University of San Diego

July 1, 2011

Pat Bermudez
Office of General Counsel
State Bar of California
180 Howard Street
San Francisco, CA 94105

re: Proposed Amendments to the Bar's Open Meeting Rules

Dear Ms. Bermudez:

The Center for Public Interest Law (CPIL) respectfully submits the following comments on the proposed amendments to the Bar's open meeting rules issued by the Stakeholder Relations Committee. Although the intent of these amendments — which are an outgrowth of the work of the Bar's Governance in the Public Interest Task Force — is to better conform the Bar's open meeting rules to the requirements of the Bagley-Keene Open Meeting Act, Government Code section 11120 *et seq.*, 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.

CPIL is a nonprofit, nonpartisan academic and advocacy center based at the University of San Diego School of Law. Since 1980, CPIL has examined and critiqued California's regulatory agencies, including the State Bar of California. We have attended the Bar's meetings and followed its activities for 30 years. From 1987 to 1992, I served as the State Bar Discipline Monitor (under now-repealed Business and Professions Code section 6086.9), under appointment by then-Attorney General John Van de Kamp, with CPIL serving as the Monitor's staff. The State Bar Discipline Monitor position was created by the Legislature and — over the course of almost five years — we wrote eleven reports on the operation of the State Bar's discipline system. We worked with Senator Robert Presley and a succession of State Bar Presidents to fashion some 40 reforms of the system, including the passage of Senate Bill 1498 (Presley), 1988 legislation creating the current independent State Bar Court. We are well aware that the Bar is part of the judicial branch under the aegis of the California Supreme Court. And we are similarly familiar with all of the executive branch agencies that license and regulate other professions and trades in California.

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Additionally, CPIL has a long history with the subject of this proposed rulemaking. In 1985, CPIL sponsored AB 1971 (Harris), which — as amended July 1, 1985 — would have imposed numerous provisions of the Bagley-Keene Open Meeting Act on the Board of Governors and its committees. The Bagley-Keene Act applies to every other occupational licensing board in the state, including all of the boards in the Department of Consumer Affairs. In exchange for our agreement to drop the bill, the Bar promised to adopt open meetings rules very similar to those in Bagley-Keene; thus far, the Bar has reneged on that promise. These proposed amendments move the Bar closer to compliance with Bagley-Keene, but not close enough to ensure minimal, meaningful participation of the public in the important work of the State Bar.[1]

We appreciate the proposed addition of a required public comment period at Board of Governors and Board Committee meetings (new Rule 6.53(C)), the expansion of the meeting notice period from five days to 10 days (amended Rule 6.51(A)(1)), the expansion of the definition of the term "board committee" (amended Rule 6.50(B)), and other proposed changes that bring the Bar into closer conformity with Bagley-Keene.

However, the proposed amendments omit entirely or are inconsistent with numerous important Bagley-Keene transparency measures. Most of these inconsistencies were identified in a November 10, 2010 memorandum to the Governance in the Public Interest Task Force authored by the Bar's Office of General Counsel, which is attached and is hereby incorporated by reference. Below, CPIL discusses some of the most important omissions and inconsistencies:

1. Immediate Public Access to Meeting Materials Distributed to Board/Committee Members In Advance of a Public Meeting: Government Code section 11125.1 ensures that materials distributed to board or committee members in advance of a public meeting that pertain to discussion of an open-session agenda item are not only public records but "shall be made available upon request without delay" (section 11125.1(a)) and "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)). Although Rule 6.56 classifies these meeting materials as "public records," it does not specify that a member of the public is entitled to them "without delay" and "at the meeting" so that the individual can access them at the time he/she most needs them — during the discussion at the meeting.

2. Location of Members Participating in Teleconference Meetings: Government Code section 11123 sets forth the requirements for a lawful meeting by "teleconference," which means "a meeting of a state body, the members of which are at different locations, connected by

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[1] Indeed, this entire rulemaking proceeding — in which the Bar proposes to add "some" or "selected" Bagley-Keene provisions to its open meeting rules — may be mooted if the current version of SB 163 (Evans) becomes law. That bill would add new section 6026.7 to the Business and Professions Code. That section would expressly require the Board of Governors to ensure that its open meeting requirements "are consistent with, and conform to, the Bagley-Keene Open Meeting Act."

electronic means, through either audio or both audio and video." Under section 11123, each "location" where members of the public may attend a teleconference must be noticed on the agenda and open to the public, and at least one member of the board must be present at each of the noticed "locations." In the words of the Department of Consumer Affairs, "the members of the agency must attend the meting at a public location. Members are no longer able to attend the meeting via teleconference from their offices, homes, or other convenient location unless those locations are identified in the notice and agenda, and the public is permitted to attend at those locations." Department of Consumer Affairs, *Guide to the Open Meeting Act* (2011) at 19.

The provisions of the Bar's open meeting rules pertaining to teleconferences — specifically Rule 6.51(A)(2) and Rule 6.54(C) — do not require board or committee members to participate from a noticed location that is open to the public. While arguably more convenient for members, this loophole could allow a board member to participate in a public meeting and cast official votes while simultaneously being lobbied or influenced by a third party who is invisible to the rest of the meeting participants. This loophole — which is unfair to members of the public and to other members of the board or committee — prompted the Legislature to tighten section 11123 in 2001 (AB 192), and the Bar should close that loophole in its open meeting rules as well.

3. Participation of Non-Committee Members in Committee Discussions: The Bagley-Keene Act allows members of a board to attend a meeting of a board committee so long as, if a majority of the board is present at the committee meeting, the non-committee members attend as observers only; non-committee members of the board may not participate in the committee meeting by making statements or asking questions (section 11122.5(c)(6)). Further, the Attorney General's Office has opined that, under such circumstances, non-committee members may not sit with committee members on the dais (81 Ops. Cal. Atty. Gen. 156). This rule is intended to prevent boards from posting notice of committee meetings (which committees are usually advisory to the board) and also full board meetings at which the board will purportedly act on committee recommendations — and then accomplishing all of its business during "packed" committee meetings so as to render the full board meeting a charade. Members of the public who attend only the full board meeting have thus missed the opportunity to meaningfully participate in the board's decisions (which were effectively accomplished at the committee meetings). The Bar's Rules 6.50(F), 6.51(A)(3), and 6.54(A)(2) permit non-committee members to attend and participate in committee meetings, which is inconsistent with the Bagley-Keene Act, the Attorney General's Opinion, and the right of members of the public to participate in public meetings concerning government business.

4. Late Addition of Agenda Items on Regular Meeting Agendas: The Bagley-Keene Act requires the posting of an agenda 10 days in advance of a meeting of a state body; no additional items may be added to that agenda after its publication. If a state body wishes to discuss an additional item at its scheduled meeting, the body must publish notice of a "special meeting" and the item must fall into one of several enumerated categories; additionally, the state body must comply with specified notice requirements and must make a finding at the special meeting, by a two-thirds vote, "that the delay necessitated by providing notice 10 days prior to a meeting as required by Section 11125 would cause a substantial hardship on the body or that

immediate action is required to protect the public interest" (section 11125.4). In its proposed revisions, the Bar has added new sections authorizing "special meetings" and "emergency meetings," and these are quite similar to Bagley-Keene. However, proposed Rule 6.51(B) is inconsistent with Bagley-Keene in that it allows the Bar to continue to add new items of all types, regardless of subject matter, to a posted agenda up until 48 hours prior to the meeting. This is unfair both to Board members and to members of the public who wish to monitor the Bar's actions and be heard on agenda items.

5. Grounds for Closed Sessions: Government Code section 11126 sets forth with great precision the enumerated types of topics that may be discussed by a board or committee behind closed doors. These exemptions to the state's open meeting law have been interpreted for decades by courts and by the Attorney General's Office, and their parameters are well-known to other occupational licensing boards and the attorneys who advise them. In crafting these exemptions, the Legislature has been careful not to allow the "closed session" exemption to swallow the open meeting requirement. For example, the "pending litigation" exception — which can easily be abused by a board wishing to discuss a particular topic in closed session because it "might" become the subject of a lawsuit — has been honed to require actual or imminent litigation to justify closed-session discussion. The Bar's Rule 6.55, which (along with Business and Professions Code section 6026.5) governs closed sessions, is not nearly as precise as the Bagley-Keene Act and thus allows the Board of Governors and its committees to meet in closed session to receive "advice of counsel" on any matter whatsoever. In fact, CPIL suggests that Rule 6.55(A)(1)'s extension of the "advice of counsel" justification for a closed session (and the Bar's boilerplate insertion of a closed session item to receive "advice of counsel pertaining to matters on the open agenda" on almost every single agenda for the Board and its committees) is inconsistent with and unauthorized by Business and Professions Code section 6026.5(a), which limits the use of that justification to "pending or prospective litigation." The Bar should incorporate Bagley-Keene's enumerated justifications for closed sessions.

6. Use of Secret Ballots: The Department of Consumer Affairs and all of its licensing boards adhere to an Attorney General's Opinion finding that secret ballots are prohibited at both open and closed session meetings. 68 Ops. Cal. Atty. Gen. 65, 69. Nothing in the Bar's rules — either current or proposed — prohibits the Board or its committees from voting by secret ballot.

7. Different Open Meeting Rules for "Board-Appointed Committees": The Bagley-Keene Act (specifically section 11121) applies broadly to every "state body" and multimember subset thereof — including advisory boards, advisory commissions, advisory committees, advisory subcommittees, or similar entities — if (a) those entities are created by formal action of the state body or of any member of the state body, and if the advisory body so created consists of three or more persons; or (b) a member of a state body serves on such an entity in his or her official capacity as a representative of that state body and that is supported, in whole or in part, by funds provided by the state body, whether the multimember body is organized and operated by the state body or by a private corporation. The Bar's proposed open meeting rules will apply only to the Board of Governors, standing Board committees, and advisory committees and commissions consisting of three or more Board members if created by formal action of the Board

or a member of the Board. They will not apply to numerous "board-appointed committees" identified on page 5 of the Bar's May 5, 2011 "Proposed Revisions" document; in fact, the Bar has drafted an entirely different set of "open meeting rules" for "board-appointed committees" and has set forth no justification for a separate set of rules. This is inconsistent with the Bagley-Keene Act.

8. No Remedy for Violation of These Rules: The Bagley-Keene Act includes both a civil (section 11130) and a criminal (section 11130.7) remedy for actions taken in violation of the Act. An unlawful decision may be voided and/or board members may be prosecuted (for a misdemeanor) if they knowingly and intentionally violate the Bagley-Keene Act. However, there is no remedy for the Bar's violation of its "open meeting rules." The Bar is free to violate its own rules with impunity — and these proposed amendments continue to establish no remedy for such violations.

We are familiar with the usual "separation of powers" argument that is advanced every time an attempt is made to conform the Bar's procedures with those of other professional licensing boards. Indeed, during the Task Force's discussions, several members asserted that it is inappropriate to subject the Bar and its Board of Governors to the Bagley-Keene Act because "the Bar is part of the judicial branch." This argument is distracting and incorrect. As an appellate court recently observed in a similar "sunshine act" matter in which the Bar has resisted a request for public records, the Bar is a government agency that is located within the judicial branch; however, "[t]he Bar is not a court. It is a public corporation. Although it has been described as an administrative arm of the Supreme Court for purposes of assisting in matters of admission and discipline, the Bar also remains subject to control by the Legislature....The bar is controlled by a board of governors, composed of a group of members and its president, that is vested with oversight of its executive functions. It has many responsibilities that are more administrative than judicial." *Sander v. State Bar of California*, 196 Cal. App. 4th 614 (June 10, 2011) (citations omitted).

Every other occupational licensing board in the State of California has found a way to comply with the Bagley-Keene Open Meeting Act since its enactment in 1967. And members of most of those boards exercise quasi-judicial authority that the Board of Governors does not exercise. For example, members of the Medical Board and the Pharmacy Board and the Board of Accountancy review and approve proposed disciplinary decisions drafted by administrative law judges, and make the final decision in individual disciplinary matters. The Bagley-Keene Act allows members to engage in disciplinary decisionmaking in closed session. The Board of Governors exercises no quasi-judicial authority; it does not review and/or approve decisions of the State Bar Court's Hearing Judge Panel or the Review Department. If the Bagley-Keene Act can accommodate the significantly more "judicial" authority exercised by executive branch agencies, why is it inappropriate for the Board of Governors — which exercises no such judicial authority?

If you review the eight deficiencies listed above, you will find that none of them are justified by any articulated "difference" between the Bar and other public agencies. The "we are special" incantation is here a *non sequitur* rationalization. The fact that the Bar is part of the judicial branch does not justify any less transparency than other agencies performing similar licensing, standardsetting, and public protection roles. There is simply no reason why consumers of legal services, when compared to those who participate in decisionmaking processes before every other state professional regulatory agency, should be second-class citizens when it comes to participating in the proceedings of the regulator that is charged with protecting them.

Finally, close association with the terms of Bagley-Keene allows for consistent guidance in its application from the longstanding body of law interpreting it — much of it solicitous to agency needs. A good attorney should want to include such a public judicial record for clarity and consistency. Since 1967, the Bagley-Keene Act has been flexibly expanded to accommodate new technology and changed circumstances; and it has been subject to fairly extensive judicial interpretation. There are clear advantages to fully signing onto the existing transparency statute for statewide agencies. The law has been amended to allow for all of the necessary exceptions to the open meeting requirement, such as closed sessions to discuss examinations or pending litigation; emergency meetings where necessary; and special meetings for certain items where there is a time constraint. And there is a body of law in place — one that has already considered the issues that will similarly impact the Board of Governors and its committees.

CPIL appreciates your consideration of these comments, and urges you to address these significant inconsistencies between the Bar's open meeting rules and the Bagley-Keene Open Meeting Act.

Sincerely,

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