open Meeting Act (“Bagley-Keene Act”) (Cal. Gov. Code § 11120 et seq.). The Governance Task Force ultimately referred this issue to the Board of Governors for consideration. At the time that the Governance Task Force issued its report, the Minority Report of the Governance Task Force recommended that the Bar either adopt all or substantially all of the requirements of the Bagley-Keene Act.<sup>1</sup> 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 own open meeting rules to incorporate similar requirements. (Cal. Gov. Code § 11121.1(a).) While Bagley-Keene requirements could also be applied to the Bar by amending the Bagley-Keene Act to remove the Bar’s exemption, this could also result in other judicial branch agencies losing their exemption. Thus, in deference to these agencies, it is recommended that the Bar adopt additional open meeting requirements

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<sup>1</sup> Following the Governance Task Force’s issuance of its report, the Legislature amended the State Bar’s fee bill to include language requiring the reconstituted governing board of the State Bar to ensure that its open meeting requirements “are consistent with, and conform to, the Bagley-Keene Open Meeting Act.” Sen. Bill No. 163 (2011-2012 Reg. Sess.) (Evans), as amended May 27, 2011, § 27, and as amended July 13, 2011, § 28. SB 163 is still pending in the Legislature. Both the Senate Committee on the Judiciary’s June 1, 2011 Analysis of SB 163, at page 10, and the Assembly Committee on the Judiciary’s June 27, 2011, Analysis of the bill, at page 11, noted that this Board “recently took action in this area, sending out to public comment proposed revisions of its rules incorporating some requirements of Bagley-Keene.”

that adopt requirements of the Bagley-Keene Act by amending its own rules. This item presents proposed revisions to the State Bar's open meeting rules that would incorporate some of the requirements of the Bagley-Keene Act. These proposed revisions would apply to the Board and committees of board members, but not to Board-appointed bodies of volunteers. At its May meeting, the revisions were released for a 45 day public comment by the Stakeholder Relations Committee. One comment was received from the Center for Public Interest Law ("CPIL"), authored by its Executive Director, Robert C. Fellmeth. A copy of the CPIL public comment is attached to this item as Exhibit B.

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## **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 any open meeting requirements. (Cal. Gov. Code §11121.1(a).)<sup>2</sup> 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.<sup>3</sup> 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.

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<sup>2</sup> 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).)

<sup>3</sup> See e.g., Freedom Newspapers v. Orange County Employees Retirement System Board, 6 Cal. 4th 821, 825 (1993).

In 2008, as part of the State Bar’s plain English rule revision project, all of the open 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 Meeting 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 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 bolster the Bar’s existing open meeting requirements.

### **ISSUE**

Should the State Bar amend the open meeting requirements applicable to the Board and committees of board members to adopt provisions that are similar 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 Rules 6.50 – 6.64 of the State Bar Rules contains proposed revisions to Chapter 1 of the Bar’s Open Meeting Rules (applicable to the Board and board committees) that are similar to selected requirements of the Bagley-Keene Act. The major changes in the Bar’s rules are summarized below.

#### **Definition of Board Committee**

- *In addition to standing committees of the Board, would make any committee, commission or subcommittee of 3 or more board members subject to expanded open meeting rules.*

- Under the existing rules, board committees subject to open meeting rules 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 limited circumstances comprising 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 that arose after the notice period.*
- *Still requires at least 48 hours notice of an agenda item added after the 10 day notice period.*
  - Current rules allow agenda items to be added after the notice period in circumstances where immediate action is required.

### Fax Polls

- *Does not allow action to be taken by fax poll.*
  - Current rules allow emergency action to be taken by fax poll if the matter can be resolved by unanimous consent without discussion.

### Special and Emergency Meetings

#### Special Meetings

- *Would restrict circumstances in which a special meeting of the Board or board committee could be called with less than ten days notice to limited subject matters with a finding that urgency is required.*
- *Requires the Board or board committee to make a finding at the beginning of a special meeting 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.*
- *Bar must still provide at least 48 hour notice of the special meeting.*
- *Would allow special meetings of the Board to be called by the President or a majority of the Board and special meetings of board committees to be called by a majority of the committee.*
  - Currently, special meetings, like regular meetings, may be called with 5 days notice.
  - Currently, special meetings of board committees are called by committee chairs.

### Emergency Meetings

- *Emergency meetings may be called without the 10-day or 48 hours notice in limited circumstances (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.*
- *Requires one-hour notice by telephone to news media that have requested notice of meetings.*
  - *State Bar rules currently 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.*

### Teleconference Meetings

- *Would require that the Bar provide a call in number to allow interested members of the public to access teleconference meetings.*
  - *Current rules provide that public may access the teleconference at the San Francisco or Los Angeles offices of the State Bar.*

### 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.*

### Board-Appointed Committees

- *The proposed amendments to Board and board committee rules will not apply to Board-appointed committees. These committees are currently subject to largely the same open meeting rules as the Board. These committees will continue to comply with existing open meeting rules, but not with expanded requirements based on Bagley-Keene.*
  - *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

## **PUBLIC COMMENT:**

At its May meeting, the Stakeholder Relations Committee authorized release of the proposed rules for a 45 day public comment period. The comment period closed on July 1, 2011. One comment was received during the comment period from the Center for Public Interest Law (“CPIL”), authored by its Executive Director, Robert C. Fellmeth. A copy of the public comment letter is attached as Exhibit B.

In sum, the CPIL letter comments that “the proposed amendments omit several important Bagley-Keene transparency measures and are inconsistent with the Act in numerous other significant respects, causing the effort to fall far short of what is fairly and unobjectionably required to ensure meaningful public participation in State Bar proceedings.” In particular, the letter objects to the Bar’s failure to adopt the following provisions of the Bagley-Keene Act: immediate public access to materials distributed to Board members in advance of a meeting; failure to make teleconference locations open to the public; participation of members of the Board who are not committee members in committee discussions; addition of additional agenda items after the 10 day notice period; closed session exception for “advice of counsel”; use of secret ballots; failure to apply extended open meeting requirements to board-appointed committees of volunteers; and no included remedies for violation.

The CPIL comment also notes that the Board's adoption of revisions to its open meeting rules may be mooted if the current version of the State Bar's fee bill, SB 163 (Evans) passes, because of the bill's language requiring the Bar's open meeting rules to be "consistent with, and conform to, the Bagley-Keene Open Meeting Act." In addition, the comment quotes the recent decision in *Sander v. State Bar of California*, 196 Cal.App.4<sup>th</sup> 614 (June 10, 2011) for the proposition that the Bar is not the type of judicial branch agency that should enjoy the exemption provided in the Bagley-Keene Act because it has many responsibilities that are more administrative than judicial. The comment also stresses that all other licensing boards in California comply with the Bagley-Keene Act.

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

Minimal. There will be some cost (3 cents per minute per person) associated with allowing the public to call in to Board teleconference meetings.

#### **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

Tab 11

Tab 19, Article 1, Section 7

#### **RECOMMENDATION**

If the Stakeholder Relations Committee and the Board of Governors decide that the State Bar should revise its Open Meeting Rules to add specified provisions of the Bagley-Keene Open Meeting Act, it would be adopt the resolutions appearing below.

#### **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 recommends that the Board adopt proposed revisions to Title 6 of the State Bar Rules, in the form attached as Exhibit A.

**PROPOSED BOARD RESOLUTION:**

Should the Board concur with the Stakeholder Relation Committee's recommendation, the following resolution would be in order:

**RESOLVED**, that upon the recommendation of the Stakeholder Relations Committee the Board hereby adopts proposed revisions to Title 6 of the State Bar Rules, in the form attached as Exhibit A.