



which concluded that Ellenberger was innocent of similar criminal charges. The trial court dismissed the action. The Fourth District Court of Appeal affirmed, holding that the dentist is not entitled to pursue federal civil rights claims in this circumstance because the publication of defamatory statements does not violate the federal constitution, even if it may violate state defamation law; the Fourth District also found no evidence, nor any allegation, of any wrongdoing or impropriety with BDE's hearing. Accordingly, the court found that, as a matter of law, the defendants' conduct as pleaded is not the basis of a federal civil rights action, and cannot be the basis of a conspiracy to violate civil rights action.

Regarding the slander per se claim, the Fourth District found that the statements of Espinosa at BDE's administrative hearing were privileged under Civil Code sections 47 and 43.8, noting that to find otherwise would deter patients from expressing legitimate complaints regarding the services of health care professionals for fear that the accused practitioners would initiate defamation actions against them. Further, the Fourth District noted that truth is a complete defense to civil liability for slander; the court found that BDE's determination that Ellenberger had been grossly negligent and in violation of several sections of the Business and Professions Code indicated that there was truth in Espinosa's accusations. Accordingly, the court found that the facts failed to support any claim of slander per se.

### RECENT MEETINGS

At its September 22-23 meeting, BDE reported that its citation and fine program is proving to be a cost-effective way to deal with minor violations. Also at its September meeting, BDE addressed the growing problem of delinquent licenses in California. Dr. David Gaynor of CDA suggested that the Board send a list of delinquent licensees to the major dental insurance providers in California to ensure that those practitioners with expired licenses will not receive payments for work performed without a license. Although the Board noted that the names of these dentists are a matter of public record and may be sent to insurance companies or otherwise published, some members were concerned with the feasibility and cost of such a practice. BDE established an ad hoc committee to consider the issue and report back at a future meeting.

At its November 3-4 meeting, BDE voted to change its traditional meeting schedule; the Board will now meet five times per year instead of six. BDE will still

meet every other month beginning in January except that there will be no meeting in July as that is when the state licensing examinations are given by the Board members on the Examination Committee. The Board noted that this abbreviated meeting schedule will reduce both the quantity and quality of time it can devote to public comment at each meeting.

Additionally, BDE voted to change the manner in which petitioner hearings are conducted (e.g., hearings on petitions for reinstatement or for modification or termination of license probation). In the past, petitioner hearings have been scheduled in conjunction with Board meetings at the request of a licensee. The Board must pay an administrative law judge (ALJ) and a deputy attorney general (DAG) to appear; BDE is not reimbursed by the petitioner if the petitioner fails to appear. Under the new plan, two extra days of meetings will be scheduled each year, one in northern California and one in southern California. These meetings will be for the sole purpose of hearing petitions and will be scheduled the day before a regular Board meeting. Under this plan, the ALJ and DAG can be scheduled and paid for a full day and will be available to conduct up to eight hearings per day. In this manner, the Board expects to save approximately \$2,000 annually in enforcement costs.

Also at the November meeting, BDE noted a 13% increase in the passage rate on the California dental exam; BDE attributed this improvement to the remedial education required by AB 194 (Tucker) (Chapter 1299, Statutes of 1992) for license applicants who fail the skills examination three times (see MAJOR PROJECTS).

### FUTURE MEETINGS

January 26-27 in Los Angeles.  
 March 10-11 in San Francisco.  
 May 18-19 in Los Angeles.  
 August 24-25 in San Francisco.  
 November 2-3 in Los Angeles.

### BOARD OF FUNERAL DIRECTORS AND EMBALMERS

*Executive Officer:*  
 Richard P. Yanes  
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The Board of Funeral Directors and Embalmers (BFDE) licenses funeral establishments and embalmers. It registers apprentice embalmers and approves funeral establishments for apprenticeship

training. The Board annually accredits embalming schools and administers licensing examinations. BFDE inspects the physical and sanitary conditions in funeral establishments, enforces price disclosure laws, and approves changes in business name or location. The Board also audits preneed funeral trust accounts maintained by its licensees, which is statutorily mandated prior to transfer or cancellation of a license. Finally, the Board investigates, mediates, and resolves consumer complaints.

BFDE is authorized under Business and Professions Code section 7600 *et seq.* The Board consists of five members: two Board licensees and three public members. In carrying out its primary responsibilities, the Board is empowered to adopt and enforce reasonably necessary rules and regulations; these regulations are codified in Division 12, Title 16 of the California Code of Regulations (CCR).

### MAJOR PROJECTS

**Board Struggles for Survival.** 1994 ended on a bizarre note for BFDE and the Cemetery Board: One board shut its doors, the other remained open by spending little money, and both looked to the Wilson administration or the legislature for a bailout from a move which cut off funding to both boards.

In the 1994-95 Budget Act signed by Governor Wilson on July 8, the state appropriated only six months' worth of funding to both BFDE and the Cemetery Board. The action was an attempt to force the restructuring of the boards and the state's regulation of the death services industry through SB 2037 (McCorquodale), which would have merged the boards effective January 1 and provided the rest of the needed 1994-95 funding to the merged board. However, the Assembly reversed the budget agreement in August by deleting the merger provision from SB 2037, and the Senate subsequently refused to concur in the Assembly's amendments—which killed SB 2037 and continuation funding for both boards. [14:4 CRLR 4, 55]

At BFDE's November 17 meeting, Executive Officer Richard Yanes reported that, in October, both BFDE and the Cemetery Board had requested a deficiency appropriation pursuant to section 27 of the 1994-95 Budget Act. Department of Finance Director Russell Gould informed Joint Legislative Budget Committee Chair Senator Mike Thompson of his intent to grant the requests. However, Senate Business and Professions Committee Chair Senator Dan Boatwright and others urged Senator Thompson to reject the requests



in light of the legislature's clearly expressed desire to have the boards continue only in a merged form. While BFDE expressed great optimism that its request would be granted at its November 17 meeting, Senator Thompson denied the request on November 18. Also on November 17, the Board took no action on the Department of Consumer Affairs' (DCA) request that it adopt a resolution delegating its licensing and enforcement authorities to DCA pending the approval of a new regulatory structure for the death services industry in California.

As a result, both boards' doors were scheduled to close by January 1. The Cemetery Board ran out of money earlier than that, and DCA shut down its operations on December 5 (see agency report on CEMETERY BOARD for related discussion). However, at this writing, BFDE's doors remain open because Board staff conserved its funds and currently have enough money to pay two employees and Executive Officer Richard Yanes.

It is widely expected that legislation will be introduced in the near future to merge the boards or create a new entity within DCA to regulate the death services industry.

**Board Rulemaking Stalled.** During the summer of 1994, BFDE adopted a package of regulatory changes which would have amended sections 1258 and 1241, and adopted new sections 1258.1, 1258.2, 1258.3, and 1262, Title 16 of the CCR; among other things, these changes would have clarified disclosure requirements for the sale of caskets, defined and prohibited the practice of "constructive delivery," and added new grounds for the issuance of a citation. [14:4 CRLR 55-56; 14:2&3 CRLR 57-58] At this writing, the Board has yet to submit this rulemaking file to the DCA Director or the Office of Administrative Law.

## LITIGATION

On October 7, the Third District Court of Appeal issued its third decision in *Funereral Security Plans, Inc. v. State Board of Funeral Directors and Embalmers*, 28 Cal. App. 4th 1470 (1994). [13:4 CRLR 49; 13:2&3 CRLR 70] Once again, the court decided several important issues arising under the Bagley-Keene Open Meeting Act, Government Code section 11120 *et seq.*, including the following:

• The court interpreted the "pending litigation" exception to the Act's open meeting requirement, Government Code section 11126(q), which permits state bodies "to confer, and receive advice from, legal counsel...[.]" to include the communication of facts (as well as legal advice)

from legal counsel and to include the state body's deliberations and decisionmaking thereon.

• With regard to the Act's procedural requirements accompanying the use of the "pending litigation" exception, the court noted that section 11126(q) requires the state body's legal counsel to prepare and submit to it, preferably prior to the closed session but no later than one week after the closed session, a memorandum stating the specific reasons and legal authority for the closed session. The court rejected the Board's assertion of a "substantial compliance" defense for failure to comply with this procedure.

• The court also interpreted section 11126(d), which—at the time relevant to this litigation—provided that state bodies may meet in closed session "to deliberate on a decision to be reached based upon evidence introduced in a proceeding required to be conducted pursuant to [the Administrative Procedure Act]." Because the language of the statute expressly contemplated (1) deliberation, (2) decision, (3) evidence, and (4) APA proceedings, the court held that state bodies are not permitted to meet in closed session under section 11126(d) to consider petitions to terminate license probation, for license reinstatement, or to reduce a penalty unless it has previously held an APA hearing to receive evidence on the issue of the licensee's rehabilitation. Further, the court held that state bodies may not meet privately under section 11126(d) to consider proposed disciplinary settlements which involve a stipulated set of facts: "Subdivision (d)...does not permit deliberations to provide cover for receiving and considering evidence in closed session. It is only deliberation, and not the introduction of evidence, which can be conducted in closed sessions pursuant to the subdivision (d) exception." To the extent that evaluation of a proposed settlement is part of the Board's litigation strategy, the court found that it may be reviewed with legal counsel under section 11126(q), but not under section 11126(d). The court noted that several of the Board's arguments for closed sessions to consider stipulated settlements are better addressed to the legislature, because "subdivision (d) simply does not go that far."

• And once again, the court held that the Board's two-member advisory committees are state bodies under section 11121.7, and fully subject to the Act's open meeting requirement. Although two-member advisory committees of a state body appear to be exempt from the open meeting requirement under section 11121.8, the court found sections 11121.7 and 11121.8 to be coexten-

sive and overlapping. The court held, in effect, that when even one member of a state body serves on an advisory committee in his/her official capacity as a representative of the state body, and the state body finances the member's participation, the open meeting requirements of the Bagley-Keene Act "follow" that member and his/her official participation.

On November 7, the Third District denied BFDE's motions for rehearing and for depublishing of its decision. On January 5, the California Supreme Court denied BFDE's petition for review but depublished the Third District's decision, thus negating the precedential impact of five years of litigation.

## FUTURE MEETINGS

To be announced.

## BOARD OF REGISTRATION FOR GEOLOGISTS AND GEOPHYSICISTS

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The Board of Registration for Geologists and Geophysicists (BRGG) is mandated by the Geologist and Geophysicist Act, Business and Professions Code section 7800 *et seq.* The Board was created by AB 600 (Ketchum) in 1969; its jurisdiction was extended to include geophysicists in 1972. The Board's regulations are found in Division 29, Title 16 of the California Code of Regulations (CCR).

The Board licenses geologists and geophysicists and certifies engineering geologists. In addition to successfully passing the Board's written examination, an applicant must have fulfilled specified undergraduate educational requirements and have the equivalent of seven years of relevant professional experience. The experience requirement may be satisfied by a combination of academic work at a school with a Board-approved program in geology or geophysics, and qualifying professional experience. However, credit for undergraduate study, graduate study, and teaching, whether taken individually or in combination, cannot exceed a total of four years toward meeting the requirement of seven years of professional geological or geophysical work.

The Board may issue a certificate of registration as a geologist or geophysicist without a written examination to any person holding an equivalent registration issued by any state or country, provided that