



given by attendants, psychiatric technicians, or psychiatric technician interim permittees in institutions under the jurisdiction of certain state entities. Existing law requires the director of the state entity to determine what constitutes adequate supervision. As amended April 17, this bill would instead authorize psychiatric technicians and psychiatric technician interim permittees to provide nursing services to patients or clients who have been diagnosed with mental disorders or developmental disabilities, provided there is adequate medical and nursing supervision by a licensed physician or registered nurse. This bill would require the director of the service where the psychiatric technician or interim permittee is performing his/her duties to determine what constitutes adequate supervision, instead of the director of the state entity. The bill would authorize nursing services to also be provided by attendants in facilities licensed by DHS if adequate medical and nursing supervision by a professional nurse is provided. [S. B&P]

**SB 113 (Maddy).** Existing law provides for the licensure and regulation of clinical laboratories and various clinical laboratory health care professionals by DHS. As amended May 10, this bill would state the intent of the legislature in revising these provisions to enact state laws consistent with CLIA (see MAJOR PROJECTS). Among other things, SB 113 would revise the scope of the clinical laboratory tests which may be performed by various individual licensees and by unlicensed laboratory personnel. It would classify laboratories and clinical tests into several categories depending upon complexity, including waived (simple), moderate complexity, and high complexity. Under the bill, LVNs and psych techs who meet minimum education and training requirements established in DHS regulations may perform laboratory tests falling into the waived or moderate complexity categories. [S. Floor]

## RECENT MEETINGS

At the Board's January 20 meeting in San Diego, Executive Officer Teresa Bello-Jones reported that due to the severe flooding during the week of January 10, the Board received numerous phone calls from LVN candidates who were unable to appear for their scheduled examinations. In response to that and other recent natural disasters, the Board adopted a general emergency/natural disaster policy at its March 17 meeting which allows the Executive Officer, in the case of an emergency or natural disaster, to waive the examination rescheduling fee; waive the replacement fee for lost or destroyed interim permits; waive

the fee for a duplicate license; and waive the delinquency fee for a license renewal. Under the policy, requests for consideration of any of these waivers must be submitted in writing with supporting documentation.

Also in January, VNPTE reelected LVN Charles Bennett as Board President, and selected PT Carolyn Duncan as Vice-President.

At the Board's March 17 meeting, staff reported that they hosted a meeting with DHS and the Board of Registered Nursing (BRN) to continue discussion regarding health care facilities' increasing use of unlicensed assistive personnel to provide patient care services; the Board considers unlicensed providers to be a threat to safe, competent patient care. [15:1 CRLR 99-100] The group reviewed a draft letter to all licensed health care facilities and clinics discussing this issue; the final version

will include the positions of the three agencies relative to the use of unlicensed assistive personnel.

Also in March, Board staff reported that it received the third quarterly report from its examination contractor, Educational Testing Service; the statistical reports indicate that 88% of all U.S.-educated candidates who were tested between October 1-December 31, 1994 passed the exam their first time. Graduates of California-accredited programs had an 80% pass rate. [15:1 CRLR 99]

## FUTURE MEETINGS

September 21-22 in San Diego.  
November 16-17 in Los Angeles.



## BUSINESS, TRANSPORTATION AND HOUSING AGENCY

### DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

Director: Jay Stroh  
(916) 263-6900

The Department of Alcoholic Beverage Control (ABC) is a constitutionally-authorized state department established in 1955 (section 22 of Article XX, California Constitution). The Alcoholic Beverage Control Act, Business and Professions Code section 23000 *et seq.*, vests the Department with the exclusive power to regulate the manufacture, sale, purchase, possession, and transportation of alcoholic beverages in California. In addition, the Act vests the Department with authority, subject to certain federal laws, to regulate the importation and exportation of alcoholic beverages across state lines. ABC also has the exclusive authority to issue, deny, suspend, and revoke alcoholic beverage licenses. Approximately 68,000 retail licensees operate under this authority. ABC's regulations are codified in Divisions 1 and 1.1, Title 4 of the California Code of Regulations (CCR). ABC's decisions are appealable to the Alcoholic Beverage Control Appeals Board. Further, ABC has the power to investigate violations of the Business and Professions Code and other criminal acts which occur on prem-

ises where alcohol is sold. Many of the disciplinary actions taken by ABC, along with other information concerning the Department, are printed in liquor industry trade publications such as *Beverage Bulletin* and *Beverage Industry News*.

The Director of ABC is appointed by, and serves at the pleasure of, the Governor. ABC divides the state into two divisions (northern and southern) with assistant directors in charge of each division; ABC maintains 26 field offices.

ABC dispenses various types of licenses. "On-sale" refers to a license to sell alcoholic beverages which will be bought and consumed on the same premises. "Off-sale" means that the licensee sells alcoholic beverages which will not be consumed on the premises. Population-based quotas determine the number of general liquor licenses issued each year per county; in 1995, the legislature applied similar quotas to beer and wine licenses for a three-year period.

## MAJOR PROJECTS

**ABC Reviewing Draft Regulatory Language for Decoy Programs.** ABC's use of minors for decoy operations was upheld last year by the California Supreme Court in *Provigo Corporation v. Alcoholic Beverage Control Appeals Board*, 7 Cal. 4th 561 (Apr. 7, 1994); legislation requiring ABC to develop and administer regulations governing the use



of minors as police decoys—AB 3805 (Richter) (Chapter 1205, Statutes of 1994)—took effect on January 1, 1995. [15:1 CRLR 100; 14:4 CRLR 108-09] In early 1995, ABC released draft regulatory language of proposed new section 141, Title 4 of the CCR, which would contain the Department's requirements for minor decoy programs. Among other things, the proposed language would provide that the purpose of law enforcement agencies using persons under the age of 21 attempting to purchase alcoholic beverages is to apprehend ABC licensees, or employees or agents of licensees, who sell alcoholic beverages to minors, and to reduce sales of alcoholic beverages to minors, and would state that the minor decoy programs must be operated in such a fashion that promotes fairness.

Under the draft proposal, at the time of the operation, the decoy must be less than 20 years of age; display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense; either carry his/her own identification showing the decoy's correct date of birth or carry no identification; and answer truthfully any questions about his/her age. Following any completed sale, the law enforcement officer directing the decoy shall, not later than the time a citation, if any, is issued, make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face-to-face identification of the alleged seller of the alcoholic beverages. The regulation would also provide that failure to comply with these requirements is a defense to any disciplinary action brought pursuant to Business and Professions Code section 25658.

At this writing, ABC has not yet commenced the formal rulemaking process necessary to formally adopt these requirements as regulations. In the meantime, ABC has released "guidelines" addressing how minor decoy programs should be run; according to ABC staff, however, the Department will not take action against licensees who deviate from the guidelines. Among other things, the guidelines state the following:

- Police agencies or ABC should notify licensees by mail of an impending decoy operation.
- The decoy should be 18 or 19 years of age and have the general appearance, mannerisms, and dress of a person well under 21 years of age.
- If a male is used, he should not be big in stature or have a beard or mustache. If a female is used, no make-up should be

used, and minimum jewelry should be worn.

- An ABC investigator should view the selected decoy prior to operation.

- Prior to the operation, police agencies must photograph the decoy to verify dress and appearance and make a photocopy of the buy money as part of every case report.

- The decoy should be instructed to enter the store, select a single item of alcohol, and place it on the counter with a \$5 bill.

- The agency running the decoy program should avoid calling on any location during rush hour.

**Rulemaking Update.** The one-year notice period on ABC's proposed amendments to section 106, Title 4 of the CCR, relating to the advertising and merchandising of alcoholic beverages, expired on May 13. [15:1 CRLR 101; 14:4 CRLR 108; 14:2&3 CRLR 115] In its proposed amendments, ABC was attempting to comprehensively address several promotional and marketing issues which are not covered by its current regulations. Its proposed changes to section 106 would add a table of contents for clarity; authorize and regulate "drink night" promotions; authorize and regulate consumer merchandise offers; authorize and regulate sweepstakes; authorize and regulate supplier participation in public service activities; authorize and regulate distilled spirits beverage lists and dispensing equipment; authorize and regulate supplier-sponsored entertainment at retail premises; and regulate contests sponsored by suppliers. If ABC wishes to pursue these regulatory changes, it must publish the rule changes for a new 45-day public comment period.

## ■ LEGISLATION

**AB 303 (Tucker).** Existing law authorizes a winegrower, beer manufacturer, brandy manufacturer, distilled spirits manufacturer, or distilled spirits manufacturer's agent to serve and provide, free of charge, food and alcoholic and nonalcoholic beverages to retail licensees and their guests, in conjunction with meetings, conventions, or combined conventions and trade shows of bona fide trade associations of retail licensees, notwithstanding any restrictions of the ABC Act. Existing law also authorizes those alcoholic beverage manufacturers to advertise in any regular publication, published at least quarterly, of a bona fide trade association, the members of which are food or alcoholic beverage retailers, if that publication does not advertise on behalf of, or directly benefit, any individual retail licensee. As introduced February 8, this bill would make various changes with regard to those authorizations, including

provisions authorizing the provision by alcoholic beverage manufacturers of entertainment and recreational activities to retail licensees at meetings, conventions, or trade shows, the payment by alcoholic beverage manufacturers of nondiscriminatory fees for the privilege of providing food, beverages, entertainment, or recreational activities or for display booth space at these events, and the payment of nondiscriminatory membership dues by alcoholic beverage manufacturers to the trade associations, as provided. [A. Floor]

**AB 805 (Cortese).** As noted above, existing law authorizes various alcoholic beverage manufacturers to advertise in any regular publication, published at least quarterly, of any bona fide trade association the members of which are food or alcoholic beverage retailers, which does not advertise on behalf of, or directly benefit, any individual retail licensee. As introduced February 22, this bill would change that authorization to apply to publications published at least annually. [S. GO]

**AB 683 (Tucker).** The ABC Act provides that persons under the age of 21 years may be used by peace officers to apprehend licensees, or their employees or agents, who sell alcoholic beverages to minors (see MAJOR PROJECTS). This bill would require ABC to send information regarding this procedure to all on-sale and off-sale licensees with each license renewal notice. [S. GO]

**AB 684 (Tucker),** as amended April 3, would also require ABC to send information regarding decoy procedures to all on-sale and off-sale licensees with each license renewal notice.

The ABC Act provides that any hearings held on a protest, accusation, or petition for a license shall be held at the county seat of the county in which the premises or licensee are located, as specified. This bill would, instead, provide that those hearings shall be held in the county in which the premises or licensee are located.

The ABC Act makes it a misdemeanor for any person to sell or otherwise dispose of, except for export, any draught or bottled beer containing a certain percentage of alcohol. This provision does not apply to the sale of bottled or draught ale, porter, brown, malt liquor, and stout bearing certain labels or a notice describing the contents under any licenses, other than on-sale beer licenses. This bill would remove the limitation respecting on-sale beer licenses, thus permitting those licensees to sell those beverages. [A. Floor]

**AB 957 (Gallegos).** Under the ABC Act, any person possessing an open container of an alcoholic beverage in any city



or county park area or public space, as specified, or any regional park or recreation and park district, is guilty of an infraction if the city or county has enacted an ordinance that prohibits the consumption of alcoholic beverages in those areas, except as specified. As amended April 18, this bill would provide, in addition, that any person possessing any can, bottle, or other receptacle containing any alcoholic beverage in any city, county, or city and county owned park shall be guilty of an infraction if the city, county, or city and county has enacted an ordinance that prohibits the possession of alcoholic beverages in those areas. However, the bill would provide that the first offense for the possession of an unopened alcoholic beverage container shall not result in the imposition of a fine. [S. GO]

**AB 1166 (McPherson).** Existing law authorizes a licensed beer manufacturer or out-of-state beer manufacturer operating under a certificate to conduct beer tastings off licensed premises only for events sponsored by certain nonprofit organizations and only if persons attending the event are affiliated with the sponsor, as specified. This bill would authorize an incorporated beer manufacturer's trade association to conduct beer tastings on behalf of one or more licensed manufacturers for educational purposes, as specified. The bill would require the association to obtain a permit from ABC for each tasting event, as provided. [A. Appr]

**AB 1521 (Lee).** Under existing law, the federal Bureau of Alcohol, Tobacco and Firearms approves and certifies the labeling of alcoholic beverages bottled or distributed in the United States. ABC regulates the content of alcoholic beverage labels with respect to alcohol content and the name of the manufacturer, rectifier, importer, wholesaler, or bottler. As introduced February 24, this bill would make legislative findings and declarations regarding the use of the name "Crazy Horse" in connection with an alcoholic beverage label. It would provide that it shall be unlawful for any alcoholic beverage bottled, sold, or distributed in California to carry a label bearing the name "Crazy Horse." [A. GO]

**AB 1781 (Cortese).** Under the ABC Act, a seller may accept the return of wine from a retailer, but the seller may not sell wine to the retailer for one year, unless the wine was returned under specified circumstances. Existing law also provides that wines returned and exchanged due to deterioration, damage, or a change in the label or container shall have the same current posted price to retailers. As amended April 5, this bill would eliminate the pro-

vision that certain wines returned and exchanged shall have the same current posted price. The bill would additionally provide that a seller may accept the return of wine from a seasonal or temporary licensee and from an annual licensee operating on a temporary basis if they have wine remaining unsold at the termination of the license period or temporary period. [S. GO]

**AB 1918 (Ducheny).** Under the California Beverage Container Recycling and Litter Reduction Act, every beverage container sold or offered for sale in the state is required to have a minimum refund value. A distributor is required to pay a redemption payment for every beverage container sold or offered for sale in the state to the Department of Conservation (DOC) and DOC is required to deposit these amounts in the California Beverage Container Recycling Fund. The term "beverage" is defined for purposes of the Act, and wine and wine from which alcohol has been removed are excluded from that definition. As introduced February 24, this bill would, as of March 1, 1996, include, within that definition of "beverage," fortified wine, as defined, and would require manufacturers of fortified wine to pay DOC a redemption payment for the beverage containers. The bill would require DOC to deposit the redemption payments, processing fees, and all civil penalties, fines, and other revenue received resulting from the inclusion of fortified wine in the definition of "beverage" for purposes of the act into the California Beverage Container Refund Fund, which the bill would create. The bill would require that the money in that fund be available to DOC for the payment of specified refund values and processing fees to processors and for related administrative costs, upon appropriation in the Budget Act.

The Act requires that a beverage manufacturer indicate a specified message on every beverage container sold or offered for sale in the state. This bill would require manufacturers of fortified wine to indicate that message on every beverage sold in the state on and after March 1, 1996. [A. NatRes]

**SB 1320 (Calderon),** as introduced March 7, would, as of March 1, 1996, include distilled spirits within the definition of "beverage" for the purposes of the California Beverage Container Recycling and Litter Reduction Act, and require manufacturers of distilled spirits to pay DOC a redemption payment for the beverage containers. The bill would require DOC to deposit the redemption payments, processing fees, and all civil penalties, fines, and other revenue received resulting from the inclusion of distilled spirits in the

definition of beverage for purposes of the Act into the California Beverage Container Refund Fund, which the bill would create. The bill would require that the money in that fund be available to DOC for the payment of specified refund values and processing fees to processors and for related administrative costs, upon appropriation in the Budget Act.

The Act requires that a beverage manufacturer indicate a specified message on every beverage container sold or offered for sale in the state. This bill would require manufacturers of distilled spirits to indicate that message on every beverage sold in the state on and after March 1, 1996. [A. NR&W]

**SB 408 (Thompson).** Existing law limits the ownership of a retail alcoholic beverage licensee by a manufacturer or producer of alcoholic beverages. As amended May 10, this bill would authorize a manufacturer, winegrower, manufacturer's agent, winegrower's agent, rectifier, distiller, bottler, importer, or wholesaler to hold an ownership interest in a retail licensee, to serve as an officer, director, employee, or agent of the retail licensee, and to sponsor or fund certain programs or projects, if the retail license is for a nonprofit school for professional chefs located in Napa County and other requirements are met. [A. GO]

**SB 436 (Rosenthal).** Under the ABC Act, a seller may accept the return of beer from a retailer only if the beer is returned in exchange for the identical quantity and brand of beer. An exception to that provision permits a seller to accept the return of beer from a seasonal or temporary licensee or an annual licensee operating on a temporary basis, as specified. This bill would revise the exception relating to the return of beer by annual licensees operating on a temporary basis, to require the licensee to notify the seller within fifteen days of the date the licensee's operations ceased. [A. GO]

**SB 584 (Dills).** Existing law provides for the issuance of a club license for the sale of alcoholic beverages to specified organizations. As introduced February 24, this bill would authorize ABC to issue a club license to certain beach and athletic clubs, as defined, that do not discriminate or restrict membership, as specified. The bill would declare that it is to take effect immediately as an urgency statute. [A. GO]

**SB 646 (Kelley).** The ABC Act prohibits the application for, and issuance of, until January 1, 1998, an original retail off-sale beer and wine license for any premises if the applicant premises are located in a city, county, or city and county where the number of retail off-sale beer



and wine licenses or total number of retail off-sale beer and wine licenses and off-sale general licenses exceeds one license for a certain number of inhabitants. [15:1 CRLR 100] As amended March 27, this bill would, until January 1, 1998, notwithstanding any other provision, provide that a retail off-sale beer and wine "replacement" license shall be issued for a specified fee when (1) the replacement license is only for use at a premises licensed within the past twelve months; (2) the prior licensee abandoned the premises or the original license is subject to a bankruptcy proceeding; (3) the applicant must pay a fee of \$100; (4) the replacement license will not be transferred to another premises; (5) all conditions imposed on the original license will be imposed on the replacement license; and (6) the original license will not be transferred subsequent to the issuance of the replacement license. The bill would place certain limitations on a replacement license. [A. GO]

**SB 1171 (Thompson).** Existing law provides that an on-sale beer and wine license may be issued or transferred to any person with respect to premises which are an integral part of a restaurant owned by, or operated by or on behalf of, the licensee, notwithstanding that a wholesaler licensed to sell alcoholic beverages in states other than California has an interest in the premises, license, or licensee, if (1) the licensee purchases no beer or wine for sale in this state from other than a California wholesaler, nor purchases beer or wine from any wholesale licensee or manufacturer holding specified ownership interests, and (2) no more than 30% of the revenues of the restaurant are derived from the sale of alcoholic beverages. As amended May 1, this bill would revise that license issuance and transfer provision to make it applicable to all retail on-sale licenses and expand the prohibitions against purchases to apply to purchases of any alcoholic beverage. [A. GO]

**SB 632 (Thompson).** The ABC Act provides that each license shall be issued to a specific person, except licenses authorizing the sale of alcoholic beverages on trains, boats, or airplanes, for a specific location. As amended April 24, this bill would prohibit any person who holds a beer manufacturer's license for a specific location from holding an on-sale license for the same or contiguous premises, unless the licenses for the contiguous premises were issued prior to January 1, 1996, and the licensed contiguous premises have been in continuous operation since the issuance of the licenses.

Existing provisions of the ABC Act known as "tied-house" restrictions gener-

ally prohibit an on-sale alcoholic beverage licensee from having an ownership interest in an alcoholic beverage manufacturer. Existing law allows as an exception to those provisions a holder of no more than six on-sale licenses to own a microbrewery, as specified. Existing law limits the licensee to purchasing alcoholic beverages for sale from a wholesale or winegrower licensee, except for any alcoholic beverages manufactured by the licensee at a single location contiguous or adjacent to the licensee's premises. This bill would, instead, limit the on-sale licensee to purchasing alcoholic beverages from a wholesale or winegrower licensee, except for licensees who hold on-sale and beer manufacturer's licenses for contiguous premises that were issued prior to January 1, 1996, and the licensed contiguous premises have been in continuous operation since the issuance of the licenses. The bill would prohibit an on-sale licensee who also has an ownership interest in a licensed beer manufacturer from operating the on-sale licensed premises and the beer manufacturing premises as contiguous premises, unless the licenses for the contiguous premises were issued prior to January 1, 1996, and the contiguous premises have been in continuous operation since the issuance of the licenses. [S. GO]

**AB 385 (Tucker).** The ABC Act provides for the issuance of a retail package off-sale beer and wine license at an annual fee of \$24. As introduced February 14, this bill would increase the annual fee for that license to \$100. [A. GO]

## ■ LITIGATION

On April 19, the U.S. Supreme Court issued its decision in *Rubin v. Coors Brewing Company*, 115 S. Ct. 1585, affirming the Tenth Circuit Court of Appeals' finding that the right to print beer labels containing alcoholic content is constitutionally protected by the first amendment. [15:1 CRLR 102; 14:4 CRLR 108; 14:2&3 CRLR 114-15] At issue was section 205(e)(2) of the Federal Alcohol Administration Act (FAAA), which prohibits beer labels from displaying alcohol content; the Court found that section 205(e)(2) violates the first amendment's protection of commercial speech.

By way of background, the Court explained that soon after the ratification of the twenty-first amendment, which repealed the eighteenth amendment and ended the country's experiment with Prohibition, Congress enacted the FAAA; the statute established national rules governing the distribution, production, and importation of alcohol and created a Federal Alcohol Administration to implement these rules.

Implementing regulations prohibit the disclosure of alcohol content on beer labels. In addition to prohibiting numerical indications of alcohol content, the labeling regulations proscribe descriptive terms that suggest high content, such as "strong," "full strength," "extra strength," "high test," "high proof," "pre-war strength," and "full oldtime alcoholic strength." However, the prohibitions do not preclude labels from identifying a beer as "low alcohol," "reduced alcohol," "non-alcoholic," or "alcohol-free." By statute and by regulation, the labeling ban must give way if state law requires disclosure of alcohol content.

The Court noted that both parties agree that the information on beer labels constitutes commercial speech, and reiterated its previous holding that the free flow of commercial information is indispensable to the proper allocation of resources in a free enterprise system because it informs the numerous private decisions that drive the system. However, the Court noted that certain types of restrictions might be tolerated in the commercial speech area because of the nature of such speech. Among the factors that courts should consider in determining whether a regulation of commercial speech survives first amendment scrutiny are whether it concerns lawful activity and is not misleading; whether the asserted governmental interest is substantial; and whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

In applying these tests to section 205(e)(2), the Court found that both the lower courts and the parties agree that respondent seeks to disclose only truthful, verifiable, and nonmisleading factual information about alcohol content on its beer labels. Thus, the Court's analysis focused on the substantiality of the interest behind section 205(e)(2) and on whether the labeling ban bears an acceptable fit with the government's goal. According to the Court, the government identified two interests it considers sufficiently "substantial" to justify section 205(e)(2)'s labeling ban. First, the government contended that section 205(e)(2) advances Congress' goal of curbing "strength wars" by beer brewers who might seek to compete for customers on the basis of alcohol content. The Court agreed that the government has a significant interest in protecting the health, safety, and welfare of its citizens by preventing brewers from competing on the basis of alcohol strength, which could lead to greater alcoholism and its attendant social costs; accordingly, the Court upheld the lower courts' conclusion that the goal of suppressing strength wars constitutes a substantial interest.



The Court also noted that the government attempted to bolster its position by arguing that the labeling ban not only curbs strength wars, but also "facilitates" state efforts to regulate alcohol under the twenty-first amendment. The Court rejected this contention, concluding that the government's interest in preserving state authority is not sufficiently substantial to meet the above requirements, noting that even if the federal government possessed the broad authority to facilitate state powers, in this case the government has offered nothing that suggests that states are in need of federal assistance.

The Court also explained that a valid restriction on commercial speech must directly advance the governmental interest and be no more extensive than necessary to serve that interest, noting that this analysis basically involve a consideration of the fit between the legislature's ends and the means chosen to accomplish those ends. The Court agreed with the Tenth Circuit's finding that section 205(e)(2) fails to advance the interest in suppressing strength wars sufficiently to justify the ban. Specifically, the Court held that section 205(e)(2) cannot directly and materially advance its asserted interest because of the overall irrationality of the government's regulatory scheme: Although the laws governing labeling prohibit the disclosure of alcohol content unless required by state law, federal regulations apply a contrary policy to beer advertising. Like section 205(e)(2), these restrictions prohibit statements of alcohol content in advertising, but, unlike section 205(e)(2), they apply only in states that affirmatively prohibit such advertisements. The Court noted that as only eighteen states at best prohibit disclosure of content in advertisements, brewers remain free to disclose alcohol content in advertisements, but not on labels, in much of the country. The Court concluded that "the failure to prohibit the disclosure of alcohol content in advertising, which would seem to constitute a more influential weapon in any strength war than labels, makes no rational sense if the government's true aim is to suppress strength wars."

The battle continues in *California Beverage Retailer Coalition v. City of Oakland*, No. 726329-3 (Alameda County Superior Court), in which the Coalition is challenging an Oakland city ordinance which establishes performance standards for licensed premises, requires merchants to post a notice of the standards, and provides that vandalism, drug sales, prostitution, and graffiti in violation of the standards are grounds for revocation of a nearby retailer's local permit to sell alcohol. [15:1 CRLR

101; 14:4 CRLR 111; 14:2&3 CRLR 119] On January 5, Alameda County Superior Court Judge James R. Lambden granted the Coalition's motion for summary adjudication of two causes of action which seek declaratory and injunctive relief based upon claims that the ordinance is preempted by the ABC Act (specifically, Business and Professions Code section 23790) and Article XX, section 22 of the California Constitution.

On January 25, the City of Oakland and seven intervenors filed a petition for writ of mandate with the First District Court of Appeal, asking that court to issue a peremptory writ of mandate directing the superior court to vacate and set aside its order granting the motion for summary adjudication. Among other things, the petitioners argued that no appellate court decision considers whether section 23790 precludes a city from enforcing an ordinance which sets up a public nuisance/crime enforcement mechanism against a preexisting alcoholic beverage sales establishment, and that there is ample case authority supporting the power of a city to regulate public nuisance and criminal activities connected with existing alcoholic beverage sales establishments.

On April 6, the Coalition filed its responsive brief with the First District, in which it argued that it is the state's prerogative to regulate alcoholic beverage licensees as it sees fit, and that municipalities may not intrude upon the right to sell alcoholic beverages through retroactive zoning ordinances. Petitioners filed their reply brief on May 4; at this writing, the First District has not yet ruled on the petition.

## BANKING DEPARTMENT

*Superintendent:*

*Conrad Hewitt*

*(415) 288-8800*

*Toll-Free Complaint Number:*

*1-800-622-0620*

Pursuant to Financial Code section 99 *et seq.*, the State Banking Department (SBD) administers all laws applicable to corporations engaging in the commercial banking or trust business, including the establishment of state banks and trust companies; the establishment, operation, relocation, and discontinuance of various types of offices of these entities; and the establishment, operation, relocation, and discontinuance of various types of offices of foreign banks. The Department is authorized to adopt regulations, which are codified in Chapter 1, Title 10 of the California Code of Regulations (CCR).

The superintendent, the chief officer of the Department, is appointed by and holds office at the pleasure of the Governor. The superintendent approves applications for authority to organize and establish a corporation to engage in the commercial banking or trust business. In acting upon the application, the superintendent must consider:

(1) the character, reputation, and financial standing of the organizers or incorporators and their motives in seeking to organize the proposed bank or trust company;

(2) the need for banking or trust facilities in the proposed community;

(3) the ability of the community to support the proposed bank or trust company, considering the competition offered by existing banks or trust companies; the previous banking history of the community; opportunities for profitable use of bank funds as indicated by the average demand for credit; the number of potential depositors; the volume of bank transactions; and the stability, diversity, and size of the businesses and industries of the community. For trust companies, the opportunities for profitable employment of fiduciary services are also considered;

(4) the character, financial responsibility, banking or trust experience, and business qualifications of the proposed officers; and

(5) the character, financial responsibility, business experience and standing of the proposed stockholders and directors.

The superintendent may not approve any application unless he/she determines that the public convenience and advantage will be promoted by the establishment of the proposed bank or trust company; conditions in the locality of the proposed bank or trust company afford reasonable promise of successful operation; the bank is being formed for legitimate purposes; the capital is adequate; the proposed name does not so closely resemble as to cause confusion with the name of any other bank or trust company transacting or which has previously transacted business in the state; and the applicant has complied with all applicable laws.

If the superintendent finds that the proposed bank or trust company has fulfilled all conditions precedent to commencing business, a certificate of authorization to transact business as a bank or trust company will be issued.

The superintendent must also approve all changes in the location of a head office; the establishment, relocation, or discontinuance of branch offices and ATM facilities; and the establishment, discontinuance, or relocation of other places of busi-