



COUNCIL OF STATE BAR SECTIONS
THE STATE BAR OF CALIFORNIA

August 19, 2016

To: David Pasternak
President, State Bar of California

Board of Trustees
State Bar of California

**Re: Impact of the Bagley Keene Open Meeting Law,
On Sections, Obtaining Relief in Current Fee Bill**

Dear President Pasternak:

We are writing to inform you and the Board of Trustees that the Council of State Bar Sections (“CSBS”) on August 14, 2016 voted unanimously to call upon you and the Board to seek inclusion in this year’s fee bill of a provision to exclude the Sections from the restrictions of the Bagley Keene Open Meeting Act of 1967 (the “Act”).

CSBS has grown increasingly concerned about the impact of the Act on the work of the Sections. We want to be very clear that our request regarding the Act should not be construed as taking a position on the various suggestions regarding deunification or de-coupling of the Sections from the Bar. The action taken by CSBS is solely related to the impact of the Act on the work of the Sections.

The preamble of the Act itself establishes why the Sections should not be burdened by it: “[i]t is the public policy of this state that public agencies exist to aid in the conduct of the people's business and the proceedings of public agencies be conducted openly so that the public may remain informed. In enacting this article the Legislature finds and declares that it is the intent of the law that actions of state agencies be taken openly and that their deliberation be conducted openly. ... The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.”

The Sections consist of volunteer attorney-members and voting non-members who are not compensated in any way for the work they do and cannot be equated with public servants. The Sections do not conduct the “people’s business”. The Sections are made up of more than 65,000 attorneys, non-lawyers and others who voluntarily join the Sections and contribute dues

each year to pay for the Sections' operations. The dues and the Sections' income from educational programming are the sole source of support for operations because other California law prohibits financial support of the Sections with public funds or from mandatory dues. Members' voluntary Section dues are neither part of the annual State Bar license fee nor are they available for use for the mandatory functions of discipline, enforcement or admissions. In short, Sections are self-supporting and exist entirely through Sections self-funding and the volunteer efforts of members.

The Sections' purpose and function is to protect the public by providing quality education programs, legislative analysis and timely publications available not just to members but also to the public at large. Through the efforts of the Sections and their thousands of volunteer members, low-cost and free continuing legal education programs are offered to the public; electronic updates of current legal developments are generated regularly; and formal mentorship of young lawyers is provided. The Sections include increasing diversity as one of their chief goals in order to expand the practice of law among all minorities, ethnicities and orientations, and they have implemented projects and initiatives to achieve these goals. Through the work of their volunteer members, the Sections originate and comment upon legislation in their substantive fields of law, providing immediate real-time expert support to legislators, regulators, and their staffs with the certainty that whatever is provided is neutral, unbiased, and can be relied upon as apolitical owing to the State Bar procedures in place to enforce *Keller v. State Bar of California*, 496 U.S. 1 (1990).

The Sections are severely hampered by the impacts of the Act. We are severely hampered in our ability to educate, publish or assist with legislation– in short, we cannot go about our work to protect the public – under the auspices of the Act.

The essential problem is that the Act has not been updated in the nearly 50 years since its enactment. Since then key technological, communication and demographic developments have taken place which enable, advance and support robust participation in the Sections in an ever more interconnected world: including internet, email, and mobile phones. With an ever-growing proportion of members of the Bar and the public working remotely and while traveling away from traditional office locations, the Act is an anachronism. Ignoring advances that have shaped today's society, the Act's prohibitions impose huge burdens on the work of the Sections and their volunteer members, as enumerated below:

- Virtually all E-mail communications between members of the Executive Committees and the task oriented sub-groups are prohibited outside of noticed meetings. That means, for example, when a presenter at an educational forum becomes ill only one or two people will know about it until the presentation occurs;
- No gathering that constitutes a quorum may meet (whether in person, by phone, or by serial communications) of the Executive Committee or task oriented or sub-group that

has not been the subject of a noticed meeting with an agenda posted on the State Bar's website at least 10 days before a meeting;

- Appointed, voting members may not participate in any noticed meeting of a quorum of any appointed group or task oriented or sub-groups by mobile phone;
- Appointed, voting members (or any members of task-oriented sub-groups) may not participate (or even listen in on) any meeting by telephone unless that member's location has been listed on an agenda for the prior 10 days, and that location is both open to the public and is ADA complaint (notwithstanding that all members of the public can access the meeting by telephone or in-person at any time and from any place);
- There are no exceptions for lawyers who work from home offices by choice, on account of physical disability, or even risk to their person.

Concerted effort by State Bar staff, the Office of General Counsel, the officers of the Sections and their individual committee members has resulted in full compliance by all the Sections with the Act, but the Sections have been weakened by the strangling of their communications and functions. Membership is declining. Morale has plunged and is being sustained only by Herculean efforts of dedicated Section volunteers and Bar Staff. Fewer educational programs are being planned and produced. Affirmative legislative proposals and comments are disappearing as committees cannot communicate in real time to actually do the hard work of drafting and updating. Publications of all kinds have dropped precipitously as authors and editors have not been able to collaborate outside of noticed meetings.

Over the past four months, the following specific consequences have resulted from the application of the Act to the Sections:

- Three female attorneys across two sections were unable for more than 4 months each to participate in the calls and meetings of their Section Executive Committees as they had been placed on medically-ordered bed rest and could not open their homes to allow access to random members of the public to participate in calls by their bedsides.
- An attorney who worked from home and has a restraining order against a former client she – and a court - felt was a danger to her was prohibited from participating on a Section Executive Committee given that she was unwilling to publish her home address and thereby make it available to her stalker.
- A number of committees of the Sections in key substantive areas such as Cyberspace law and Agribusiness have simply elected not to continue meeting as they can no longer meet by phone given the number of lawyers who work from home or whose firms are unwilling to allow public access to secure premises.

- Other of the Sections’ committees have gone from monthly meetings and vibrant weekly subcommittee calls to full-day in-person meetings once per quarter, increasing the expense of meeting while simultaneously limiting the ability to provide current updates.
- Production of the Sections’ work product has ebbed as committees are unable to meet and communicate in any manner that reaches a quorum. As a result, for example, the Business Law Section’s production of eBulletins has dropped over 30% over the same period last year.
- The Sections committees are experiencing an unheard-of drop in the number of applications they are receiving and in the number of volunteers willing to act as officers.

Application of the Act to the Sections serves no valid purpose. It addresses a problem, the need for openness in governmental decision-making, which the Sections do not have because they make no governmental decisions. They simply do not, in the words of the Act, “do the people’s business.” Anecdotal evidence proves that the Act harms the Sections yet, by rendering the Sections ineffective and unable to function, the Act simultaneously harms the public interest it was intended to protect. All Section meetings are already open to the public. Indeed, the Sections welcome the input and attention of the public in their work and invite public participation in all their venues.

The impact of the Act on the Sections has been to drive volunteers to organizations in which participation is rewarded and not burdened with illogical, misdirected regulation. The loss of volunteers and morale will accelerate should it become clear that neither the State Bar President nor the Board are willing to expend the time and effort needed to the remove Sections from the scope of the Act. It is therefore of the greatest urgency, President Pasternak, that you and the Board take whatever action you can to seek relief for the Sections from the Act as part of this year’s dues bill.

/s/ Shirish Gupta
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 Co-Chair,
 Council of State Bar Sections

/s/ Matt Powelson
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 Co-Chair,
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/s/ Emily Aldrich-Stoner
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/s/ Brian Arbetter
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/s/ Perry Segal
 Perry Segal
 Immediate Past Co-Chair,
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/s/ Mark Ressa
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 Immediate Past Co-Chair,
 Council of State Bar Sections

cc:

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Pamela Wilson, Senior Director, Office of Education
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Council of State Bar Sections