



# THE STATE BAR OF CALIFORNIA

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Date: November 10, 2010

To: Bill Hebert, President

From: Office of General Counsel

Re: Application of Bagley-Keene Act to State Bar Meetings

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## **ISSUE:**

A proposal has been made to make the State Bar of California subject to the Bagley-Keene Open Meetings Act ("Bagley-Keene Act") (Gov. Code, § 11120 et seq.). This memo provides background regarding the open closed meeting requirements in statute and State Bar rules that have been applicable to the State Bar since 1975 and highlights differences that would apply if the Bagley-Keene Act is applied to State Bar meetings.

## **OPEN MEETING REQUIREMENTS APPLICABLE TO THE STATE BAR:**

Business and Professions Code section 6026.5 was adopted in 1975 and applied open meeting standards to the meetings of the Board of Governors of the State Bar. Prior to this, the State Bar was not subject to any open meeting laws since judicial branch agencies are expressly exempted from the Bagley-Keene Act. (Gov. Code, 11121.1(a).)

Section 6026.5 applies only to meetings of the full board and requires that every meeting shall be open to the public except those meetings, or portions thereof, relating to:

- (a) Consultation with counsel concerning pending or prospective litigation.
- (b) Involuntary enrollment of active members as inactive members due to mental infirmity or illness or addiction to intoxicants or drugs.
- (c) The qualifications of judicial appointees, nominees, or candidates.
- (d) The appointment, employment or dismissal of an employee, consultant, or officer of the State Bar or to hear complaints or charges brought against such employee, consultant, or officer unless such person requests a public hearing.

- (e) Disciplinary investigations and proceedings, including resignations with disciplinary investigations or proceedings pending, and reinstatement proceedings.
- (f) Appeals to the board from decisions of the Board of Legal Specialization refusing to certify or recertify an applicant or suspending or revoking a specialist's certificate.
- (g) Appointments to or removals from committees, boards, or other entities.
- (h) Joint meetings with agencies provided in Article VI of the California Constitution.

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. In 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 Commission. In 1989 and 1990, the Board also adopted resolutions requiring other committees which acted in an advisory capacity to the Board to act in open session subject to certain exceptions set forth by the Board. All of the open meeting rules were drafted based on the provisions of existing open meetings laws, the Brown Act (Gov. Code § 54950 et seq.) and the Bagley-Keene Act, as well as case law and opinions of the Attorney General interpreting these laws.

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 Board and Board Committee meetings. (“State Bar Open/Closed Meeting Rules” or “Rules”) State Bar Rules 6.60-6.63 contain open meeting requirements for the following specified State Bar Board-appointed committees: Committee of Bar Examiners; Board of Legal Specialization; Client Security Fund Commission; Committee on Group Insurance; Committee on Professional Liability Insurance; Council of State Bar Sections; Section Executive Committees; Lawyer Assistance Program Oversight Committee; and the Legal Services Trust Fund Commission. These rules also provide specific exceptions in which these State Bar entities may meet in closed session.

While the Board may only meet in closed session pursuant to the exceptions set forth in section 6026.5, the State Bar Rules provide that Board Committees may also meet in closed session for three additional reasons: to receive advice of counsel or to consider matters privileged under the law; to confer with a State Bar representative during negotiations with union and non-union employees; or to confer with a State Bar representative before the purchase, sale, exchange, or lease of real property. State Bar Rule 6.53(A).

## IMPACT OF APPLYING BAGLEY-KEENE TO STATE BAR MEETINGS:

If the Bagley-Keene Act is applied to the State Bar, the requirements would differ from those currently applicable to the Bar under the Open/Closed Meeting Rules in the following main areas:

<b>BAGLEY-KEENE</b>	<b>STATE BAR OPEN/ CLOSED RULES</b>
<p><b>Entities Covered:</b> Applies broadly to state boards, commissions, or similar bodies created by statute or executive order, including advisory bodies consisting of 3 or more members. (Gov. Code § 11121.)</p>	<p><b>Entities Covered:</b> The Board, Board Committees and Board-Appointed Committees, as designated by the Board.</p> <p>Bagley-Keene Act could apply to all Board-Appointed Committees who may lose some grounds for meeting in closed that they currently have under State Bar Rules.</p>
<p><b>Entities Exempt:</b> Judicial branch agencies are exempt from coverage under the Act. (Gov. Code § 11121.1(a).)</p>	<p><b>Entities Exempt:</b> Section 6026.5 acknowledges exemption for judicial branch agencies by allowing closed sessions for joint meetings with Article VI agencies. (Bus. &amp; Prof. Code § 6026.5(h).)</p>
<p><b>Definition of Meeting:</b> Members of the full body may only attend meetings of standing committees of which they are not members as observers—they may not participate. (Gov. Code § 11122.5(c)(6).)</p>	<p><b>Definition of Meeting:</b> Board members may attend meetings of Board Committees and participate, but not vote. (State Bar Rule 6.50(E)(2).)</p>
<p><b>Notice:</b> Notice and agenda must be posted on the internet at least 10 days in advance of meeting. Notice must be made available in ADA accessible format upon request and disability-related accommodations must be accommodated. <sup>1</sup> (Gov. Code § 11125.)</p>	<p><b>Notice:</b> Notice and agenda must be posted on website and in lobby of SF and LA State Bar offices no fewer than 5 days before meeting. (State Bar Rule 6.51(A)(1).)</p>
<p><b>Emergency Meetings:</b> Emergency meetings may be called without notice, upon majority vote that one of the following exists: work stoppage or crippling disaster that severely impairs public health or safety. (Gov. Code § 11125.5.)</p>	<p><b>Emergency Meetings:</b> Emergency meetings may be called for “those circumstances that call for immediate action before the next regular meeting of the board or board committee.” (State Bar Rule 6.51(B).)</p>

<sup>1</sup> The State Bar is subject to the provisions of the ADA; the provisions of the Bagley-Keene Act requiring materials and locations to be ADA compliant would provide an additional enforcement tool and cause of action.

<b>BAGLEY-KEENE</b>	<b>STATE BAR OPEN/ CLOSED RULES</b>
<p><b>Action on Items Not on Agenda:</b> Action may be taken: in an emergency (see definition above); or with 2/3 vote finding need for immediate action, discovered subsequent to posting the 10 day notice. Need for immediate action items still require 48 hours notice. (Gov. Code § 11125.3.)</p>	<p><b>Action on Items Not on Agenda:</b> Only in emergency (see definition above). (State Bar Rule 6.51(B).)</p>
<p><b>Exceptions for Closed:</b> Exception for pending litigation is narrow and no other exceptions for consultation with counsel are allowed. (Gov. Code § 11126(e).)</p>	<p><b>Exceptions for Closed:</b> Rules allow Board Committees to meet in closed to receive advice of counsel or consider matters privileged under law. (State Bar Rule 6.53(A).)</p>
<p><b>Public Comment:</b> Allows public to comment on any item on agenda. (Gov. Code § 11125.7.)</p>	<p><b>Public Comment:</b> Does not expressly allow public comment.</p>
<p><b>Special Meetings:</b> May only be called for specified purposes where compliance with the 10-day notice provisions would impose a substantial hardship on the body or where immediate action is required to protect the public interest. At least 48 hour notice is required. (Gov. Code § 11125.4.)</p>	<p><b>Special Meetings:</b> May be called by the President or 12 Governors of the Board, or by chairs for Board Committee meetings. 5 day notice requirement applies. (State Bar Rules 6.50(B), 6.51(A)(1).)</p>
<p><b>Location:</b> Prohibits meetings in any facility that discriminates, is not accessible to persons with disabilities, or where members of the public may not attend without making a payment or purchase. (Gov. Code § 11131.)</p>	<p><b>Location:</b> No comparable provision.</p>
<p><b>Teleconferencing:</b> Meetings may be held by teleconference. Notice must be given, open portion of meeting must be accessible at each teleconference location, agendas posted at all locations, members of the public allowed to address body at all locations, votes must be taken by roll call. Fax polls are not allowed. (Gov. Code § 11123.)</p>	<p><b>Teleconferencing:</b> Teleconference meetings must include locations at State Bar’s SF and LA offices where public may access the teleconference. Fax polls allowed for emergency meetings where issue can be resolved by unanimous consent without discussion. (State Bar Rules 6.51(A)(2), 6.51(B).)</p>
<p><b>Individuals Covered:</b> Covers members who are elected or appointed but not yet assumed duties of office. (Gov. Code § 11121.95.)</p>	<p><b>Individuals Covered:</b> Does not apply to elected members not yet sworn in.</p>

<b>BAGLEY-KEENE</b>	<b>STATE BAR OPEN/ CLOSED RULES</b>
<b>Secret Ballots:</b> Election of officers may not be done by secret ballot. (68 Ops. Cal. Atty. Gen. 65.)	<b>Secret Ballots:</b> The election for State Bar President is conducted by secret ballot.