



CLOSING THE JUSTICE GAP WORKING GROUP

The State Bar of California, Closing the Justice Gap, January 14, 2021



Staff Presentations

- Bagley Keene Open Meeting Act and California Public Records Act
 - Suzanne Grandt, Office of General Counsel
- Presentation on Media Contacts Policy
 - Teresa Ruano, Office of Strategic Communications & Stakeholder Engagement
- Other Administrative Matters
 - Randall Difuntorum, Office of Professional Competence



Other Administrative Matters

- Copying Messages to: CTJG@calbar.ca.gov
- Keeping Staff In-the-Loop
 - Inability to Attend a Meeting (establishing a quorum)
 - Status of Assignments/Agenda Materials
 - Changes in Contact Information
- Zoom Webinar Host – Mimi Lee
- State Bar Travel Policy for Possible In-Person Meetings
- Meeting Schedule
- File Sharing: CTJG One Drive <http://bit.ly/CTJGOneDrive>



Discussion of Project Plan and Timeline

- Working Group Charter
- Subcommittees
- Advisory/Focus Groups
- Public Comment and Public Hearings
- Outreach
- Surveys



Discussion of Project Plan and Timeline

- Working Group Charter
 - Development of recommendations for building a regulatory sandbox, including specific matters to be addressed
 - An assessment of the “pros and cons” of a sandbox as a way to foster experimentation with innovative legal services delivery
 - Other non-sandbox proposals for changes to: lawyer advertising rules; LRS regulation; lawyer provision of nonlegal services (Rule 5.7); and lawyer fee sharing with nonlawyers (Rule 5.4)



Discussion of Project Plan and Timeline

- Working Group Charter
 - There are 7 Sandbox related subparts in the Charter
 - Sandbox subpart (1) includes two deliverables: a “scope” recommendation; and a regulatory structure-governance recommendation
 - There are 4 non-Sandbox deliverables that are discreet matters but are not insignificant (e.g., all of the advertising rules)
 - Staff’s project plan contemplates a total of 12 deliverables to complete all of the assignments in the Charter



Discussion of Project Plan and Timeline

1. Scope Document [Ch. 1(1)]
2. Structure and Governance Document [Ch. 1(1)]
3. Changes to Laws and Rules Document [Ch. 1(2)]
4. Criteria and Application Process Document [Ch.1(3)]
5. Technology Issues Document [Ch. 1(4)]
6. Data & Metrics Evaluation Document [Ch. 1(5)]
7. Compliance and Enforcement Document [Ch. 1(6)]
8. Participant Exit/Termination Document [Ch. 1(7)]
9. Lawyer Advertising and Solicitation Rules Document [Ch. 2]
10. Lawyer Referral Service Statutes and Rules Document [Ch. 3]
11. Rule 5.4 Financial Arrangements with Nonlawyers Document [Ch. 4]
12. Rule 5.7 re Nonlegal Services Document [Ch. 5]



Discussion of Project Plan and Timeline

- Subcommittees
 - SCOPE Subcommittee
 - Scope
 - Eligibility Criteria & Application Process
 - Technology Issues
 - Participant Exit/Termination
 - SAGE Subcommittee
 - Structure & Governance
 - Changes to Laws and Rules
 - Compliance and Enforcement
 - Data Collection & Metrics Evaluation



Next Meeting - Assignments

- Meeting Schedule
- Leadership Appointments to the Initial 2 Subcommittees
- Assignment: Scope Recommendation Document
- Assignment: Structure & Governance Recommendation Document



Bagley-Keene Open Meeting Act California Public Records Act

Suzanne Grandt, Assistant General Counsel, Office of General Counsel



State Bar Subject to Bagley-Keene

- “The State Bar is subject to the Bagley-Keene Open Meeting Act. . . and all meetings of the State Bar are subject to the Bagley-Keene Open Meeting Act.” Business & Professions Code 6026.7, **effective April 1, 2016**
- The Bagley-Keene Act does not apply to Judicial Nominees Evaluation Commission or the State Bar Court.



Public Policy

- Bagley-Keene Open Meeting requirements are based on the concept of sunshine in government.
 - “Let the people know the facts, and the country will be safe.” Abraham Lincoln
 - “Secrecy and a free democratic government don’t mix.” Harry Truman
 - “Sunlight is said to be the best of disinfectants.” Louis D. Brandeis



Bodies Covered by Bagley-Keene

- Every state board, commission, or similar multimember body created by statute or executive order;
- Board, commission, committee, or multimember body that exercises authority delegated by a state body;
- Advisory boards, advisory committees/subcommittees, advisory commissions, or similar multimember bodies of 3 or more persons, created by formal action of a state body or member thereof;
- Official representatives of state bodies serving on other boards or commission that are supported, in whole or in part, by funds provided by the state body.



Bodies Covered by Bagley-Keene

- What about task force and working groups?
- Questions to ask:
 - How many people?
 - Is it an advisory body?
 - Does it have authority to act on behalf of a decision making body?
 - Was it created by staff?
 - Was there a resolution regarding its creation, including membership at a meeting?
 - Who is serving on the task force/working group?



What is a “Meeting?”

- “Any congregation of a **majority** of the members” of a body “at the same time and place to hear, discuss, or deliberate upon any item” within the jurisdiction of the body.



Properly Noticed Meetings

- **General Rule** = 10 Days' Notice to persons who request notice and posted on State Bar's website.
- Notice must include specific agenda.
- The notice must state the date, time, and location of the meeting.
- Notice shall include contact person for questions (including ADDRESS).
- Only items on agenda can be discussed, unless a late add is justified with required finding made.
- All meetings must be ADA compliant.
- Opportunity for Public Comment.
- Exceptions for Special and Emergency meetings.



Properly Noticed Meetings

- What is a good agenda item description?
 - Short statement of item to be discussed/action taken at meeting
- TIPS:
 - Will someone unfamiliar with the state body understand what the item is about?
 - Avoid abbreviations, acronyms, short hand (ex. "Appendix I")
 - Distinguish between Discussion v. Recommendation/Approval
 - VERBS are important



Agenda – examples

- Proposed State Bar Rule Changes v.
- Discussion and recommendation for approval of proposed State Bar Rule 300.500. v.
- Draft Report on the July 2018 Bar Exam v.
- Approval of Draft report on the July 2018 Bar Exam for Submission to California Supreme Court



Adding Additional Items to the Agenda

- Items typically should not be added to the agenda after the 10-day notice period.
- **Exception:**
 - Action may be taken on an item not appear on agenda if:
 - Majority vote determines there is an emergency situation (crippling disaster or threat to public/safety health – VERY RARE)
 - 2/3 vote, or if less than 2/3 present, unanimous vote that there is:
 1. Need to take immediate action AND
 2. Need for action came to attention of state body after posting of agenda
- *Should be used sparingly; not excuse to add things to agenda last minute



A “Meeting” Does Not Have to Occur In One Place

- Any use of a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter of the state body.
- A majority of members of a body may not use any series of communications outside of a properly-noticed meeting. This becomes a prohibited **serial meeting**.
- This includes:
 - Telephone Calls
 - E-mails
 - Serial Briefing



Serial Meetings Prohibited

- Daisy Chain
- Hub and Spoke
- Emails
 - Avoid “reply all”
 - Do not include quorum
- Serial Briefings
- Telephone Calls/Messages
- **Exception:** Prohibition on serial meetings does not prohibit staff from engaging in separate conversations or communications outside of a meeting to answer questions or provide information.
 - As long as that staff member does not communicate to members of the body the comments or position of other members. (“BCC” always encouraged)



Exceptions to the Meeting Definition

- Individual contacts between members of the body and others that do not otherwise violate the Act.
- Attendance of a majority of the members of a body at a conference, training, or workshop.
- Open and publicized meeting regarding topic of state concern organized by an outside group.
- Purely social or ceremonial occasion as long as business not discussed among the members of a body.
- Majority of members of a body can attend a open notice meeting of a standing committee as long as they don't participate.



Teleconference Meetings

- Under Bagley-Keene, meetings of a covered body may take place via audio or video teleconferencing so long as the meeting complies with the BK meeting requirements as well as additional requirements.
- Every teleconference meeting location (i.e. call-in location of a member) must be identified in the notice and agenda and be open to the public and allow for public participation.
 - At least one member of the body must be physically present at each of the locations specified in the notice and agenda.
 - Each call-in location must be open to the public and ADA accessible.



Teleconference Meetings Cont.

- The portion of the teleconference open to the public must be audible to the public at the call-in locations identified in the notice and agenda.
- Votes must be taken by roll call.



Teleconference Meetings Cont.

- Members are not able to attend the meeting via teleconference from their offices, homes, or other convenient locations unless those locations are identified in the notice and agenda posted at least 10 days in advance of the teleconference.
- **If one member is attending an in-person meeting via telephone, is the meeting now considered a teleconference?**
 - Yes, one person calling in converts the meeting to a teleconference.
- What do I do if I do not want to or am unable to notice my home or office address for a teleconference meeting?



Teleconference Meetings Cont.

- Members must either attend at another noticed office location or may not participate.
- BK does not require posting a call in-number for teleconference meetings. State Bar does so as a matter of policy.
- Out-of-state call-in locations may be permissible: let chair decide.
- Which are proper additional call in locations?:
- Yellow Stone National Park
 - Judge's Chamber, San Francisco Superior Court House room 301
 - Central Park, New York, NY
 - Starbucks Reserve, 201 Mission St
 - 123 Main Street, Sacramento California 5555



Teleconference Meetings Cont.

- Members who do not post call in location may not participate in the meeting
- These members may call in anyway but LISTEN ONLY
- These members should not make comments as a “member of the public”
- These members cannot vote at meeting or vote by proxy
- Agendas should be posted at all call in locations



Public Comment

- A state body shall provide an opportunity for members of the public to directly address the body on each open session agenda item before or during the consideration of the item.
- This is not required if public comment was allowed during a committee's consideration of substantially the same item.
- A State Body may adopt reasonable regulations to govern public comment, including limiting the time for particular issues and individual speakers.
- Members of the public may record meeting but may not cause disruption.



Social Media

- The use of social media creates a risk of inadvertent Bagley-Keene violations.
- Social media comments and “Likes” may involve communications among a majority of the legislative body outside of a properly-noticed meeting.
 - Example: A member posts about a meeting on her Facebook page and two other members comment on the post.
 - Example: A member re-tweets a comment/statement by another member.



Closed Session

- These meetings are not open to the public.
- The grounds for closed session are limited to those found in the Bagley-Keene Open Meetings Act or state law.
- Closed session must be held during a regular or special meeting; they may not be scheduled independently of a noticed meeting.
- The agenda must indicate the specific grounds for closed session after each agenda item.



Closed Session- Grounds under BK

- Appointment, employment evaluation, or dismissal of public employee.
- To prepare, approve, grade, or administer exam.
- Unwarranted invasion of privacy of an individual licensee or applicant.
- To consider conferring of honorary degrees, gifts, donations, or bequests that the donor has requested be confidential.
- To give instructions to negotiator prior to purchase, sale, exchange, or lease of real property.
- To discuss investment decisions regarding retirement, pension, or endowment funds.
- To hold sessions with representations regarding salaries, salary schedules, or fringe benefits.



Closed Session- Grounds under BK Cont.

- To consider matters posing a threat or potential threat of criminal or terrorist activity.
- To receive advice of counsel regarding pending litigation.
- To discuss response to confidential final draft of audit report.



Closed Session - Grounds under Bus & Prof. Code Section 6026.7

- Appeals from decisions of the Board of Legal Specialization refusing to certify or recertify an applicant or suspending or revoking a specialist's certificate.
- The preparation, approval, grading, or administration of examinations for certification of a specialist.
- The preparation, approval, grading, or administration of the California Bar Examination or the First-Year Law Students' Examination.
- Matters related to the Committee of Bar Examiners' consideration of moral character.
- Information about a law school's operations that constitutes a trade secret as defined in subdivision (d) of Section 3426.1 of the Civil Code.



Meetings with Less Than 10 Days Notice: Special and Emergency Meetings

- Very rare- should check with General Counsel office to make sure requirements are met.
- Special meetings (48 hours notice) 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.
- Emergency meetings (one hour notice) are only in rare cases of true emergency i.e., work stoppage that “severely impair public health or safety, or both” or “crippling disaster.”



Open Meetings and Writings

- Public is entitled to have access to records of the State Body
- State Bar posts material on-line 5 days in advance of meetings
- Public has right of access to any other writings/material distributed to majority of members of State Body for items discussed in Open Session unless they fall under specific CPRA exemption
 - If prepared by state body must be made available at meeting.
 - If prepared by other person (incl. state bar staff) may be made available after meeting.



Open Meetings and Writings Cont.

- This includes right of access to PowerPoint and training materials
- Also includes access to e-mails and other writings between State Body members as well as search history during meetings



Open Meetings and Writings

- Simply because a document is discussed in closed session does not make it exempt from public disclosure.
- Each document must be individually analyzed to determine whether it falls under a CPRA exemption.
- Some closed session grounds overlap with CPRA (i.e., pending litigation, moral character investigation).
- The fact the document concerns something appropriate for closed session will likely support the public interest in withholding the document (California Government Code section 6255).



Open Meetings and Writings

- Any audio or video recording of an open meeting made at the direction of the body is subject to inspection under the CPRA, but may be erased or destroyed 30 days after recording. (Gov. Code § 11124.1)
- Closed session minute book is not subject to disclosure under the CPRA. (Gov. Code § 11126.1)



Remedies/Enforcement

- Overturn decision or action
- Court of Public Opinion
- Civil Action
 - Exposure to Attorneys Fees and Costs for Violation
 - Likely limited to Hot Button Issues, Press Interest
- Criminal Action
 - Willful violations can be misdemeanor
 - Unlikely to Occur



State Bar Subject to the California Public Records Act

- Effective January 1, 2016, all public records and writings of the State Bar became subject to the CPRA. Bus. & Prof. Code, § 6026.11.
- The CPRA creates a presumptive right of access to any record created or maintained by the State Bar* that relates in any way to the business of the State Bar. Every such record must be disclosed unless a statutory exception is shown.
- *Access to records of the State Bar Court are governed by court rules and laws applicable to records of the judiciary and not the CPRA. Bus. & Prof. Code, § 6086.5



What is a writing?

- A writing is defined as “any handwriting, typewriting, printing, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any form of communication or representation...and any record thereby created, regardless of the manner in which the record has been stored.”



What do I need to know as a Committee Member?

- You should never respond to CPRA Requests.
- If you receive a request for records, refer the request to staff **immediately**.
 - It may not be clear from the request whether it is a CPRA request (ex. mentions FOIA, asks for information, asks for list, etc.)
 - Forward to staff if unsure



Your “Writings” may be Public Records

- Social media posts
- Emails on personal accounts
- Documents on personal computers
- Text messages
- Voicemails



City of San Jose v. Superior Court (2017) 2 Cal.5th 608

Ted Smith, a local attorney and activist, sought communications from the San Jose mayor, city council members and staff concerning the development of the San Pedro Square Open Market. His Public Records Act request explicitly sought “voicemails, emails and text messages sent or received on private electronic devices” of these officials and employees.



City of San Jose v. Superior Court (2017) 2 Cal.5th 608

- The city produced some documents, but took the position that “since the City does not prepare, own, use or retain any record created by the Mayor, members of the City Council or their staff using any type of personal digital assistant, those records are not public records.”
- Smith took the city to court and prevailed in the trial court. The city appealed and won: “local agency” does not include individuals, and communications on private devices are “not accessible” to the city, therefore, not public records.



City of San Jose v. Superior Court (2017) 2 Cal.5th 608

- Smith appealed to the California Supreme Court.
- The Supreme Court held that when a city employee uses a personal account to communicate about the conduct of public business, the writings may be subject to disclosure under the CPRA.
- The public record does not lose its status as such because it is located on an employee's personal account. The Court rejected the notion that where the record resides matters to the determination.



City of San Jose v. Superior Court (2017) 2 Cal.5th 608

- The opinion suggested looking to the following factors:
 - Context
 - Context
 - Purpose
 - Audience
 - Whether the employee was acting within the scope of employment I preparing or receiving the communication



City of San Jose v. Superior Court (2017) 2 Cal.5th 608: What Does this Mean for Committee Members?

- All writings concerning the State Bar business may be a public record.
- Be careful combining personal writings with business.
- Segregating State Bar e-mail is recommended.
- Do not retain drafts without good reason.
- Work with State Bar staff as instructed.



City of San Jose v. Superior Court (2017) 2 Cal.5th 608: What Does this Mean for Committee Members?

- Staff typically will ask Committee members to self collect documents.
- Search affidavits may be required.
- Familiarize with State Bar Record Retention Policies.
- Cooperate with staff and be cognizant of deadlines for collection.



City of San Jose v. Superior Court (2017) 2 Cal.5th 608: What Does this Mean for Committee Members?

- Some recent examples:
 - CPRA requests re: Bar exam inadvertent disclosure
 - Supreme Court investigation
 - Discovery in litigation



Judicial Review & Remedies for Enforcement





Judicial Review & Remedies for Enforcement

- A requester may seek a court order to enforce the right to inspect or to receive a copy of public records by filing a verified petition alleging improper withholding of public records in the Superior Court in the county where records situated.
- Bench trial based upon points and authorities, declarations, possible in camera inspection of records, and oral argument to decide whether the decision to refuse disclosure was justified under Gov. Code sections 6254 or 6255.



Judicial Review & Remedies for Enforcement Cont.

- Prevailing requestor shall be awarded costs and reasonable attorney fees. Plaintiff prevails if suit motivates disclosure. Once suit is filed, any voluntary disclosure by agency means plaintiff has prevailed. Requestor need not prevail on all issues; one issue is probably sufficient. Agency receives fees only if suit is adjudged totally frivolous.



Judicial Review & Remedies for Enforcement

- Petition to the appellate court for an extraordinary writ within 20 days after service of written notice of entry of order.
- Order for disclosure may be stayed by appellate court if agency demonstrates irreparable damage and probable success on merits.
- Extent of review:
 1. Independent review of trial court's statutory balancing analysis.
 2. Factual findings made by trial court upheld if based on substantial evidence.



Questions?

- Thank you for your participation.



State Bar of California Social Media Guidelines/Policy Trustees, Task Forces, Committees, Commissions, and Working Groups

Introduction

The State Bar uses social media (Twitter, LinkedIn, Facebook, and Instagram) to disseminate—to the public, licensees, and stakeholders—news and information about the State Bar. The use of social media must be guided by the constraints of the State Bar being a governmental agency and the responsibilities commensurate with that role.

Additionally, the Bagley-Keene Open Meeting Act prohibits a majority of members of a state body from using a series of communications of any kind outside properly noticed public meetings. The act applies to the Board of Trustees as well as many of the State Bar's advisory bodies created by the Board: task forces, committees, commissions, and working groups. Serial meetings—whether directly or through intermediaries—to discuss, deliberate, or take action on any item of business that is within the subject matter of the state body are prohibited. The term 'serial meetings' refers not only to in-person meetings, but also to:

- Telephone calls
- Text messages
- Emails
- Social media messages or comments (i.e., Facebook, Twitter, Instagram, etc.)

To that end, the State Bar and its volunteer entity members must use the following guidelines when communicating about State Bar business on any social media platform.

Confidential Information

State Bar content must conform to professional and ethical rules. To that end, no confidential or privileged information should be posted.

Types of Content

Entity members can share pictures, videos, audio, and graphics so as long as they do not violate Bagley-Keene. If you are unsure whether it is permissible to share specific content, please contact State Bar staff before posting.

Do's

- **DO** repost @StateBarCA posts regarding meeting information.
- **DO** post notices regarding meeting agendas and meeting materials.
- **DO** post updates as they are happening during meetings and post-meeting recaps.
- **DO** respond to messages regarding how to get more information about the meeting.

- **DO** post information on how to subscribe to receive notices regarding agendas and meeting materials.
- **DO** take care to note when expressing opinions related to your group's work that the opinions are yours and do not represent the group.
- **DO** remember that, when posting about the work of your State Bar entity, you are perceived as representing that group, and hence the State Bar. Please keep it professional and civil.
- **DO** use relevant hashtags.

Don'ts

- **DON'T** create a serial meeting by responding to, commenting on, or retweeting other entity members on social media platforms regarding information and decisions that the entity is considering.
- **DON'T** make promises regarding issues that the public has mentioned.
- **DON'T** use social media to reach State Bar staff regarding concerns about the work of the entity. Instead please communicate with staff directly by email or phone.

Crowdsourcing

Outreach within your social media network to solicit ideas and input from your network and the public is encouraged, provided that you comply with the following guidelines:

- **DON'T** tag or mention other entity members in your posts.
- **DON'T** speak for the entity when commenting online on input from the public.
- **DON'T** invite other entity members to participate or comment on your posts.
- **DO** ask questions and gather ideas independently within your network.
- **DO** use relevant hashtags (e. g., #ATILS.)

MOST IMPORTANTLY, if you are within the social network of another entity member and you view a crowdsourcing post concerning your group's work **DON'T** participate by commenting, retweeting, or liking their post, as such conduct may lead to a violation of Bagley-Keene. If you see a post that you would like to respond to, send an email to staff and staff will disseminate your comment in a manner permissible under Bagley-Keene.

SAMPLE POSTS: BEFORE A MEETING

- The next [@StateBarCA](#) meeting of [ENTITY] will be held on [date, time, location]. To subscribe to receive meeting notices, scroll down on this page and select [ENTITY]: <http://board.calbar.ca.gov/Committees.aspx#subscribe>
- The agenda and materials for the [date] meeting of [@StateBarCA](#) [ENTITY] are now posted: <http://board.calbar.ca.gov/Committees.aspx>
- Time is allotted for public comment at each meeting of the [@StateBarCA](#) [ENTITY]. Interested in attending to comment? Check the agenda and contact the committee coordinator listed on the agenda if you have questions. Our next meeting is [date]. Agenda: <http://board.calbar.ca.gov/Committees.aspx>

SAMPLE POSTS: DURING A MEETING

- Today's meeting of the [@StateBarCA](#) [ENTITY] will begin at [time]. You can view the live webcast here: <http://board.calbar.ca.gov/Video.aspx>
- Post nonconfidential information, such as noteworthy quotes, as they happen.

SAMPLE POSTS: AFTER A MEETING

- The archived webcast of the [date] meeting of [@StateBarCA](#) [ENTITY] is now available: <http://board.calbar.ca.gov/Video.aspx>