DATE: April 14, 2016

SUBJECT: Bagley-Keene FAQ’s for Conducting Section Business

This a comprehensive set of short answers to questions arising as we move to the Bar’s full implementation of the Bagley-Keene Open Meeting Act as of April 1, 2016.  Staff worked to develop questions based on issues raised by Section Executive Committee members and the Office of General Counsel prepared answers to these questions. We will continue to make refinements as we continue to work in this new environment.

Please consult the previously distributed Summary of Bagley-Keene Act Requirements or Memorandum on Bagley-Keene Requirements prepared by the Department of Consumer Affairs for more detailed explanation and statutory citations.

***SPECIAL NOTE ON INDEMNIFICATION:*** *It is the practice of the State Bar to defend and indemnify appointed volunteers acting within the scope of their authority. An enforcement action would most likely be brought as a writ proceeding or action for declaratory relief against the State Bar seeking a declaration or order that a particular practice violates Bagley-Keene or that an action taken in a meeting violating Bagley-Keene is null and void. Bagley-Keene also specifically provides that costs and attorney’s fees may be awarded, but clearly states that these costs and fees should be paid by the agency and not become the personal liability of any public employee or officer.  While willful violations are misdemeanors under the Act, this would have to be brought by a District Attorney and is unlikely except for truly egregious conduct.*

**MEETINGS**

1. **When does Bagley-Keene apply?**

For the Bar, Bagley-Keene applies to:

1. The Board of Trustees;
2. Committees or commissions of 3 or more people formally created by the Board of Trustees; and
3. Committees, commissions, task forces or other groups of 3 or more people formally created by the groups in b) above.
4. **What constitutes a meeting?**

A meeting is any congregation of a majority of the members of a body at the same time and place to hear, discuss, or deliberate on any item within the body’s jurisdiction. It also includes any series of communications of any kind, directly or through intermediaries which include a majority of the members of the body.

1. **What period of notice is required for a properly noticed meeting? (New question)**

10 days’ notice must be provided to any person who requests it (we accomplish this through an online subscription) and by posting an agenda on the State Bar’s website. See questions 32 – 35 for additional information.

1. **What are exemptions from a meeting?**

The following do not constitute a meeting:

* Individual contacts between members of a body and others that do not otherwise violate the statute
* Attendance of a majority of members at a conference or similar gathering open to the public as long as the body’s business is not discussed
* Attendance of a majority of members at an open and publicized meeting regarding a topic of state concern organized by an outside entity as long as the body’s business is not discussed
* Attendance of a majority of members at a purely social or ceremonial occasion as long as the body’s business is not discussed
* Attendance of a majority of the members of a body at an open and noticed meeting of a standing committee if the members who are not also members of the standing committee attend only as observers
1. **Does a pre-call with (4) officers constitute a meeting?**

It depends on the size of the body of which the officers are members. If the 4 officers do not constitute a quorum of the larger group, then this would not be a meeting so long as the 4 officers do not further discuss content with additional members that ultimately add up to a quorum.

1. **What constitutes a sub-committee?**

For Bagley-Keene purposes, a sub-committee is a group of 3 or more persons formally created by a body covered by the Act. Formal creation includes voting by body or appointment by Chair or other member of body with authority to do so.

1. **Does a group of 2 have to comply with Bagley-Keene?**

An informal group of 2 that does not have authority to act on behalf of the larger group may meet without complying with Bagley-Keene. They may also talk to other members of the group, as long as they ensure that they do not talk with a quorum or more. And they are fee to talk to as many non-committee members as they wish.

1. **Does Bagley-Keene apply when a subcommittee holds a brainstorming session where no official action is taken?**

Yes, Bagley-Keene applies as long as a quorum of a covered body hears, discusses or deliberates on a matter, even if no action is taken.

1. **Can 8 or fewer Executive Committee members (where 9 members would be a quorum) hold a meeting without a 10-day notice or agenda?**

Yes, as long as those members ensure that they do not talk to any additional members that would ultimately wrap up a quorum.

1. **Under what circumstances can a meeting be closed?**

A meeting can be closed under any of the grounds allowed by Bagley-Keene or by Business and Professions Code section 6026.5. A summary list of each of the exceptions appears in the Summary of Bagley-Keene Act Requirements document, previously distributed.

1. **Can meetings that cover committee appointments or section awards be conducted in closed session?**

Yes, under Business and Professions Code section 6026.5(d) and Government Code section 11126(c)(5).

1. **Do votes taken in closed session need to be made public?**

No.

1. **How is voting done and recorded for open meetings?**

Bagley-Keene requires a public report of the vote of each person. This can be recorded at the meeting and made available to members of the public who ask. The Board takes a roll call at the start of each meeting, and unless there is a complaint, substitutes that roll-call if it is apparent that the vote will be unanimous. For teleconference meetings, each vote must be by roll-call.

1. **What is a serial meeting?**

Any time that a quorum (majority) of members use a series of conversations, including in person, email (i.e., though a thread that ultimately goes to a quorum of members or more), phone, or through intermediaries, to discuss, deliberate or take action on a matter within its jurisdiction.

1. **If a Section Chair communicates to the full executive committee is that considered a meeting?**

Yes, assuming that the communication is about information within their jurisdiction. The communication of information to a majority creates a meeting because the information has been “heard” and can be deliberated upon. Also, if members began emailing each other or replied to the Chair, this can also create a quorum and a prohibited meeting. However, although email to a majority of members would create a prohibited meeting, these emails cannot be properly noticed and open to the public and therefore are just prohibited.

1. **Can a meeting venue be changed once the meeting has been noticed?**

No, the venue cannot be changed after the 10 day notice period, but can be changed before the 10-day notice period.

1. **Do social gatherings of the committee count as a meeting?**

No, as long as business is not discussed.

**QUORUM**

1. **What constitutes a quorum?**

A quorum is a majority of the members of a body subject to Bagley-Keene.

1. **Do section advisors count in determining a quorum of the section executive committee?**

No, advisors invited to attend executive committee meetings do not count toward the quorum because they are not members of the Executive Committee as it was created by the Board.

1. **If a section advisor is a member of a working subcommittee do they count in determining a quorum for the subcommittee?**

If a group covered by Bagley-Keene formally creates a subcommittee that includes advisors as one or more of its members, then yes. If an advisor attends a meeting of a subcommittee that he/she is not a member, then no.

1. **Can a two person subcommittee solicit information from non-members?**

Yes. Two person groups are not covered by Bagley-Keene as long as they do not have authority to act independently. They can communicate with as many non-members as they’d like to, but should not communicate with a quorum or more of the members of the larger covered group.

1. **If committee tasks are divided up and handled by small groups of committee members constituting less than a majority of the committee, can each small group meet and communicate within the small group without triggering the notice requirements?** Groups of less than a quorum can meet and discuss information as long as they ensure that their discussions do not spread to a larger group that includes a quorum.
2. **Same situation as question above, but the small groups also communicate with the ExCom chair.  If the ExCom chair does not pass on information from one small group to another and a small group plus the ExCom chair does not make a majority of the committee, can each small group meet and communicate within the small group and with the ExCom chair without triggering notice requirements?**

This would become a problem if the committee chair had further conversations that resulted in the information being discussed among a quorum or more of the group.

**CONFERENCE CALL MEETINGS**

1. **Are the locations for each committee member required to be noticed for conference call meetings?**

Yes. This is explicitly required by the statute.

1. **What do I do if I do not want to notice my home address for a conference call meeting?**

Then you can either attend at another noticed office location or you may not participate.

1. **Do names of meeting attendees need to be listed in addition to the meeting locations?**

No, just the call-in location address must be listed. However, the address must include enough information for the public to find the call-location of the member, such as suite number, floor number, or firm name.

1. **What do I do if I do not have “public space”?**

The Bar plans to have one of its office locations noticed for each teleconference meeting. You can attend at that location or at another noticed location that will allow public access.

1. **Can I give Starbucks as the location from which I will be calling into a meeting?**

While Starbucks is public, and ADA compliant, it may be difficult to actually allow the public to participate in your call at a Starbucks because this would require you to put your cell phone on speaker so that members of the public who were interested could participate. This may not be the best arrangement since it could be disturbing to other people at the Starbucks.

1. **What happens if my location changes for a conference call meeting after the meeting is noticed?**

If the location changes and was not included in the notice and agenda, you cannot call in from this location. However, you could call in from any of the other locations noticed in the agenda.

1. **Can I use a cell phone vs. a land line for conference call meetings?**

You can use either as long as it is in a location that can be noticed and made open to the public.

1. **Can I take a conference call from my car?**

No because this isn’t a location that is set or can be made available to the public.

1. **If one committee member is attending an in-person meeting via telephone is the meeting now considered a teleconference? Even if there is only one participant on the phone?**

Yes, one person calling in converts the meeting to a teleconference. In this instance, we recommend posting a call-in number for members of the public to access the meeting and also including the location of the one person calling in on the notice and agenda.

1. **If a teleconference is noticed and one person cannot attend what do we do about the noticed meeting location?**

If you have advance notice, State Bar staff can mark it as deleted from the notice and agenda. This will automatically update the notice and agenda on the Bar’s website.

**AGENDAS**

1. **Is the 10 day notice to publish agendas business days or calendar days?**

10 calendar days.

1. **Can we have a meeting with less than a 10 day notice?**

Only for special meetings with at least 48 hours’ notice. Special meetings can only be held for a limited number of topics listed in the statute, and with a required finding by the group that posting regular notice would cause substantial hardship or that immediate action is required to protect the public. A list of the topics that can be discussed during a special meeting is available in the Summary of Bagley-Keene Requirements document previously distributed.

1. **How detailed do agendas need to be?**

Agendas should provide a short description (need not exceed 20 words) of each item of business that is planned to be discussed.

1. **When do agendas need to be submitted to staff?**

The Office of Education will require agendas to be submitted **15 days** in advance to give staff enough time to ensure proper compliance and posting of the agenda by the 10 day cut off.

1. **What happens if the agenda is not posted within 10 days of the meeting?**

Then the meeting cannot be held until an agenda is posted within the required timeframe.

1. **Is use of the meeting template for posting the agenda online mandatory?**

Yes, because it will provide a streamlined way of ensuring that the agenda is created correctly, is remediated for ADA compliance, and can be posted efficiently to the Bar’s paperless system.

1. **Can an agenda item be changed after posting?**

An agenda item can only be changed to indicate that materials have been posted, or to indicate that an item has been removed from consideration. You cannot substantively change the content of an agenda item because this would be the same as adding an item after the 10 day notice period.

1. **Can agenda items be taken out of order?**

Yes, we have language in the agenda template indicating that this may happen.

1. **How do we handle “other business”?**

“Other Business” is too general a category for an agenda because it can bundle multiple items. You can have a section which gives members the opportunity to announce topics they would like to have added to future agendas as long as no substantive discussion occurs.

1. **What constitutes formal action?**

Formal action is either a vote by the group or action taken by an officer or other member who has authority to do so.

1. **Under what circumstances can a non-posted agenda item be discussed?**

An item not posted can only be discussed if there is a finding made by 2/3 of the body (or unanimous if less than 2/3 of body is present) before discussion of the item that there is a need to take immediate action that came to the attention of the body subsequent to the posting of the agenda. Notice of the additional item shall be posted as soon as possible, but at least 48 hours in advance.

1. **Are meeting minutes required to be posted?**

Keeping minutes is not explicitly required by Bagley-Keene.  However, any action taken, and the vote on that action of each member must be publicly reported and must be provided if requested by a member of the public.

1. **Can the contact person listed on the agenda be someone other than State Bar staff?**

No, our practice is to have the contact person listed be a member of State Bar staff, but we can also include a member of a Section Executive Committee if that’s desired.

1. **Do meeting materials need to be posted online with the agenda?**

This is not required by Bagley-Keene. The functionality is available to post materials with the agendas, but all documents must be remediated to be compliant with ADA guidelines before posting.

1. **Do meeting materials need to be provided to members of the public?**

Yes. If they are distributed or considered in connection with an open meeting, they are public records which must be made available upon request.

**EMAIL**

1. **How can email be used?**

Email should be used sparingly. Any email communication that reaches a quorum (majority) of the body is a meeting in violation of Bagley-Keene. Staff can email members of the committee as long as the ability to “reply all” is eliminated and so long as staff does not share the views of members of the body with other members.

**NOTE: The permission to “reply all” on the Lyris lists has been discontinued.**

1. **Can the committee chair communicate with the full committee? If so, under what circumstances?**

Communications to the whole committee should be done by staff to avoid creating a serial meeting in violation of Bagley-Keene.

1. **How can staff be used to communicate with the committee?**

Bagley-Keene includes an exception which provides that staff members may communicate with members of the body to answer questions or provide information, as long as they do not communicate the views of one member of the body to other members of the body. Staff cannot facilitate communications among members or action by the group.

1. **Can members submit votes on an item via email?**

No.

1. **Can a series of email communications be a properly noticed meeting if they are posted where the public can access them?**

No. Providing public access to a series of emails does not make the meeting compliant with Bagley-Keene.

1. **How can a committee chair share with the full Ex. Com. a written report on past and future committee activities without violating Bagley Keene?**

Best practice is to have staff distribute b/c this presents no Bagley-Keene issue. As long as members are not allowed to communicate regarding posted material, we consider posting to Hummingbird to be the same. But if members are downloading materials, editing them and reloading them, that’s an issue and that practice should not happen between a quorum or more of the members of the committee.

**MISCELLANEOUS**

1. **How can social media be used without violating Bagley-Keene? (New Question)**

Social media (e.g., Facebook, LinkedIn, Twitter, etc.) cannot be used to communicate with a quorum or more of the members of a covered body regarding matters within the jurisdiction of the group; such communication outside of a properly noticed meeting constitutes a serial meeting in violation of Bagley-Keene. Generally, it is not possible to control who, or how many members of a covered body will land on the social media page/site (or subsequently “share” or “retweet” posts), so its use to post, discuss, or otherwise communicate about group matters should be avoided. However, posting a request to the public (persons who are not members of the covered group), or soliciting written contributions from the public is permissible.

1. **Who is liable if there is a Bagley-Keene violation?**

An enforcement action would most likely be brought as a writ proceeding or action for declaratory relief against the Bar seeking a declaration or order that a particular practice violates Bagley-Keene or that an action taken in a meeting violating Bagley-Keene is null and void. The Act specifically provides that costs and attorney’s fees may be awarded, but the Act also clearly provides that these should be paid by the agency and not become the personal liability of any public employee or officer. While willful violations are misdemeanors under the Act, this would have to be brought by a District Attorney and is unlikely except for truly egregious conduct.

1. **If my question has not been answered or if I have additional questions who should I contact?**

Contact your Section Coordinator who will get back to you with the answer(s). Arrangements can also be made to schedule a call with an attorney from the Office of General Counsel.

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