OPEN MEETING LAW

No open meeting laws applied to auxiliary organizations until January 1, 1975 when Section 11121.5 was added to the Bagley-Keene Open Meeting Law in the Government Code (Stats. 1974, c.1179, Section 1) to read:

> Under the provisions of this article, the official student body organization at any campus of The California State University shall be treated in the same manner as a state body.

Section 11121.5 was repealed in 1984 (Stats. 1984, c.1158, Section 3).

Effective April 29, 1977 (Stats. 1977, c.36, Section 379) all CSU auxiliary organizations became subject to the Bagley-keene Open Meeting Law when Education Code Section 89903 was amended to read:

> Each governing board of an auxiliary organization shall conduct its business in public meetings in accordance with the provisions of Article 9 (commencing with Section 11120) of Chapter 1 of Part 7 of Division 3 of Title 2 of the Government code.

This part of Education Code Section 89903 was also repealed by Stats. 1984, c.1158, Section 1.

Then came Senate Bill No. 2286 (Seymour) which added Education Code Sections 89920-89928 (Stats. 1984, c.1158, Section 2) and became effective on January 1, 1985. This has been the open meeting law applicable to all auxiliary organizations since January 1, 1985. No section thereof has been amended since that date. There has been no judicial review of any section since it was enacted into law.

On October 24, 1985, I made a presentation on this open meeting law at a retreat held by the Associated Students of San Diego State University. Here is what I said:

<u>Government Code Section 11121.5</u>

Under the provisions of this article, the official student body organization at any campus of the California State University shall be treated in the same manner as a state body.

<u>Education Code Section 89903</u>

Then came Senate Bill No. 2286 (Seymour), Chapter 1158, Statutes of 1984, which became effective on January 1, 1985.

What kind of help did we get from the System's Office of General Counsel?

On November 20, 1984, General Counsel Chapman sent a memo to State University Dean Kagan which said:

> We would recommend that University advisors to Associated Student Bodies familiarize themselves with the new open meeting law requirements (with) which student body organizations must now abide.

On November 29, 1984 Kagan sent a copy of Chapman's memo and a copy of SB 2286 to campus Vice Presidents and Deans of Students adding only this:

> I suggest that appropriate staff familiarize themselves with these materials.

This is about as much help as we should have expected from the folks in Long Beach.

The California State Student Association got Senator Seymour to ask the Office of Legislative Counsel to draft SB 2286 using an outline of content prepared by CSSA's Legislative Director at that time, Curtis Richards. I didn't see the language until it was in bill form and had worked its way through the Senate and was under consideration by the Assembly Education Committee. I saw immediately that there were key omissions, ambiguities and other inconsistencies in the bill's language. As the attorney for the Auxiliary Organization's Association, I called this to the attention of the leadership of that organization. A judgment was made that any effort to modify the bill to deal with its defects might jeopardize its passage. It was felt that getting the auxiliaries out of the Bagley-keene open meeting law was of such critical importance we didn't want to do anything that might affect realizing that goal. We thought that the auxiliaries could live with the problems of the new law until amendments could be introduced in 1985 to deal with its deficiencies.

I proposed to the Auxiliary Organizations Association's Annual Conference in January of 1985 that such legislation be introduced. On January 31, 1985 Curtis Richards wrote to the President of AOA and commented:

> *** as one who watches the Legislature, I am particularly nervous about this suggestion for "cleanup" legislation so quickly. Because we had a few uncomfortable situations with SB 2286, I would argue that we should wait for the dust to settle. I also believe that before amendments are made to the law, we need to see how well or poorly it works for CSU's auxiliary organizations. ***

We took Curtis Richards' advice and no amendments to the new open meeting law were proposed during the 1985 legislative session. I

am going to propose to the AOA and the CSSA that they survey their members with regard to difficulties being experienced in complying with the new open meeting law and then determine what types of amendments, if any, might be appropriate.

Now, what does the new open meeting law say about the conduct of meetings of auxiliary organizations and specifically student body type auxiliary organizations.

First, let me emphasize that the new open meeting law applies only to governing boards and subboards of governing boards of auxiliary organizations.

The new law at Section 89921 states that:

> Each governing board and subboard <u>shall</u> annually establish *** the time and location for holding regular meetings.

Obviously the date should also be specified.

Who needs to be notified of the regular meeting schedule? For the moment, only the members of the governing board for governing board meetings and the members of the subboard for each subboard meeting.

Can you change the regular meeting schedule -- either date, time or Location? Yes. You must, of course, notify the members.

Can you have special meetings? Yes. You must, of course, notify the members.

Who else needs to be notified of the regular meeting schedule? Any individual or medium (Daily Aztec, for example) who requests such notice in writing.

When do you have to notify an individual or medium who so requests notice? Depends upon what they request. If they request notice of all meetings of the governing board or a subboard, just give them the annual meeting schedule.

If they request notice for a particular meeting or meetings, the law says you must give written notice "at least one week prior to the date set for the meeting."

Can you just give them the annual meeting schedule? I think so.

What kind of notice for individuals or media is required for special meetings? If a special meeting is to be held at least one week after it is called, you must give at least one week's notice. While the law doesn't so state, the implication is that, if a special meeting is to be held on less than a one week call, individuals and media should be notified as soon after the meeting call as is practicable.

What is the minimum notice for a special meeting? Section 89222 says that:

> The call and notice of a special meeting shall be delivered at least 24 hours prior to any meeting.

What must the notice of a special meeting include?

> *** and shall specify the time and place of the special meeting and the business to be transacted.

Can you add anything to the agenda of a special meeting that is not included in the notice?

> No other business shall be considered at those meetings by the governing board or subboard.

Note, there is no parallel requirement that those notified of regular meetings be provided with any indication of the business to be transacted.

There is, however, one curious section in the law (89924) which states:

> No governing board or subboard shall take action on any issue until that issue has been publicly posted for at least one week.

My interpretation of "action" is "final action" -- more on this later.

How is an "issue" "publicly posted?" CSSA suggested that:

> Agendas could be posted in high traffic areas; i.e., outside A.S. Government offices, or on a bulletin board, in the Student Union.

I don't have anything better to offer. So, if you post the agenda for the governing board or a subboard somewhere at least one week before the day of the meeting, the governing board or subboard can take action on items identified on that agenda.

Can you take action at a special meeting called on less than one week's notice? Yes.

If there is an emergency, can you take action at a meeting with less than one week's notice? Yes.

Please note that there is no requirement in the law that anyone, including the members of a governing board or subboard, receive copies of the agenda for any regular meeting, but I assume you would want to do so in order to conduct business. So long as an agenda for a regular meeting is posted at least one week before a meeting, you could hand out copies of that agenda at the meeting

and take action on those agenda items designated as action items.

Another anomaly in the law is the requirement in 89922 that notice of a special meeting must be given to any "party to be directly affected by" the meeting. There is no such parallel requirement with regard to regular meetings.

Someone also asked me to comment on the consequences of failing to comply with the open meeting law.

A logical question is, would such a failure invalidate action taken at such a meeting? I have reviewed all of the reported (Appellate Court) decisions involving the Brown and Bagley-Keene open meeting laws and found no case that determined that an action taken at a meeting that was not properly noticed was void. Courts are very reluctant to invalidate actions of public bodies unless a specific statutory provisions calls for it. For example, the key section of the Education Code relating to conflicts of interest by members of the governing board of an auxiliary organization is specific in this regard when it states (89906):

> No member of the governing board of an auxiliary organization shall be financially interested in any contract or other transaction entered into by the board of which he is a member, and any contract or transaction entered into in violation of this section is void.

This open meeting law contains no similar provision. Then, what is the penalty for failure to comply? Section 89927 states:

> Each member of a governing board pursuant to this article, who attends a meeting of the governing board where action is taken in violation of any provision of this article, with knowledge of the fact that the meeting is in violation of this article, is guilty of a misdemeanor.

First, note that the penalty applies only to members of the governing board and to meetings of the governing board. There is no penalty provision relating to members of subboards or meetings of subboards.

Second, to have the misdemeanor penalty would require that a complaint be filed with the City Attorney who would then have to charge the entire board and take the case against them into court. I doubt whether the City Attorney would do so - and it is within his discretion to decide whether to prosecute misdemeanors.

I am, of course, not suggesting that you should violate the open meeting law because there is no effective enforcement mechanism available to apply the penalties for failure to comply.

On a more recent occasion, I again commented on the content of this open meeting law. See Exhibit A.

Exhibit A

OPEN MEETING LAW APPLICABLE TO ALL CALIFORNIA STATE UNIVERSITY AUXILIARY ORGANIZATIONS

89921 refers to the governing board of an auxiliary organization. This obviously refers to the board of directors by that or any other designation. It also refers to a "subboard" of an auxiliary organization without defining that term. Committees are obviously subboards. If there had been an intention to limit the application of the term subboards to committees, that could have been done. Not having so limited it (or defined it to so limit it), the only viable conclusion is that it applies to other types of bodies made up of members of the governing board.

89922 provides that each governing board and subboard:

> *** shall, at least one week prior to the date set for the meeting, give written notice of every regular meeting, and any special meeting which is called, at least one week prior to the date set for the meeting, to any individual or medium that has filed a written request.

The term "medium" means campus or off-campus newspaper, radio or television station. You will note that there is no requirement that either the Agenda or the action items for such meetings be provided.

89923 says that notices for special meetings shall specify "the business to be transacted." There is no such requirement for regular meetings. Thus, the Agenda for a regular meeting of the Board of Directors or the Executive Committee could be handed out at the meeting.

But, 89924 indicates:

> No governing board or subboard shall take action on any issue until that issue has been publicly posted for at least one week.

What does "publicly posted" mean? This Section was obviously written with A.S. type auxiliaries in mind where there is a common practice of posting agendas. How should other types of auxiliaries comply? Post the "action" items (which means "business items") on a bulletin board somewhere that is designated by the Board of Directors for that purpose. Of course, posting an Agenda with action items clearly identified would also satisfy this requirement. The posted notice should also indicate the date, time and place where the meeting is to be held.

Do notices of meetings of the Executive Committee need to be posted at least one week in advance of their meetings? No, because only action items need be posted and the Executive Committee normally does not take final action on matters.

By the way, some auxiliary organizations incorrectly interpret 89924 to apply to special meetings as well as regular meetings and prohibit any action from taking place at a special meeting unless that action item has been posted at least one week before the special meeting. That is clearly an erroneous interpretation because the whole purpose of having special meetings is to deal with matters without having to wait for a week to go by.

Sections 89925 and 89926 are obviously directed at A.S. organizations.

I have already discussed 89927 and its clear applicability to the governing board but not to subboards of the governing board. As governing boards, under the Nonprofit Corporation Law can delegate final authority to act to subboards (committees), this is a serious flaw in this statutory plan.

Section 89928 applies only to CSSA.

Over the years, I have been asked literally hundreds of times to respond to questions regarding this open meeting law. The above comments by me reflect the kinds of questions I received and my responses. Occasionally, I am asked to provide my advice and counsel on whether a particular course of conduct could or will result in a violation of the open meeting law. Let me describe such a matter and my responses.

The day before a meeting of the Board of Directors of an auxiliary, five of the Directors met privately to discuss one of the action items on the agenda. I was asked whether such a meeting was a violation of the open meeting law. I responded that it was. Not unexpectedly, the five Directors who attended that meeting didn't agree with me. I subsequently had time to reflect on this matter and came up with this rationale for the conclusion I reached:

> Everyone understands that the explicit purpose of open meeting laws is to provide the public (the university community in our case) with the opportunity to attend meetings and listen to all discussions that precede formal action on any issue of interest and concern to them. It is not as well understood that an explicit purpose of having all discussions occur during meetings of governing boards is to permit all members of the governing board to hear and participate in the entire discussion process that precedes action being taken. The *** meeting of only five Directors of *** precluded the other Directors *** from having the opportunity to participate in the discussion that occurred.

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