

State Bar of California

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The State Bar of California was created by legislative act in 1927 and codified in the California Constitution at Article VI, section 9. The State Bar was established as a public corporation within the judicial branch of government, and membership is a requirement for all attorneys practicing law in California. Over 162,000 California lawyers are members of the State Bar.

The State Bar Act, Business and Professions Code section 6000 *et seq.*, designates a Board of Governors to run the State Bar. The Board President is usually elected by the Board of Governors at its June meeting and serves a one-year term beginning in September. Only governors who have served on the Board for three years are eligible to run for President.

The Board consists of 23 members: sixteen licensed attorneys and six non-lawyer public members, plus the Board President. Fifteen of the sixteen attorney members are elected to the Board by lawyers in nine geographic districts; the sixteenth attorney member is a representative of the California Young Lawyers Association (CYLA), appointed by that organization's Board of Directors each year for a one-year term. The six public members are variously appointed by the Governor, Assembly Speaker, and Senate Rules Committee. Each Board member serves a three-year term, except for the CYLA representative (who serves for one year) and the Board President (who serves a fourth year when elected to the presidency). Members' terms are staggered to provide for the election of five attorneys and the appointment of two public members each year.

The State Bar maintains numerous standing and special committees addressing specific issues; seventeen sections covering substantive areas of law; Bar service programs; and the Conference of Delegates, which gives a representative voice to local, ethnic, and specialty bar associations statewide.

The State Bar and its subdivisions perform a myriad of functions which fall into six major categories: (1) testing State Bar applicants and accrediting law schools; (2) enforcing the State Bar Act and the Bar's Rules of Professional Conduct, and promoting competence-based education; (3) ensuring the delivery of and access to legal services; (4) educating the public; (5) improving the administration of justice; and (6) providing member services.

Much of the Bar's annual budget is spent on its attorney discipline system. The system includes the nation's first full-time professional attorney discipline court and a large staff of investigators and prosecutors. The Bar recommends sanctions to the California Supreme Court, which makes final discipline decisions. However, Business and Professions Code section 6007 authorizes the Bar to place attorneys on involuntary inactive status if they pose a substantial threat of harm to clients or to the public, among other reasons.

Major Projects

Supreme Court Rescues Discipline System After Yearlong Stalemate; Wilson Leaves Office Without Resolving Bar Crisis

On December 3, the California Supreme Court ordered the state's attorneys to contribute a special assessment in order to resurrect the State Bar's attorney discipline system, which had been allowed to close down in June 1998 due to lack of funds.

The court's rescue of the Bar's discipline system is just one of many steps needed to resuscitate the State Bar, which has collapsed in the wake of one of the most unusual show-downs in state history. For the Bar, the crisis began in October 1997 when Governor Pete Wilson vetoed its "dues bill," legislation that would have authorized the Bar to charge its attorney members \$458 per year in compelled Bar licensing fees for 1998 and 1999. For Governor Wilson, the Bar's problems began much earlier.

♦ **The Bar's Ill-Fated Dues Bill.** Various provisions of existing law authorize the Bar to charge its members a number of fees on an annual basis. The most important of those provisions are Business and Professions Code section 6140, which authorizes the Bar to assess annual membership fees, and section 6140.4, which permits the Bar to levy a special surcharge of \$110 annually to fund the Bar's attorney discipline system. Section 6140.4's surcharge was added in 1988, after SB 1498 (Presley) (Chapter 1159, Statutes of 1998) substantially overhauled the structure and decisionmaking functions of State Bar Court. [11:4 CRLR 1; 8:4 CRLR 123-24] However, these provisions include sunset dates, and the Bar typically sponsors annual legislation extending the sunset dates and authorizing to charge its members licensing fees ("dues").

SB 1145 (Burton), the Bar's 1998-99 dues bill, was passed on September 9, 1997, after a rocky trip through the legislature; three public members of the Board of Governors even testified against it in the Assembly. The bill would have authorized the Bar to charge attorney members who have been licensed three years or more a total of \$458 per year—\$20 less than in prior years—during 1998 and 1999. The annual membership portion of this fee would have been \$271, and the discipline system surcharge remained at \$110. The bill would also have required the Bar to rebate at least \$10 to each member in 1998 from the expected proceeds of the sale of its Franklin Street office building in San Francisco; and to provide specific, detailed responses to each recommendation contained in a May 1996 report issued by the State Auditor, in which the Auditor noted numerous ways in which the Bar could save money and reduce licensing fees.

During 1997, the Bar was especially anxious to secure a two-year dues bill, and had contracted with lobbyist Mel Assagai to ensure its passage. The lobbyist contract proved controversial: Assagai was formerly a Bar employee who functioned as a legislative lobbyist from the Bar's Sacramento office. When Assagai announced plans to leave the Bar and start a private lobbying firm in early 1997, the Bar entered into a contract with him for \$900,000 over two years—including a special bonus of \$75,000 if his work resulted in the enactment of a two-year dues bill. The contract was negotiated without competitive bidding, and the \$75,000 bonus proved to be illegal under Government Code section 86205(f), which states that a lobbyist may not "accept or agree to accept any payment in any way contingent upon the defeat, enactment or outcome of any proposed legislative or administrative action." When the illegal provision was exposed in the media, it was rescinded and Assagai eventually paid a \$2,000 fine to the Fair Political Practices Commission; but the damage was done.

♦ **The Governor's Veto.** On October 11, 1997, Governor Wilson vetoed SB 1145. In a stinging veto message, the Governor alluded to a number of long-simmering problems at the Bar. He discussed the dissatisfaction of many attorneys with the structure and governance of the Bar; as an integrated, mandatory bar which is part state agency and part trade association, many members believe the Bar is using compelled licensing fees to carry out political activities with which they disagree. "Simply stated, some members believe that the Bar cannot function effectively as both a regulatory and disciplinary agency as well as a trade organization designed to promote the legal profession and collegial discourse among its members." Although this issue was purportedly settled in *Keller v. State Bar*, 496 U.S. 1 (1990), many feel the Bar has not been abiding by the rule established in *Keller*. In that case, the U.S. Supreme Court struck down the Bar's use of compelled licensing fees for political or ideological activities unrelated to the regulation of the legal profession or improving the quality of legal services available to the people of the state. [8:4 CRLR 215] Since then, the Bar has divided its expenses into "chargeable" expenses permitted by *Keller*, and "nonchargeable" expenses invalidated by *Keller*, and has been permitting members who do not wish to fund "nonchargeable" activities to request a refund of that proportion of their Bar dues. [15:4 CRLR 251; 15:1 CRLR 179] The whole process has resulted in nothing but dispute and litigation for the past nine years, and—in his veto message—Wilson criticized the "minuscule rebate" (generally \$2–4 per year) for those opposed to the Bar's political activities.

The high price of mandatory Bar dues also played a role in the Governor's veto. "Indeed, California bar dues are more than twice the average of the other forty-nine states, which is approximately \$200 per year. None of this appears to be of any consequence to the Bar, but then the Bar's own small army of staff attorneys pays no bar dues at all." Wilson also stated that the Bar does not spend its members' dues money wisely; he described the Bar as "bloated, arrogant, oblivious, and unresponsive," and opined that the Bar has lost focus: "The Bar has drifted...and become lost, its ultimate mission

obscured. It is now part magazine publisher, part real estate investor, part travel agent, and part social critic, commingling its responsibilities and revenues in a manner which creates an almost constant appearance of impropriety." Specifically, the Governor pointed to the \$900,000 lobbying contract with the illegal bonus provision; its agreement to pay new Executive Director Steve Nissen \$200,000 per year "plus perks"; and the Bar's resistance to legislative efforts to reduce dues and to scale back SB 1145 to a one-year bill to ensure continued legislative oversight of the Bar.

Finally, the Bar's Conference of Delegates upset Wilson by adopting resolutions "in favor of legalizing same sex marriages, to prohibit discrimination against transvestites and transsexuals, to reduce penalties for drug dealers, to reduce penalties for repeat child molesters, [and] to thwart the will of the voters relative to affirmative action at state law schools."

In vetoing the dues legislation, Wilson noted that "it is time for the Bar to get back to basics: admissions, discipline, and educational standards." He said he would sign a dues bill that "required Bar members to pay only for functions which were, in fact, a mandatory part of a responsible, cost efficient regulatory process."

♦ **Bar Shutdown.** In the wake of the Governor's veto of the Burton bill, legislators and Bar officials scrambled to craft a bill to deal with the future of the Bar (see discussion below). On the fiscal level, during 1998 the Bar was able to assess active members only \$77 of the \$458 it had requested in SB 1145 (and \$50 of that \$77 is legislatively earmarked for the Bar's Client Security Fund and its Building Fund); it issued an urgent missive asking all members to voluntarily pay the full amount, but few responded. On January 22, 1998, the Bar eliminated 45 of its 700 employee positions; by March, it was warning employees that 60-day layoff notices would be issued if the legislature did not act soon. On April 27, over 500 Bar employees received 60-day pink slips. On April 29, the Bar announced a shutdown of its toll-free complaint number (which receives 140,000 calls per year); no new complaints against attorneys would be accepted, and only the most serious of the 1,600 then-pending complaints would be investigated and pursued by remaining staff.

On June 22, with funds about to run out and no emergency legislation in sight, the Bar petitioned the California Supreme Court to issue an emergency order requiring California lawyers to pay a reduced amount of dues (\$287) to keep the Bar functioning. According to the petition submitted by then-Bar President Marc Adelman, "unless the Court acts immediately, most of the State Bar's judicial and governmental functions...will be effectively shut down after June 26, 1998." On June 24, the court refused to intervene, expressing hope that the Bar "and the other two branches of government" would resolve this matter quickly. The court even offered the services of Chief Justice Ronald George to act as a mediator between the two sides. Neither side accepted the offer. On June 26, the Bar ran out of operating funds and laid off 470 employees, retaining only about 200 persons to handle the most essential functions and those programs which are funded by sources independent of the dues bill.

♦ **The Impact of the Shutdown.** The funding crisis impacted segments of the Bar differently, depending on how they are funded. For example, all 70 full-time positions in the Bar's admissions department were preserved because of the self-funding nature of the Bar exam. Fourteen full-time employees of the Bar's Client Security Fund program also retained their jobs, because the CSF is funded through legislation separate from the dues bill. Created in Business and Professions Code section 6140.5, the CSF attempts to compensate clients who have suffered financial losses caused by deliberate dishonest acts of active Bar members arising from or connected to the practice of law.

Other areas were not so fortunate. The Bar's Office of Professional Competence, which is usually staffed by ten persons, was reduced to two. That office's main responsibility is maintenance of the Bar's Ethics Hotline, which has since been shut down.

And the Bar function of most importance to consumers—the attorney discipline system, which receives, investigates, and prosecutes complaints against lawyers and takes disciplinary action against their licenses to protect the public—was hardest hit by the shutdown. The Bar's 283-person discipline office—consisting of investigators, prosecutors, a probation unit, and a prevention team—was slashed to 20 employees. The State Bar Court, which once had 52 positions, ended up with only seven. The State Bar Court judges continued working but temporarily reduced their salaries to the cost of three full-time judges.

The impact of the layoffs has been severe. From April to October, the Bar received 2,097 written complaints about attorneys, and investigated none of them. The Bar also halted the investigation of another 4,400 pending cases. Of the 159 fully investigated cases scheduled for hearing before the end of the year, the State Bar Court will only be able to hear about 40 cases; the rest of the court's 700-case workload has been abated, and most of the attorneys subject to those charges remain free to practice.

♦ **Former State Bar Discipline Monitor Weighs In.** On May 1, Center for Public Interest Law (CPIL) Executive Director Robert C. Fellmeth urged Governor Wilson and key legislators to quickly resolve the discipline crisis. Fellmeth served as State Bar Discipline Monitor from 1987 through 1992, and—along with former Senator Robert Presley—was the chief architect of the 1988 structural changes to the Bar's discipline system, including removal of disciplinary decisionmaking from the jurisdiction of the Board of Governors.

Fellmeth acknowledged that the Bar has brought most of its problems upon itself, but defended the discipline system. According to Fellmeth, the discipline system “has made important strides in terms of structure, authority, and output, and it—along with the consumers of California who must rely on the Bar to police errant attorneys—is suffering disproportionately from the current funding crisis.” Fellmeth viewed the fee bill crisis as an opportunity to make some much-needed changes to the Bar's structure. He urged the Governor and legislature to disintegrate the existing State Bar by severing its trade association functions into a voluntary organization. Specifically,

Fellmeth argued that the admissions, standardsetting (through the establishment of the Rules of Professional Conduct), and discipline components of the Bar should be retained, along with the Client Security Fund, the Legal Services Trust Fund (which is funded with interest accruing on attorneys' client trust funds and assists legal services organizations in providing legal services to the indigent), and Bar's fee arbitration programs. The Conference of Delegates, the Bar's “sections” which focus on specific areas of the law, and all Bar legislative and other lobbying on issues which are unrelated to the regulation of the legal profession should be spun off into a separate voluntary trade association. Fellmeth also stated that “the primary statutory charge of this agency should be unambiguously clarified: protection of the public from incompetent, dishonest, or impaired attorneys.”

Fellmeth also advocated a restructuring of the Board of Governors from a primarily elected, attorney-dominated board to an appointed body consisting in majority of public members, and which is fully subject to the Bagley-Keene Open Meeting Act. Fellmeth suggested that “it may be appropriate to designate a number of positions to be appointed by the Governor, a number by the legislature, and perhaps the majority by the California Supreme Court. Given this agency's concededly unusual role in serving and supporting the judicial branch, such a role may be appropriate.”

Finally, Fellmeth stressed that Bar dues for disciplinary functions should not be reduced. “While the Bar may be guilty of excessive spending generally, do not mistake the current problem as one of excessive spending on discipline.... ‘Punishing’ the Bar by cutting attorney dues to below \$400 per year hurts consumers who need a strong discipline system.” Fellmeth noted that “the sum is hardly excessive....Members of the Bar are paying approximately two hours of billable time per year for a strong discipline system which assures minimum competence and honesty....Cutting dues for discipline is irresponsible given the level of consumer protection here required and the lessons we learned in the 1980s when we underfunded this function—as is now again proposed.”

♦ **The Governor Speaks.** After seven months of silence, Governor Wilson held a press conference on May 29 to announce his preferences regarding the Bar. His plan would “concentrate the Bar's mandate” (by charging it with protection of the public rather than promotion of the legal profession), “restore financial accountability” (by cutting Bar dues to \$295 per year, and placing the Bar on a fiscal year budget which is annually submitted to the legislature), and “improve oversight.” As to the last component of his plan, the Governor proposed conversion of the 23-member Board of Governors into an appointed board fully subject to the Bagley-Keene Open Meeting Act, and the shifting of the duties of the State Bar Court to the California Supreme Court. He advocated legislation prohibiting the Bar from spending members' dues without express statutory authority, prohibiting the Bar from engaging the services of contract lobbyists unless specifically authorized by legislation, and restricting Bar legislative lobbying to “legislation directly impacting Bar admissions, discipline, and scope of practice, as well as the regulation of

law schools or their administration of Bar programs expressly authorized by statute."

♦ **Legislative Initiatives.** Meanwhile, and with no apparent sense of urgency, the legislature slowly worked on three bills intended to end the impasse and provide the Bar with operating funds. In the end, none of them were forwarded to the Governor, nor were any of several other urgency "stop-gap" measures intended to reinstate the Bar's discipline system on an interim basis until the matter is resolved.

The Bar sponsored AB 1669 (Hertzberg), which would have preserved its existing governance structure and its current authority to regulate admissions, discipline, and development of professional standards; reduced Bar dues to \$320 by January 1, 1999; and prohibited the Bar from using compulsory dues on its Conference of Delegates or its sections. AB 1669 would also have removed the Bar's existing authority to lobby on issues relating to "the administration of justice" and "science of jurisprudence," and restricted Bar legislative lobbying to its discipline, admissions, professional competence, and legal services functions. Toward the very end of the legislative session, legislators appeared close to a compromise on the Hertzberg bill that the Governor might accept (reportedly, the compromise included an appointed Board of Governors, annual dues at the \$325 level, and Wilson's preferred restrictions on Bar lobbying), but the bill never came to the Senate floor for a vote and the legislation died as the session ended.

AB 1798 (Morrow) called for much more serious changes to the Bar. Assemblymember Morrow's bill would have stripped the Bar of all but its most essential services: admissions, discipline, and regulation of the legal profession. AB 1798 would have eliminated the Client Security Fund, the Bar's oversight of attorney referral services, the Legal Services Trust Fund, and the Bar's Judicial Nominees Evaluation Commission, which rates the Governor's proposed nominees to the bench. The Morrow bill would have reduced Bar dues to \$272. AB 1798 never made it out of the Assembly Judiciary Committee, but Assemblymember Morrow continued to play a major role in the Bar dues bill debate.

SB 1371 (Kopp) took a radically different approach. Senator Kopp's bill aimed to abolish the Bar entirely and turn most of its functions over to the Administrative Office of the Courts under the California Supreme Court. SB 1371 would have allowed for the creation of a voluntary California State Lawyer's Association to lobby on behalf of lawyers. The bill never came to a vote, but Senator Kopp also remained a major player in the dues bill debate.

♦ **A Second Supreme Court Petition.** August 31 marked the end of the legislative session, and legislators failed to pass any dues bill. On September 30, the Bar once again petitioned the California Supreme Court to intervene. This time, the Bar asked the court to issue an emergency order requiring all attorneys to pay \$171.44 in order to partially restore essential functions of the discipline system on an interim basis. The fee would fund the Chief Trial Counsel's Office, which is responsible for intake, investigation, and prosecution of complaints; the State Bar Court, responsible for hearing and ad-

judicating disciplinary matters; the Fee Dispute Arbitration program; the Office of Professional Competence; the Office of Membership Records; and the General Counsel's Office.

The Bar argued that the court has the inherent right to impose such a fee under Article VI of the California Constitution, which authorizes the court to regulate the practice of law, including the power to admit and discipline attorneys. While the legislature may exercise police power over the legal profession, the court retains primary policymaking authority in this area, including the ability to review legislative actions to ensure the legislature has not overstepped its boundaries.

The Bar stressed that it was only requesting interim, partial funding to resolve a severe crisis: At the time of the June 26 layoffs of 80% of the Bar's staff, work on 4,459 open investigations was suspended. Since then, the Bar had received 2,097 new written complaints, bringing the total unresolved investigations to 6,556—far exceeding the 4,000-case 1985 backlog which precipitated the 1986 legislation authorizing the appointment of the State Bar Discipline Monitor and the subsequent restructuring of the State Bar Court. The Bar argued that, because of the legislature's failure to act, the Supreme Court was the last available remedy for consumers; a dues bill passed in 1999 will not take effect until January 1, 2000.

♦ **Supreme Court Rescues Discipline System.** Following oral argument on November 9, the California Supreme Court ruled in favor of the Bar in *In Re Attorney Discipline System*, 19 Cal. 4th 582 (Dec. 3, 1998). Citing its "inherent [constitutional] authority over the discipline of licensed attorneys in this state" and noting that the State Bar Act enacted by the legislature "did not divest this court of any of its preexisting powers related to discipline, including the power to create and fund a disciplinary system through the assessment of fees on attorneys," the court adopted new Rule 963 (Interim Special Regulatory Fee for Attorney Disciplinary), requiring every lawyer actively practicing law in the state to pay \$173. The funds raised are to be used only for disciplinary purposes. To ensure that the money collected is used properly, the court appointed retired Court of Appeal Justice Elwood Lui as a special master to oversee the collection and disbursement of the special assessment. The Bar will be responsible for day-to-day management of the discipline system, with Justice Lui evaluating the functions and expenditures of the Bar and reporting back to the court.

The court cited several reasons for its decision, including public protection. On this issue, the court rejected arguments by counsel for Senators Ray Haynes, Ken Maddy, and Ross Johnson, and Assemblymembers Dick Ackerman and Bill Morrow, who contended that there is no real need for a discipline system within the Bar; instead, attorney misconduct should be dealt with exclusively through criminal complaints and civil law suits brought by injured clients. The court stated that these remedies "would not protect future clients adequately from potentially damaging conduct by attorneys," and noted that such a system "would place attorneys in a unique position: Every other licensed profession in the state of which we are aware is regulated by a board that has the power to suspend or revoke the license of an errant practitioner...."

The court also noted the unique position of the Bar in relation to its own workload. In the past, the court spent a "considerable portion" of its resources reviewing the Bar's attorney discipline decisions. "Since the implementation of the reforms affecting the State Bar disciplinary process in the late 1980s, however, this court has been able to reduce considerably its resources devoted to overseeing the process, and instead has relied upon the professionalism and consistency generated by the revised process, particularly that achieved by the newly created State Bar Court....The continuing severe disruption or diminution of this system will have a concomitantly deleterious impact on the court."

Finally, the court noted that time is of the essence. Rejecting Governor Wilson's argument that the court should let the new Governor and legislature resolve this matter, the court stated that "an entire year has now passed without a fee bill being in effect....Even if a bill is enacted soon after January 1, 1999, it may well not take effect until January 1, 2000....Given the public interests that are at grave risk, the now long-standing deadlock that has devastated the ability of the existing system to function, and the court's inherent power and authority in this area, we find that it is reasonable and necessary to discharge our primary responsibilities in this area."

The court-ordered assessment must be paid in addition to other fees already mandated by legislation by February 1, 1999.

♦ **The Fate of the Bar.** As Governor Wilson left office without addressing the remaining issues affecting the Bar and California consumers who depend on it to police dishonest, incompetent, or impaired lawyers, the Bar's fate now rests with the Davis administration and the newly-elected legislature.

Bar Leaders Conduct Business As Usual

Despite the lingering crisis jeopardizing the future of the Bar, its leaders have maintained a "business-as-usual" approach: The Board of Governors elected a President for 1998-99, held elections for vacant seats on the Board, and held its annual meeting in Monterey.

♦ **Election of New President.** At its September 12 meeting, the State Bar elected San Francisco attorney Raymond C. Marshall to be its 73rd president. Marshall is a partner in the law firm of McCutchen, Doyle, Brown, & Enersen. He has served on the Board of Governors for three years, and chaired the Bar's committees on communications, public policy, and legal and ethnic minorities. Marshall received his law degree from Harvard and has practiced at McCutchen Doyle for twenty years.

Marshall's top priority is to get the Bar's discipline system running again. As such, one of his first duties was to personally argue the Bar's petition for the dues assessment in front of the Supreme Court on November 9 (see above). With the court ruling in the Bar's favor, Marshall plans to turn his attention to crafting a lasting dues bill for 2000. After that, Marshall wants to look into restructuring the Bar in a manner that will work better for both lawyers and the public, and avoid some of the current criticisms of the Bar. Marshall plans to seek input from legislators, lawyers, and the public in a series of meetings and forums.

♦ **Board of Governors Elections.** As required by the State Bar Act in Business and Professions Code section 6021, the Bar held elections for vacancies on its Board of Governors in advance of its annual meeting in October. The fee crisis forced the Bar to get creative with its financing of the election. Corporate sponsors paid the bill for mailing ballots to members in exchange for permission to enclose advertisements in the ballot packets. The Bar did not enclose statements describing candidates or return postage envelopes with the ballot packets, requiring members to mail back the ballots themselves.

The low-cost tactics were at least partly responsible for the election results. Bar members voted at an all-time low rate. In Los Angeles, only 2,890 ballots were cast, compared to 11,110 in 1997 and 8,809 in 1996. In the East and South Bay areas outside San Francisco, only 1,011 ballots were cast, compared to 4,663 in 1997 and 5,005 in 1996.

In Los Angeles County, Bar members elected two new representatives to the Board of Governors: Los Angeles County Deputy District Attorney Karen S. Nobumoto and James D. Otto, the managing partner of Cummins & White. Elsewhere, Sacramento County Bar President James D. Greiner was elected to represent that area; Oakland sole practitioner David Roth was elected to represent the East and South Bay district outside San Francisco; and Ronald Albers ran unopposed to represent San Francisco and Marin counties.

♦ **Annual Meeting.** The State Bar held its 1998 annual meeting from October 1-4 in Monterey. Due to its financial problems, the conference was completely self-funded; no member dues were expended on the event. Although the Bar considered cancelling the meeting, it would have suffered \$420,000 in cancellation fees had it done so. Over 2,600 people attended, of which 1,252 were paid enrollees.

The conference featured speeches, seminars, and presentations which enabled lawyers to earn continuing legal education (CLE) units. Over 120 CLE courses, including "Time Management for Attorneys" and "Cyberspace Law," were offered, along with courses on legal ethics and substance abuse. The rest of the conference was comprised of numerous speeches from judges, politicians, businesspeople, lawyers, and television celebrities.

JNE Commission Attracts Private Funding

The Bar's Commission on Judicial Nominees Evaluation (JNE or "Jenny" Commission), created in 1979 pursuant to Government Code section 12011.5, investigates the qualifications of persons being considered by the Governor for an appointment to the bench prior to their appointment. An investigation team of the Commission solicits information about a judicial nominee by mailing 500-600 questionnaires and making follow-up phone calls to interview individuals who have had contact with the potential appointee; the team also reviews legal opinions, briefs, and transcripts, and interviews both the nominee and his/her colleagues. The team presents its findings to the full Commission, which consists of 25-30 members; the Commission discusses the facts learned in the investigation and assigns a rating to the candidate. The possible ratings are exceptionally well-qualified, well-qualified,

qualified, and not qualified. So long as the candidate meets certain residency and occupational requirements, the Governor may appoint him/her even if deemed not qualified by the JNE Commission. In such a case, the Commission may make public this fact after due notice to the appointee of its intention to do so.

The funding problems of the State Bar now jeopardize the existence of the Commission, which was not funded by the California Supreme Court's December 3 order (see above). Thus, JNE has turned to the state's largest law firms to make one-time donations of \$10,000 to help with its current fiscal crisis. The goal of JNE officials is to raise \$150,000 to continue its investigations of potential judges. These funds are expected to adequately cover the costs of performing these evaluations until March 1999, when the terms of the current JNE members end. According to one fundraiser, more than a dozen unnamed law firms throughout California have donated \$10,000 or less each. At its July 1998 meeting, the Board of Governors approved the fundraising activities of the Commission.

However, critics believe there is a conflict of interest in that the donations given by these law firms could come at a cost, where the price tag comes in the form of favors given to the firm in question. In particular, potential judges may currently work for the same law firms that are donating the money. To assuage the critics, Commission Chair Helen E. Zukin of Los Angeles claims that precautions have been taken. According to Zukin, few commissioners know the names of all the law firms that have contributed money, and those commissioners who know the name of a law firm that has contributed money in a case they are evaluating must remove themselves from that particular evaluation.

Minimum Continuing Legal Education Program in Jeopardy

SB 905 (Davis) (Chapter 1425, Statutes of 1989) added section 6070 *et seq.* to the Business and Professions Code. [9:4 CRLR 138] This provision required the State Bar to submit to the Supreme Court a rule of court mandating "minimum continuing legal education" (MCLE) for members of the California Bar. Under SB 905, the rule must require active Bar members—with specified exceptions—to complete at least 36 hours of CLE courses during each three-year period, including four hours of ethics instruction, four additional hours in either ethics or law practice management, and one hour each in substance abuse and the elimination of bias from the legal profession. SB 905 included four exemptions from the MCLE requirement: retired judges, officers and elected officials of the State of California, full-time professors at American Bar Association-approved or California-accredited law schools, and full-time employees of the state of California acting within the scope of their employment. The following year, the Bar adopted and the Supreme Court approved Rule 958, California Rules of Court, to effectuate SB 905.

In March 1997, the First District Court of Appeal invalidated the Bar's MCLE program in *Warden v. State Bar*, finding that imposition of the requirement on some members of

the Bar violates their equal protection rights because there is no rational basis for the exemptions (see LITIGATION). In June 1997, the California Supreme Court granted the Bar's petition for review of the First District's opinion. The Bar's MCLE requirement is still in effect during the pendency of the *Warden* litigation; however, the Board of Governors has made adjustments to the MCLE compliance process during the pendency of the appeal. While the case remains unresolved, the Bar encourages all active members to comply with the requirement, but is not placing members on administrative inactive status for failure to comply, and has delayed the assessment of \$75 noncompliance fees on members who have failed to comply.

California Supreme Court Rejects Confidentiality Rule

In September, the California Supreme Court rejected proposed Rule 3-100, Rules of Professional Conduct, which would have permitted (but not required) an attorney "to reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent the client from committing a criminal act that the member believes is likely to result in death or substantial bodily harm."

The rule was proposed to resolve an apparent conflict between Business and Professions Code section 6068(e), which requires lawyers to "maintain inviolate" client confidences, and Evidence Code section 956.5, which creates an exception to the attorney-client privilege "if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm." The Supreme Court rejected the proposed rule without comment. This marks the third time since June 1988 that the Court has rejected a State Bar rule in this critical area. [13:4 CRLR 215; 11:2 CRLR 182]

Legislation

AB 1669 (Hertzberg), as amended May 14, would have limited the functions of the State Bar to those authorized by the legislature and the Supreme Court, including (among others) responsibilities related to the enforcement of the disciplinary provisions of the State Bar Act, the maintenance of member records, the determination of the qualifications and testing of candidates regarding admission to the practice of law, the development and promulgation of standards of professional conduct for its members, the certification of programs to improve the quality of legal services, and other specified functions; the bill would also have limited, as of January 1, 1999, the State Bar's use of fees collected as revenue, and would have provided that mandatory fees may be used only for those activities specified above. AB 1669 would also have removed the Bar's existing authority to lobby on issues relating to "the administration of justice" and "science of jurisprudence," and restricted Bar legislative lobbying to its discipline, admissions, professional competence, and legal ser-

vices functions. The bill would have required the Bar to annually present its budget to the fiscal committee of each house of the legislature for review.

AB 1669 would have authorized the Bar to charge active members in practice for three years or more \$340 in 1998 and \$320 in 1999 and 2000. The bill would have prohibited the Bar, after July 1, 1998, from funding the Conference of Delegates with mandatory fees. It would further have prohibited the Bar, after January 1, 1999, from funding its sections with mandatory fees; and required the Bar to request the California Supreme Court to rescind Rule 958, California Rules of Court, which currently requires active Bar members to complete 36 MCLE hours every three years (see MAJOR PROJECTS), and instead required the Administrative Office of the Courts to conduct of study of MCLE by January 1, 2000.

AB 1669 died on the Senate floor on August 31.

AB 1798 (Morrow), as amended March 23, would have limited the responsibilities of the State Bar to specific areas including, among others, the enforcement of disciplinary provisions, the maintenance of member records, the determination of the qualifications and testing of candidates regarding admission to the practice of law, the development and adoption of standards of professional conduct for its members, and other duties authorized by statute.

AB 1798 would have limited the Bar's use of fees collected as revenue, and provided that mandatory fees may be used only for those activities specified above; restricted the Bar from expending any compulsory membership fees to engage in advocacy for or against any legislation that is not related to the regulation of, or admission to, the legal profession; and prohibited the Bar from awarding a contract for goods, services, or both, in an aggregate amount in excess of \$50,000, except under a request for proposals procedure.

The bill would have prohibited the Conference of Delegates and the Bar's subject-matter sections from operating as part of the Bar; and repealed the provisions of law establishing the Bar's MCLE program, its Building Fund, its Client Security Fund, its registration and regulation of lawyer referral services, its Legal Services Trust Fund, and the Judicial Nominees Evaluation Commission. **AB 1798** died in the Assembly Judiciary Committee.

SB 1371 (Kopp), as amended April 2, would have transferred to the Supreme Court and the Administrative Office of the Courts, as of July 1, 1999, all the powers, duties, and functions relating to admission to the practice of law, attorney discipline, mandatory continuing legal education, and the Client Security Fund currently vested in the State Bar Board of Governors; provided for the transfer of employees of the State Bar that perform the transferred functions to the Administrative Office of the Courts, and would prohibited that office from paying the licensing fees of its attorney employees; and authorized the establishment of a voluntary, unincorporated association called the California State Lawyer's Association, and declared the intent of the legislature that all assets of the State Bar be transferred to the Association upon its formation to the extent that transfer is consistent with the California Constitution.

Senator Kopp later amended his bill to limit the functions of the State Bar to those authorized by the legislature, and specifically limit the responsibility of the State Bar, and the expenditure of compulsory membership fees, to certain disciplinary matters, maintenance of records, an ethics hotline, and related communications; the bill would have transferred the State Bar Court to the California Supreme Court. **SB 1371** would also have authorized the State Bar to perform functions related to judicial nominee evaluation, admission to practice, legal specialties, lawyer referral services, fee arbitration, and the income on trust account program, but would permit those programs to be funded only from specified sources. As amended, **SB 1371** would also have converted the primarily-elected Board of Governors to a 19-member Board with 17 members appointed by the Governor, one by the Speaker of the Assembly, and one by the Senate Rules Committee; and would have subjected the Bar and its committees to the Bagley-Keene Open Meeting Act. **SB 1371** died in the Senate Judiciary Committee.

AB 1374 (Hertzberg), as amended August 24, clarifies Article 13 of the State Bar Act, which establishes the Bar's arbitration system for the resolution of fee disputes between attorneys and their clients. The bill amends Business and Professions Code section 6204 to clarify that the parties may agree in writing to be bound by the award of arbitrators appointed pursuant to Article 13. This bill was signed by the Governor on September 23 (Chapter 798, Statutes of 1998).

AB 1716 (Murray), as amended August 24, would have authorized a lawyer to sell financial products (such as long-term care insurance, life insurance, and annuities governed by the Insurance Code) to any client who is an elder or dependent adult with whom the lawyer has or has had an attorney-client relationship in the past three years, so long as the lawyer provides that client with a written disclosure that includes certain information about the financial product, including a statement that if the purchase of the financial product is for the purposes of Medi-Cal planning, the client has been advised of other appropriate alternatives, including spend-down strategies. **AB 1716** would also have created a new cause of action for civil damages and other civil remedies for clients injured by an attorney's sale of financial products in violation of this section.

Governor Wilson vetoed **AB 1716** on September 30, noting that "I would sign this bill to provide elder protection were it not for the requirement that the attorney advise his client as to how to spend down his assets in order to qualify for Medi-Cal."

AB 2086 (Keeley), as amended August 27, amends section 1282.4 of the Code of Civil Procedure—effective until January 1, 2001—to permit persons admitted to the bar of any other state to represent a party in an arbitration proceeding in California, or to render legal services in this state in connection with an arbitration proceeding in another state. Such attorneys must serve upon the arbitrator, the State Bar of California, the parties, and counsel a certificate containing specified information prior to the first scheduled hearing in the arbitration. In the bill, the legislature expressed its intent to respond

to the holding in *Birbrower, Montalbano, Condon & Frank v. Superior Court (ESQ Business Services, Inc., Real Party in Interest)* (see LITIGATION) to provide a procedure for non-resident attorneys who are not licensed in this state to appear in California arbitration proceedings. AB 2086 was approved by Governor Wilson on September 28 (Chapter 915, Statutes of 1998).

AB 2069 (Kaloogian), as amended August 10, authorizes the superior court to appoint a practice administrator with specified powers to take control of the practice or deceased or disabled member of the State Bar of California. AB 2069 was approved by Governor Wilson on September 21 (Chapter 682, Statutes of 1998).

Litigation

At this writing, the California Supreme Court is considering a case challenging the constitutionality of the State Bar's Minimum Continuing Legal Education (MCLE) program (see MAJOR PROJECTS). In *Warden v. State Bar of California*, 53 Cal. App. 4th 510 (Mar. 13, 1997), the First District Court of Appeal found that the statute creating the Bar's MCLE program is unconstitutional because it violates the equal protection rights of Bar members who are not exempt from the program. Created in 1989 by SB 905 (Davis) (Chapter 1425, Statutes of 1989), the MCLE program is designed "to assure that, throughout their careers, California attorneys remain current regarding the law, the obligations and standards of the profession, and the management of their practices." Under Business and Professions Code section 6070 *et seq.*, Bar members must complete 36 hours of CLE during each three-year compliance period, including four hours of legal ethics, four more of either ethics or law practice management, and one hour each in substance abuse and elimination of bias in the legal profession. Exempt from the MCLE requirement (either as set forth in section 6070 or in Rule 958, California Rules of Court) are retired judges, officers and elected officials of the State of California, full-time professors at accredited law schools, and full-time state and federal employees acting within the scope of their employment.

In 1993, attorney Lew Warden challenged the MCLE requirement after the Bar placed him on administrative inactive status for his refusal to comply. Warden alleged that the MCLE program violates his right to equal protection by exempting certain Bar members from its requirements. The superior court granted the Bar's motion for summary judgment, and Warden appealed.

The Court of Appeal agreed with Warden, finding that the statutes creating program are unconstitutional because there is no rational relationship between the goal of the legislation and the exemptions for state officers, elected officials, retired judges, and full-time law professors. All of these exempted members could actively represent clients, yet there is no mechanism to ensure that they are aware of current legal developments. By a 2-1 vote, the First District also rejected the Bar's invitation to rewrite the statute by "excising the offending exemptions." Here, the court examined the legislative history of SB 905 (Davis) and found that the bill as

introduced included no exemptions from its requirement; however, the legislature "rejected that legislative opportunity" and enacted the bill with the specified exemptions.

On June 5, 1997, the California Supreme Court granted the State Bar's petition for review. Should the Supreme Court affirm the First District's finding that the exemptions are unconstitutional, the Bar is reiterating its request that the court simply sever the exemptions from the MCLE legislation, thus making all Bar members subject to the requirements. Alternatively, the court may throw out the statute entirely. If the court rejects the entire measure, the State Bar will be forced to sponsor new legislation requiring MCLE for California attorneys.

In *Birbrower, Montalbano, Condon & Frank v. Superior Court (ESQ Business Services Inc., Real Party in Interest)*, 17 Cal. 4th 119 (Jan. 5, 1998; as modified Feb. 25, 1998), the California Supreme Court held that out-of-state attorneys not licensed to practice law in California may not enforce a fee agreement for representing a California client in California regarding an in-state business dispute.

ESQ Business Services, a California corporation, entered into a legal retainer agreement with the New York law firm of Birbrower, Montalbano, Condon & Frank to provide services in ESQ's claim against Tandem Computers, Inc., a Delaware corporation with its principal place business in Santa Clara County. Although none of Birbrower's attorneys were licensed to practice in California, two of them traveled to California on numerous occasions to advise ESQ regarding its dispute with Tandem, meet with Tandem representatives to represent ESQ, interview potential arbitrators to hear the matter, and discuss a proposed settlement agreement authored by Tandem. ESQ eventually settled the dispute with Tandem, and it never went to arbitration. Before the settlement, ESQ and Birbrower modified their fee agreement, converting the agreement from a contingency agreement to a fixed-fee agreement under which ESQ would pay Birbrower over \$1 million.

In January 1994, ESQ sued Birbrower in California for legal malpractice; Birbrower filed a counterclaim which included a claim for its attorneys' fees for the work it performed for ESQ in both California and New York. ESQ moved for summary judgment on Birbrower's counterclaim, arguing that by practicing law in California without a license, Birbrower violated Business and Professions Code section 6125, rendering the fee agreement unenforceable. The trial court granted ESQ's motion, and the court of appeal affirmed. The Supreme Court agreed to review the matter to determine whether Birbrower's actions and services performed while representing ESQ in California constituted the unauthorized practice of law under section 6125 and, if so, whether a section 6125 violation renders the fee agreement wholly unenforceable.

The Supreme Court affirmed the trial court's ruling in part, holding that Birbrower could not enforce the fee agreement for legal services that it performed in California. The court acknowledged that modern legal practice has made definition of the terms "practice of law" and "in California" difficult, and recognized the need to examine each case individually on its own facts. In this case, "Birbrower engaged in unauthorized law practice in California on more

than a limited basis, and no firm attorney engaged in that practice was an active member of the California State Bar." Allowing Birbrower to enforce the agreement as to legal services performed in California would be allowing Birbrower to enforce an illegal contract. The court found that Birbrower might be able to collect for legal services that it performed legally in New York; thus, the fee agreement was not totally unenforceable. The court also rejected Birbrower's invitation to "create an exception to section 6125 for work incidental to private arbitration or other alternative dispute resolution proceedings," noting that "any exception for arbitration is best left to the Legislature, which has the authority to determine qualifications for admission to the State Bar and to decide what constitutes the practice of law." The U.S. Supreme Court denied Birbrower's petition for certiorari on October 5, and the California legislature has now responded to the court's decision with AB 2086 (Keeley) (see LEGISLATION).

In *Swidler & Berlin v. United States*, 524 U.S. 399 (June 25, 1998), a divided U.S. Supreme Court ruled that the attorney-client privilege survives a client's death. The case arose out of an investigation conducted by Independent Counsel Kenneth Starr into the dismissal of several employees of the White House's Travel Office. Vincent W. Foster, Jr., was Deputy White House Counsel when the firings occurred. In July 1993, Foster met with James Hamilton, an attorney for Swidler & Berlin, to seek legal representation concerning possible congressional or other investigations of the firings. During their meeting, Hamilton took three pages of notes and marked them "privileged." Nine days later, Foster committed suicide. In 1995, the Independent Counsel subpoenaed Hamilton's notes; Swidler filed a motion to quash, arguing that the notes were protected by the attorney-client privilege and the work product privilege. After examining the notes *in camera*, the district court concluded they were protected by both doctrines; the Court of Appeals for the District of Columbia Circuit reversed.

On certiorari, a 6-3 majority of the Supreme Court held that the notes were protected by the attorney-client privilege even though Foster was deceased. "It has been generally, if not universally, accepted, for well over a century, that the attorney-client privilege survives the death of the client in a case such as this." The Court noted that some cases have carved out exceptions to the general rule (for example, in testamentary cases where disclosure has been used to further the client's intent in the settlement of his estate); but these circumstances did not appear in this case. The Court reasoned that "[k]nowing that communications will remain confiden-

tial even after death encourages the client to communicate fully and frankly with counsel."

Another U.S. Supreme Court decision has jeopardized the already-scarce funds available for legal services for the indigent. Like state bars in 47 other states, the California Bar maintains a Legal Services Trust Fund which awards grants to legal services organizations to provide legal services to indigent people; the funds derive from the Bar's Interest on Lawyers' Trust Account (IOLTA) program authorized in Business and Professions Code section 6210 *et seq.* Under this program, California lawyers are required to deposit client retainers in an interest-bearing checking account; banks transfer any interest earned to the Bar's Legal Services Trust Fund, which in turn awards it to qualified legal services organizations. In *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (June 15, 1998), the U.S. Supreme Court analyzed a similar IOLTA program created by the Texas State Bar, and concluded that the interest earned on client funds held in IOLTA accounts is the "private property" of the client for purposes of the Takings Clause of the U.S. Constitution. The Court then remanded the case to the district court for consideration whether IOLTA funds have been "taken" by the state, as well as the amount of "just compensation," if any, which is due to the challengers.

In response, State Bar Executive Director Steve Nissen stated that the decision "is clearly a disappointment. However, the case is far from over—and we still are confident that the IOLTA program will ultimately prevail in the courts....Even if there is a property interest, there may not necessarily be an unconstitutional taking." Nissen noted that in California, IOLTA provides more than \$10 million in annual grants to 110 nonprofit organizations serving one-half million indigent Californians every year; IOLTA is the second-largest source of funding for California's free legal services programs. Without such funding, many thousands of impoverished children, senior citizens, and victims of escalating domestic violence, among others, would likely lose their only means of legal help.

Future Meetings

- January 29–30, 1999 in San Francisco.
- March 12–13, 1999 in San Francisco.
- April 30–May 1, 1999 in San Francisco.
- June 25–26, 1999 in Los Angeles.
- August 20–21, 1999 in San Francisco.
- September 30–October 3, 1999 in Long Beach (annual meeting).