The full Commission usually meets every other Wednesday in San Francisco.

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. Today, the State Bar has over 145,000 members, which equals approximately 17% of the nation's population of lawyers.

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 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—seventeen licensed attorneys and six non-lawyer public members. Of the attorneys, sixteen of them—including the President—are elected to the Board by lawyers in nine geographic districts. A representative of the California Young Lawyers Association (CYLA), appointed by that organization's Board of Directors, also sits on the Board. The six public members are variously selected by the Governor, Assembly Speaker, and Senate Rules Committee, and confirmed by the state Senate. 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). The terms are staggered to provide for the selection of five attorneys and two public members each year.

The State Bar includes twenty standing committees; fourteen special committees, addressing specific issues; sixteen sections covering fourteen substantive areas of law; Bar service programs; and the Conference of Delegates, which gives a representative voice to 245 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, which are codified at section 6076 of the Business and Professions Code, 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.

Almost 75% of the Bar's annual $56 million budget is spent on its attorney discipline system. The system includes the first full-time professional court for attorney discipline in the nation 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.

At this writing, there are two public member vacancies on the Board of Governors due to the resignations of Roberta Weintraub and William Hayes. Weintraub was an appointee of the Senate Rules Committee, and Hayes was a gubernatorial appointee. As of the Board's May 20 meeting, no appointments had been made to fill these vacancies. In September 1995, the terms of five attorney Board members (from Districts 2, 3, 4, and 7 (two seats in District 7 become vacant)) expire; of these five Board members, only James Weintraub and William Hayes. Weintraub and William Hayes. Weintraub's term "political trade association"-type activities because they have been historically financed from mandatory Bar dues one must pay in order to practice the profession. Although these critics have prevailed in their challenge to the use of compelled Bar dues for political and ideological activities unrelated to the regulation of the legal profession, and have forced the Bar to afford them a "check-off" opportunity to avoid funding these activities (see LITIGATION), the Bar has narrowly interpreted what must be voluntarily funded. In addition, other members of the Bar believe that the discipline system is overly strict and hostile to practicing attorneys, is excessively resourced, and should be a constructive supporter rather than a negative force.

Meanwhile, consumer critics of the State Bar also object to its basic structure, but on a much different basis. They contend that the State Bar establishes rules of practice and exercises basic police powers to determine who is able to practice law and who should be disbarred. As such, it should represent the interests of the broad body politic. But they note that 17 of the 23 members of the Board of Governors are not appointed by any public official, but are elected by the profession itself. Accordingly, they argue that the Bar is a sanctioned cartel, which allows the cor-

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ruptive assumption of state powers by a self-interested profession. These critics cite the Bar’s opposition to licensed “independent legal technicians” to bring needed legal services to the middle and lower middle classes not eligible for legal aid. And they cite continuing problems with attorney dishonesty, barriers to legal services, and excessive billing.

Others, chiefly the Center for Public Interest Law (CPLL), contend that assurance of competence is the raison d’être of professional licensing, and note that the Bar does not license by area of practice, does not test for competence in the subject matter relied upon, does not ever retest licensees, generally does not address incompetence through its discipline system, does not reimburse for damages due to negligence through its Client Security Fund, and does not require malpractice insurance coverage. CPLL argues that, as with most agencies dominated by the profession allegedly regulated, Bar leaders exercise a great deal of bona fide effort in the public interest, but fail to challenge the “tribal rules” which are usually the most serious problem warranting state intervention.

Supporters of the current Bar structure reply that the State Bar is a “special creature” warranting control by the profession because its function relates to the judiciary, and it is subject to Supreme Court review and check. Critics contend that such a check exists only on paper, and that the Court—given its resources, orientation, and procyclic to delegate—is not a realistic independent check. Some argue that the Bar should be placed under the Department of Consumer Affairs, with retained Supreme Court review of any rules impacting court practice.

Due to the early release of its preliminary report, the Commission’s final recommendations were no surprise. By a 13–8 vote, the Commission recommended retention of the Bar’s existing “integrated” structure (the combination of private trade association selected by the membership, and state regulatory agency exercising police powers). Although the Commission reached this conclusion, many Bar-watchers view the Commission as being driven by so-called “Bar junkies” who favor retention of the integrated structure; perhaps in response to this perception, SB 60 (Kopp)—currently pending in the legislature—would force the Bar to survey its members as to their opinion on this issue (see LEGISLATION).

While supporting the existing structure of attorney control over the Bar, the Commission did advance many specific reform recommendations consistent with recent critiques of Bar regulation, including: (1) limiting admission to the State Bar exam to graduates of ABA- or Bar-approved law schools; (2) granting California reciprocal admission to a person licensed three years or longer in another jurisdiction if that jurisdiction reciprocates with California licensees; (3) requiring malpractice insurance coverage by attorneys; (4) transfer of the State Bar Court to the Supreme Court (which the latter has not yet agreed to take over); and (5) Supreme Court appointment of the Bar’s Chief Trial Counsel (rather than appointment by the State Bar Board of Governors). Other recommendations concern delivery of legal services to the poor, the development of effective alternative dispute resolution, the encouragement of legal internships for students, pro bono service by lawyers, and public education by the legal profession. Of great import, the Commission endorsed the concept of an “independent legal technician” category with proper regulatory controls.

The final recommendations of the Commission were submitted to a seven-member committee of the Board of Governors for implementation.

**Implementation of the Recommendations of the Discipline Evaluation Committee.** Related to the Futures Commission, the Bar has also been considering a series of recommendations relating to its evolving discipline system. In August 1994, the Discipline Evaluation Committee (DEC) chaired by retired U.S. Ninth Circuit Court of Appeals Judge Arthur L. Alarcón issued a series of recommendations, which the Board’s Discipline Committee has now been considering for several months. [15:1 CRLR 172–73; 14:4 CRLR 2091]

Most of the major recommendations have focused on the State Bar Court—the internal judicial panel consisting of a six-judge Hearing Department which presides over disciplinary hearings, and a three-judge appellate Review Department which entertains appeals from the decisions of the hearing judges, and makes the final disciplinary recommendation to the California Supreme Court.

**State Bar Court Staffing Changes.** At its January 20 meeting, the Discipline Committee ordered State Bar Court senior executive Stuart Forsyth to analyze four options regarding the State Bar Court’s Review Department for report by the March meeting. The four options were (1) maintaining the current statutory structure of three full-time judges (two attorney judges and one non-attorney judge); (2) the current structure except with one attorney judge at 50% time and the non-attorney judge at 60% time; (3) a Review Department consisting of a single full-time judge; or (4) no Review Department.

At a special February meeting, the Discipline Committee considered reducing the number of Review Department judges, and accepted the conclusion that the State Bar Court’s present workload does not justify the resources currently committed. The Committee engaged Alexander B. Aikman, a court administration consultant, to report to the Committee at its May meeting on alternatives to the present Review Department structure.

Also at the February meeting, the Discipline Committee voted to support retention of the present number of hearing judges (six), but also decided to examine the issue regularly, and to reevaluate it in 1997 when current changes will have been absorbed. The Committee also voted to authorize Forsyth to develop a plan for reorganizing the staff of the State Bar Court to a maximum degree without materially compromising its work, and report back at the April meeting.

These events concerned Bar critics, who contend that the Bar is focusing its reform attention on the one institution which has consistently come in under budget and has been empirically successful [14:1 CRLR 209–10], while ignoring longstanding regulatory failures—including those matters addressed by the Futures Commission (see above).

Lise Pearlman, the Presiding Judge of the State Bar Court, expressed concern that the State Bar—which controls the prosecution—believes it may also control State Bar Court staff. According to Pearlman, the Bar believes that Court employees are “Bar employees” and are subject to hiring, duty assignment, and promotions as determined by the Bar, not by the Court for whom they purportedly work. The use of Stuart Forsyth to conduct the Bar’s evaluation of her Court’s operations within the Bar added to a long series of indignities Pearlman and other judges felt had been inflicted upon the Court. Those indignities reached a zenith when State Bar staff decided to include Court employees in a “flex-time” arrangement (e.g., authorized four-day workweeks) without consulting the presiding judge.

At its April meeting, the Discipline Committee unanimously adopted Forsyth’s report, which included the elimination of fourteen authorized State Bar Court positions and the reconfiguration of seventeen positions into case coordinator and deputy case coordinator positions. The fact that these recommendations of the Court’s senior executive did not consider the views of the Presiding Judge allegedly supervising him exacerbated the split between the Bar and the Court.
At the Discipline Committee's May meeting, consultant Alexander Aikman presented his report, recommending that the Review Department function as a three-judge panel, but with changes to the standard and scope of review. Rather than "independent judgment" review, Aikman suggested that the Review Department use the "substantial evidence" standard. A more limited basis for review, the substantial evidence standard compels affirmation of the decision below where supported by "substantial evidence" in the record. Aikman also recommended that the scope of review be limited to issues raised by the parties, precluding sua sponte introduction of matters by the review panel. Finally, he recommended that the presiding judge position remain full-time, while the remaining two Review Department judges (one attorney and one non-attorney) each be half-time positions.

The Discipline Committee approved the Aikman recommendations and released them for public comment ending on August 1. Following receipt of comments, the Committee will discuss the matter further in August, and report in the fall to the Board of Governors. Many of the suggested changes to the State Bar Court would require statutory amendment.

- **Staggered Terms for State Bar Court Judges.** At its March 11 meeting, the Board of Governors adopted the Discipline Committee's recommendation to submit to the Supreme Court a revised term arrangement for judges of the State Bar Court. Presently, the terms of the entire court expire at the same time, which can lead to disruption should a large number of vacancies occur. Accordingly, the Board proposed that the terms of one Review Department and two Hearing Department judges expire in 1998; the terms of one Review Department and one Hearing Department judges would end in 1999; and the terms of one Review Department judge and two Hearing Department judges would expire in 2001—with the two San Francisco Hearing Department terms expiring at different times. Judges would have six-year terms thereafter, accomplishing a staggering of expirations.

- **Complainants' Grievance Panel Changes.** Throughout 1995, the Bar's Discipline Committee has also been considering the DEC's recommendation to abolish the Complainants' Grievance Panel (CGP). [15:1 CRLR 173] This Panel is statutorily created and is authorized to audit any closed investigation on its own motion or upon outside complaint. It may recommend reinvestigation, and serves as the only check on the final disposition of over 95% of complaints submitted to the State Bar about attorneys. State Bar staff have contended that the Panel does not often order reinvestigations, and that its reviews primarily increase workload and paperwork to demonstrate the basis for decisions made—rather than affecting the decisions themselves. The Discipline Committee discussed the alternative "end product" approach, whereby the Bar would audit a number of investigation closures on a sampled basis periodically.

At the March meeting of the Discipline Committee that the DEC's assumptions about elimination of the Panel are not accurate. He noted that the CGP is not limited to review at the end of an investigation, and is able to audit or review case closures by the Bar's Intake Unit as well as its Office of Investigations. He also argued that the alternative of both internal and external review might be more costly than the current system.

At its March meeting, the Discipline Committee decided to defer final decision about the Panel until a later meeting and requested a report on the necessary statutory and other changes needed to implement the Discipline Evaluation Committee's recommendation. The Committee also asked for an evaluation of the fiscal impact of alternatives, and proposed models for some public participation.

At the Discipline Committee's April meeting, Senior Executive Stuart Forsyth presented draft amendments to Business and Professions Code sections 6086.11, 6086.13(a)(11), 6093.5, and 6095(c) to create a Discipline Audit Panel (DAP) to replace the CGP. The DAP, made up of four public members and three attorneys, would allegedly have "broader authority" to examine how the Bar handles disciplinary investigations—but would do so by periodic audits; the draft amendments would eliminate the panel's existing authority to review case closures at the request of complainants. The State Bar would no longer have to inform a complainant about procedures available where a case is closed since there would be no assured remedy. Instead, the new DAP would conduct two annual audits, one random and one on subjects selected by the Panel, and render an annual report concerning the results. Both the Discipline Committee and the Board of Governors approved the proposal, which has since been amended into AB 1414 (Brown), now pending in the legislature (see Legislation).

Current public members of the CGP are concerned that the legislation and its implementation may result in inadequate staff resources and independence to conduct a bona fide audit.

- **Mandatory Remedial Education.** The DEC recommended mandatory remedial education for violators who are subject to discipline. [14:4 CRLR 210] At its March meeting, the Discipline Committee approved the release of proposed amendments to State Bar Rule of Procedure 290 for a 90-day public comment period. The proposed amendments provide that a member shall complete the State Bar Ethics School as a requirement in all dispositions or decisions involving imposition of discipline, unless the member has completed such a course within the prior two years or unless excused by the Supreme Court. Where a member resides a substantial distance from the School, he/she may seek approval of the Office of Chief Trial Counsel, and of the State Bar Court, to attend a comparable remedial education course offered by a certified provider in another jurisdiction. At this writing, the public comment period is scheduled to end on June 8.

- **Statute of Limitations for Investigations.** In response to a recommendation of the DEC, the Discipline Committee adopted proposed new State Bar Rule of Procedure 504.1 at its February 21 meeting. [15:1 CRLR 177] The new rule requires the Bar to initiate a disciplinary proceeding "based solely on a complainant's allegation" within five years from the date of the alleged violation. At its March 11 meeting, the Board of Governors approved the recommended rule. Some have expressed concern as to whether the five-year period would be tolled by active concealment or continued attorney-client relationship, both of which toll the statute of limitations for legal malpractice actions.

- **Disbarment Extension in Lieu of Permanent Disbarment.** The DEC's recommendation to allow permanent disbarment of attorneys has been considered throughout 1995 by the Bar. Currently, an attorney who is disbarred may petition for reinstatement after a five-year period; after denial of reinstatement, a disbarred attorney may apply at two-year intervals for reinstatement without limitation. There is no provision for permanent disbarment. At its February 22 meeting, the Board's Discipline Committee reconsidered a proposed amendment to California Rule of Court 951(f) to allow permanent disbarment. [15:1 CRLR 177] The Committee believed the remedy to be unduly harsh, and the Office of Trial Counsel suggested the alternative of a longer period of ten years during which reinstatement would not be considered for two classes of offenses—a felony conviction involving moral turpitude, and misappropriation of client funds in an amount qualifying as grand theft.
This more limited remedy of ten years for felonies and client grand theft was rejected by the Discipline Committee at its March meeting; however, at its April meeting, the Committee approved the proposed rule for a 90-day comment period ending on July 6.

* Summary Disbarment of Attorneys. At the April meeting of the Discipline Committee, the Office of the Chief Trial Counsel presented a proposed amendment to Business and Professions Code section 6102(c), which would authorize summary disbarment for attorneys convicted of felonies involving moral turpitude, felonies committed in the course of the practice of law, and misdemeanors involving both moral turpitude and clients or the practice of law. After brief discussion, the Committee carried the matter over to the May meeting. At the May meeting, the Chief Trial Counsel presented a revised version of the proposed amendment, which would apply summary disbarment only to attorneys convicted of felonies involving moral turpitude. The Committee approved the more limited revision, and referred the matter to the Board Committee on Courts and Legislation for consideration in July 1995.

Supreme Court Adopts Reappointment Process for State Bar Court Judges. The terms of five Hearing Department judges and all three incumbent Review Department judges expire on June 30, 1995. Following a public comment period ending on January 13, the California Supreme Court adopted amendments to Rule of Court 961 regarding the procedure for nominating candidates for positions on the State Bar Court. Under Rule 961, the Supreme Court will appoint a seven-member Applicant Evaluation and Nomination Committee to solicit and evaluate applications for vacancies on the State Bar Court. The Committee is required to consist of four lawyers, two active or retired judges, and one public member; no more than two members of the Committee may be present members of the Board of Governors, and neither of those may sit on the Board's Discipline Committee. The Committee must evaluate the qualifications of all applicants for appointment or reappointment to the State Bar Court and make recommendations to the Supreme Court; the Committee must submit the names of at least three qualified applicants for each vacancy. At the time it transmits its recommendations, the Committee must inform any incumbent seeking reappointment if he/she is not among the candidates recommended for appointment to a new term. /15:1 CRLR 174-75/

On March 2, the Supreme Court announced its appointments to the Committee. The chair is the Honorable Rebecca A. Wiseman, judge of the Kern County Superior Court. Other members include the Honorable Reuben A. Ortega, associate justice of the Second District Court of Appeal; current Board of Governors members Jay Plotkin and Melissa McKeith; former Board of Governors member Edward George, Jr.; Berkeley appellate law specialist Victoria DeGoff; and public member Edward Davis, former Los Angeles police chief and state senator.

In order to allow adequate time to consider candidates, the Supreme Court extended the terms of all sitting State Bar Court judges to November 1, 1995. The Committee will recommend three candidates for each of judicial positions open; the nominees may include sitting judges. Critics of the Bar have expressed concern that the appointed committee, influenced by current Bar staff, may seek to retaliate against existing State Bar Court judges. Such retaliation against the sitting judges—and especially against Presiding Judge Lise Pearlman—would be motivated by her objections to State Bar control of Court staff (see above) and to the Bar's attempt to control nominations to the Court, and could take the form of refusing to include their names among the three nominees to be submitted to the Supreme Court for each position. However, such an exclusion appears unlikely given the extraordinary success of the State Bar Court and widespread respect for its judicial decisions.

Confidentiality of Bar Disciplinary Investigations. At the May meeting of the Discipline Committee, Chief Trial Counsel Judy Johnson proposed an amendment to Business and Professions Code section 6086.1 concerning the confidentiality of Bar investigations. Currently, the statute requires the Bar to hold all disciplinary investigations in confidence until formal charges are filed, unless confidentiality is waived by the Chief Trial Counsel finds the public interest is served by disclosure. The proposed amendments would allow public access to disciplinary investigations after the Bar makes a formal decision to commence an investigation, and after notice to the member. Note that most complaints to the Bar do not result in the initiation of a formal investigation; the latter occurs only after an initial inquiry yields "probable cause" that a violation of applicable law or standards has occurred. Where such an investigation is under way, disclosure would be limited to the name of the complainant, the name of the member, the date of investigation initiated, the allegations involved, and the status of the investigation. The Chief Trial Counsel may decline to disclose information where any investigation may be prejudiced.

The proposed alteration of confidentiality would bring the Bar close to what is termed the "Oregon rule," under which complaints and investigations are public information. Traditionally, California has followed a more restrictive practice, refusing to disclose ongoing investigations until public and formal charges are filed—often one or more years after the underlying events. The State Bar had already moved toward somewhat greater disclosure in allowing the Chief Trial Counsel to disclose the fact of an investigation. However, that option places a difficult burden on the Chief Trial Counsel, who may be accused of secreting ongoing malpractice or dishonesty where he or she does not disclose. Because the Bar substantially filters incoming complaints before formal investigations are undertaken, and because most such investigations begin against attorneys with multiple complaints from different persons, the Chief Trial Counsel proposes to reverse the burden from disclosure of formal investigations unless she allows disclosure, to disclosure of investigations unless she decides to close them (e.g., in order to protect an undercover investigation).

Following discussion, the Committee referred the proposal back to the Chief Trial Counsel for further refinement and possible resubmittal.

Update on Bar Rulemaking. The following is a status update on proposed regulatory amendments which have been considered by the State Bar in recent months:

- **Uncontested Admissions.** In 1990, the Supreme Court adopted California Rule of Court 953, the so-called "finality rule," which provides that where a recommendation of the State Bar Court to disbar, suspend, vacate a stay, or modify conditions of probation is unchallenged by either the respondent or the Office of the Chief Trial Counsel within the requisite period, the decision is final. The Supreme Court retains authority to act on its own motion in any matter before the State Bar Court; however, unlike the previous rule where no decision was final until the Supreme Court had affirmatively acted, new decisions are final unless there is a petition for review or the Court decides to intervene. [11:1 CRLR 148]

Reinstatement decisions are discipline-related, and are governed by the same basic procedural rules as are applicable to discipline generally. They have therefore been included within the ambit of the finality rule. The Supreme Court requested that the Bar draft and send out for public comment a revision to Rule 953(b) to permit the Supreme Court to handle uncon-
tested admission and reinstatement mat-
ters under the same finality rule generally
applicable. Thus, an unchallenged recom-
mandation of the State Bar Court in rein-
statement matters and in moral character
proceedings (relevant to admissions) would also constitute a final judicial de-
termination on the merits.

At this writing, the proposed rule has
been released for a 90-day comment pe-
riod ending on July 6; the Admissions and
Competence Committee is scheduled to
address the public comments at its August
25 meeting.

• Rules for Accrediting Specialty Cer-
tification Programs. In April 1993, the
Board of Governors approved the new
version of Rule of Professional Conduct
1-400(D)(6), which prohibits California
attorneys from advertising as a “certified
specialist” unless the attorney is certified
by the Bar’s Board of Legal Specialization
or by another entity approved by the Bar
to designate specialists. At its August 1994
meeting, the Board Committee on Admis-
sions and Competence addressed the issue
of whether the Bar should determine which
entities properly designate certified spe-
cialists. The Committee hesitated to as-
sume the role of certifying those who cer-
tify competence. On the other hand, the
value of certification rests in the use of
specialist titles by those who have demon-
strated special competence. The use of such
titles without regulatory control stimulates
their use by private groups lacking quality
control or bona fide standards.

On April 7, the Bar released a proposal
which would permit it to establish and
administer a program for accrediting enti-
ties that certify attorneys as legal special-
ists. At this writing, the public comment
period closes on July 6.

• Appellate Law Specialty. In a related
topic, the Board of Governors approved
at its April meeting “appellate law” as an
eight area of legal specialty in California.
(The current areas of specialization enti-
tled to title designation include criminal
law, family law, immigration and nation-
ality law, workers’ compensation law, per-
sonal and small business bankruptcy, tax-
atation, and probate/estate planning/trust
law.) “Appellate law,” as defined by the
Standards for Certification and Recerti-
fication in Appellate Law, is the practice of
law dealing with both procedural and sub-
stantive matters before state and federal
appellate courts. Members may become
such a specialist by taking an examination
administered by the Bar every two years;
the first exam is scheduled for August 27.
For a short period of time, members may
also qualify for this specialty designation
by satisfying alternative requirements,
such as demonstration to the Appellate
Law Advisory Commission the requisite
knowledge of appellate law and related
fields by accumulating “points” in two of
the three areas of briefing, writing, or
teaching. The time period for becoming an
appellate law specialist under this alterna-
tive expires on December 31.

• Legal Services Trust Fund. The Board
Committee on Legal Services has released
for public comment a proposed rule change
to allow the Bar’s Legal Services Trust Fund
Commission to increase the amount charged
as a “processing fee.” The current rule per-
mits organizations which receive legal ser-
vice grants to charge clients a $10 processing
fee; the amendment would increase the max-
imum charge to $20.

Grants from the Bar’s Trust Fund go to
qualified legal services projects which
provide legal services without charge to
indigent persons. Funds may not be used
for fee-generating cases. The processing
fee is not considered a “fee for service.”
Programs may otherwise charge for ser-
vice not involving Trust Fund moneys so
long as half of all services of the organi-
ization are without charge.

The proposed change yielded two ob-
jections in public comments received.
First, some clients cannot afford a pro-
cessing fee and would be denied services
as a result. Although it might be possible
to waive the fee, its initial imposition may
deter indigent persons desperately needing
assistance. Second, Commission members
and recipient programs have objected that
no processing fee should be considered as
income for purposes of a match (matching
funds qualify recipients for additional grant
funds).

The Trust Fund Commission recom-
manded in May that the Board of Gover-
nors revise the proposed rule to compel pro-
cessing fees to be nominal in amount and not
available as a bar to the completely indigent.
The Commission intends to adopt guidelines
to 1) change the maximum processing fee
to allow recipient programs to charge a cli-
ent up to $20 with the understanding that it
would be waived or otherwise adjusted so as
to constitute a barrier to the indigent; (2)
require recipient programs to allow waiver
and to inform clients of the waiver possibil-
ity at the same time the fee is disclosed; and
(3) allow recipient programs to count pro-
cessing fees as qualified expenditures only
up to $10 per client (so the additional $10
would not count toward a grant increase).
In fact, only a small number of programs
charge any processing fee.

The 90-day public comment period
began on May 19 and is scheduled to end
on August 17; at this writing, the Bar has
plans to hold hearings on the proposal on
June 23 in San Francisco and before the
Board of Governors’ meeting in Los An-
geles in July.

• Trial Publicity Rule. In October
1994, the Bar’s Committee on Admissions
and Competence published proposed new
Rule of Professional Conduct 5-120 for a
90-day public comment period. The pro-
posed rule comes in response to SB 254
(Kopp) (Chapter 868, Statutes of 1994),
which requires the Bar to adopt a trial
publicity rule governing out-of-court
statements made by attorneys in both civil
and criminal proceedings. Under the new
law, the Bar must “consider” ABA Model
Rule of Professional Conduct 3.6 in its
formulation and submit its rule to the Cal-
ifornia Supreme Court by March 1, 1995.
[15:1 CRLR 176-77; 14:4 CRLR 214]

As published, the rule would have pro-
hibited a lawyer who is participating or
has participated in the investigation or lit-
gigation of a matter from, directly or indi-
rectly, making an out-of-court statement
“that a reasonable person would expect to
be disseminated by means of public com-
munication, if the lawyer knows or rea-
sonably should know the statement will
have a ‘substantial likelihood of materi-
ally prejudicing’ an adjudicative proceed-
ing in the matter. The proposed rule also
contained a ‘safe harbor’ provision which
lists several types of extrajudicial state-
ments which attorneys are permitted to
make. The Discussion section of the pro-
posed rule notes that “[w]hether an extra-
judicial statement violates rule 5-120 de-
pends on many factors, including: (1)
whether the extrajudicial statement pres-
ents information clearly inadmissible as
evidence in the matter for the purpose of
proving or disproving a material fact in
issue; (2) whether the extrajudicial state-
ment presents information the member
knows is false, deceptive, or the use of
which would violate Business and Profes-
sions Code section 6068(d); (3) whether the
extrajudicial statement violates a law-
ful ‘gag’ order to protective order; statute,
rule of court, or special rule of confidenti-
ality; and (4) the timing of the statement.”

The “substantial likelihood of material
prejudice” language in the proposed rule
is based on current ABA Model Rule 3.6
and the U.S. Supreme Court’s plurality
decision in Gentile v. State Bar of Nevada,
498 U.S. 1023 (1991) [11:4 CRLR 213-
14; 11:3 CRLR 202], in which the Court
considered a disciplinary action that had
been imposed on a Nevada lawyer by the
Nevada Supreme Court for allegedly im-
proper extrajudicial statements. Nevada’s
trial publicity rule contained both the
“substantial likelihood of material preju-
dice” standard and a safe harbor provision.
Two public hearings in late 1994 produced substantial opposition to the rule as proposed. The Bar accepted public comments on proposed Rule 5-120 until January 9. During its January 21 meeting, the Board of Governors considered defying the statutory requirement to submit a proposed rule on trial publicity, but compromised on a more liberal version. The revised version clarifies an attorney’s right to respond to “scurrilous comments made by opposing counsel.” It also provides that out-of-court speech may be sanctioned only if it presents a “clear and present danger” of influencing a jury’s verdict, rather than the “substantial likelihood” test of the circulated draft.

At this writing, the proposed rule awaits Supreme Court rejection, approval, or revision.

• Monetary Penalties for Disciplined Attorneys. At its March meeting, the Discipline Committee was scheduled to discuss the comments received on its proposal to adopt Guidelines for the Imposition of Monetary Sanctions in Attorney Disciplinary Proceedings pursuant to Business and Professions Code section 6086.13, which became effective on January 1, 1994. The Guidelines would establish two ranges of fines for disciplinary violations of the State Bar Act and the Rules of Professional Conduct (RPC)—an upper range ($2,600-$5,000 per violation) applicable to the most serious statutory or RPC violations, and a lower range ($100-$2,500 per violation) applicable to all other statutory or RPC violations. Under the Guidelines, the specific sanction to be imposed within the applicable range will be determined by a State Bar Court judge upon application of specified criteria. Monetary sanctions will be paid into the Bar’s Client Security Fund, which assists in compensating clients who have been victimized by the intentional dishonesty of their lawyers. [14:4 CRLR 213; 14:2&3 CRLR 224–25; 13:4 CRLR 215]

At the April meeting of the Discipline Committee, the Office of the Chief Trial Counsel presented the requested report, stating that its computer system contains no discipline allegation code references enabling the systematic capture of information about continued practice by those who have lost their licenses. However, it was estimated that approximately 25% of the 1,200 investigations initiated under the category “interference with justice” concerned some aspect of conduct by those purportedly barred from practice. Such an estimate indicates a serious problem. Upon consideration of the report, the Committee adopted a revised version of Rule 1-311 and referred it back to the Committee on Admissions and Competence for review and recommendation to the Board of Governors. However, the Committee on Admissions and Competence deferred the matter to July. Members of the latter Committee hesitate to require notice to clients that the suspended or disbarred attorney is not authorized to practice law as an attorney. One solution would be to specifically require such persons to designate themselves as “paralegals” who must undergo existing law work under the license of an attorney who is responsible for their actions. The Office of the Chief Trial Counsel has argued that the current problem is exacerbated by the tendency of suspended or disbarred attorneys to practice without close supervision, and in a manner conveying the impression that they remain fully licensed attorneys.

• Copies of Significant Documents for Clients. In September 1993, the Board of Governors forwarded proposed new Rule of Professional Conduct 3-520, which would require attorneys to provide to a client, upon request, one copy of any significant document or correspondence received or prepared by the attorney relating to the employment or representation, to the California Supreme Court for review and approval. [14:1 CRLR 176; 13:1 CRLR 142]

In May 1994, the Supreme Court returned the proposed rule to the Bar, with instructions to release it for comments from California superior and appellate courts, particularly with regard to the potential fiscal impact of the proposed rule on appellate courts in criminal cases in which counsel has been appointed by the court for indigent defendants. According to the Court, “[r]ecords and transcripts on appeal may consist of tens of thousands of pages. Such material arguably would be ‘significant’ to any appeal and it would appear that the cost of complying with the proposed rule, which would be placed on the courts, could be considerable.” The
Court suggested that the Bar may wish, for example, to determine whether a definition of the term “significant” or some other means may be used to describe more precisely “an attorney’s duty in the criminal appellate context or even in other instances in which an onerous fiscal burden may be placed on courts or counsel.” Additionally, the Court suggested that the Bar contemplate including language in the rule to state that the rule does not supersede any other statutory or judicially-created protective orders or other nondisclosure agreements.

Accordingly, the Bar released the proposal for public comment in August 1994, and closed the public comment period on November 21. The Bar resubmitted the rule to the Supreme Court in December 1994; at this writing, the Court has not yet acted on the rule.

**LEGISLATION**

**SB 60 (Kopp), as amended May 11, would require the State Bar to conduct a plebiscite of its active members in good standing to determine whether the members favor abolishing the State Bar, to have its regulatory functions taken over by other entities and its other activities either ceasing or taken over by one or more voluntary bar associations. The bill would specify the contents of the ballot for the plebiscite, which would include an analysis by the Legislative Analyst. The Board of Governors would be required to report the results of the plebiscite to the Supreme Court, Governor, and the legislature by July 1, 1996. SB 60 would also require the State Bar to contract with the State Auditor to conduct a comprehensive management audit of the State Bar. [S. Appr]**

**AB 1414 (W. Brown), as amended April 24, would repeal existing provisions creating the Complainants’ Grievance Panel and instead provide for a Discipline Audit Panel within the State Bar, consisting of three members of the State Bar and four public members who have never been members of the State Bar or admitted to practice before any court in the United States. The Panel would conduct specified audits relating to the processing of complaints against attorneys by the State Bar (see MAJOR PROJECTS). [S. Jud]**

**AB 1435 (W. Brown), as introduced February 24, would establish annual Bar membership fees for the years 1996 and 1997 in the same amounts as those for the year 1995. No adjustment for inflation is included.**

Existing law, until January 1, 1996, requires the Board of Governors of the State Bar to increase the annual membership fees by an additional fee of $110 to be used exclusively for discipline augmentation. This bill would continue that requirement for the years 1996 and 1997; again, no adjustment for inflation is included. [S. Jud]

**AB 757 (Speier). Existing law provides for the award of exemplary (or “punitive”) damages in an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice. As introduced February 22, this bill would enact the Fair Damages Distribution and Litigation Reduction Act of 1995, providing for the apportionment of such exemplary damages which exceed twice the amount of compensatory damages among the plaintiff, the State Bar, and a nonprofit corporation chosen by the plaintiff. Currently, all such damages accrue to the plaintiff (subject to fee apportionment to the plaintiff’s attorney). [A. Jud]**

**AB 1420 (W. Brown). Existing law requires an attorney who contracts to represent a client on a contingency fee basis to provide a duplicate copy of the contract to the client at the time the contract is entered into; the contract must be in writing and must include specified information. As introduced February 24, this bill would require such a contract to include a statement that before hiring a lawyer, the client has the right to know about the lawyer’s education, training, and experience, and his/her actual experience dealing with similar cases. [A. Jud]**

**SB 596 (Petris). Existing law provides that for a person to be admitted to practice law, he/she must graduate from a law school accredited by the examining committee of the State Bar or must otherwise studied law, as specified. As introduced February 21, this bill would prohibit the State Bar from accrediting law schools, and limit the activities of the State Bar to responsibility for admission of persons to the practice of law and discipline of members. [S. Jud]**

**SB 682 (Peace). Existing law requires the Medical Board of California, the State Bar, and the Board of Chiropractic Examiners to each designate employees to investigate and report to the Department of Insurance’s Bureau of Fraudulent Claims any possible fraudulent activities relating to motor vehicle or disability insurance by licensees of the boards or the Bar. As introduced February 22, this bill would require, in addition, that those entities investigate and report any possible fraudulent activities relating to workers’ compensation. [A. Ins]**

**SB 1183 (Mountjoy). Existing law imposes prescribed duties on every attorney, including a duty not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest. As amended March 28, this bill would create a cause of action against an attorney who violates some of these duties, making the attorney liable to the opposing party or parties injured for treble damages, as specified. [S. Jud]**

**SB 702 (Petris). Existing law regulating admission to the practice of law provides that, among other requirements, a first-year law student attending a nonaccredited law school must pass an examination (the so-called “baby Bar”) and shall not receive credit for the first year of study until he/she has passed the examination. A student attending a nonaccredited law school also shall not receive credit for any study subsequent to the first year that is done prior to passing the “baby Bar,” unless good cause exists for giving credit for some or all of the study. As amended May 18, this bill would eliminate the requirement that a student at a nonaccredited law school pass the “baby Bar” examination as a condition of receiving credit for the first year of study or subsequent study, and of admittance to the practice of law. The bill would instead require only that a student at a nonaccredited school take the examination.

This bill would further provide that the Committee of Bar Examiners shall notify a student who has taken the “baby Bar” examination of what his/her score suggests about the student’s probability of becoming an attorney. A student may continue his/her legal studies as long as he/she can satisfy the law school’s academic standards. In addition, the bill would require the State Bar to publish the same statistics for the “baby Bar” examination as it currently publishes for the general Bar examination. [S. Floor]**

**SB 1321 (Calderon), as amended May 9, would revise provisions relating to the appointment of members of the Committee of Bar Examiners, delete obsolete provisions, revise provisions relating to undergraduate study or its equivalent, provide that an applicant may graduate from a law school accredited either by the Committee or the American Bar Association, revise provisions governing legal study or apprenticeship, require passage of a professional responsibility examination as a condition of admission to the Bar, revise and add new provisions related to applications and filing fees for the Bar examination, and revise and add new provisions related to the admission of out-of-state or foreign attorneys.**
Existing law establishes a court filing fee of $14 for filing a notice of motion, any other paper requiring a court hearing after the first paper, a notice of intention to move for a new trial in a civil action or special proceeding, or an application for renewal of judgment. This bill would authorize a county board of supervisors to increase the court filing fee to $16 for these matters. The additional revenue from the higher fee would be deposited in a Wage Earners' Legal Assistance Fund created in the county treasury and would be available for legal services for persons or families with specified incomes provided by nonprofit organizations under contract to the county. [A. Jud]

AB 1241 (Richter). The California Environmental Quality Act (CEQA) generally requires the preparation of an environmental impact report or negative declaration unless a development project is exempt from the Act. CEQA requires the Governor's Office of Planning and Research, at least every two years, to review and recommend changes to the guidelines adopted pursuant to the Act, and requires the Office, by a specified date, to recommend certain proposed changes to the guidelines. As amended May 17, this bill would prohibit the Office from expending any funds appropriated to it if the Office does not comply with those requirements. The bill would also require the State Bar to prepare and submit to the Governor and the legislature a report on the number of projects that were subject to, exempt from, or subject to litigation under, CEQA. [A. Appr]

SB 141 (Beverly). Under existing law, a limited liability company is prohibited from rendering professional services; professional services are those services for which a license, certification, or registration is required under specified statutes. As amended April 24, this bill would permit limited liability companies to perform all professional services except those subject to licensing or certification by a limited number of entities, including, among others, the State Bar. [S. Jud]

**LITIGATION**


The *Brotherhous* case stems from *Keller v. State Bar of California*, 496 U.S. 1 (1990) [10:2&3 CRLR 215-16], in which the U.S. Supreme Court struck down the Bar's use of mandatory membership fees for ideological or political purposes unrelated to the "regulation of the legal profession or improving the quality of legal services." The Bar was compelled to create a negative check-off enabling Bar members to avoid paying that portion of their fees dedicated to such unrelated use. The Third District's decision in *Brotherhous* dealt a blow to the Bar's attempt to limit the determination of allowable mandatory charges to mandatory arbitration. The Bar had created a mandatory arbitration procedure to adjudicate these disputes, and the Third District held that the Bar may not bind members in a manner which forecloses judicial determination of first amendment rights. The grant of review by the Supreme Court in February vacates this decision.

In *Passman v. Torkan*, 34 Cal. App. 4th 607 (Apr. 26, 1995), the Second District Court of Appeal held that a defamation complaint filed by two attorneys representing one party in underlying litigation against the opposing party was correctly dismissed because the alleged defamation occurred during a judicial proceeding and was therefore privileged. In the underlying litigation, Torkan sued Kermanshahchi, seeking dissolution of a corporation in which both were stockholders. Torkan claimed that Kermanshahchi fraudulently failed to report the corporation's gross receipts. After the trial court determined that Torkan held a 20% ownership share in the corporation, Kermanshahchi elected to purchase that interest.

During the valuation of the shares by three court-appointed appraisers, Torkan accused Kermanshahchi and his two attorneys, Sanford Passman and Stephen Gross, of misleading the appraisers and of criminal conspiracy to steal the value of his shares. Torkan also sent a letter to the district attorney urging criminal prosecution. Attorneys Passman and Gross sued Torkan for defamation. Torkan demurred to the complaint, asserting the litigation privilege in Civil Code section 47(b) (which is ironically used most often by counsel to fend off defamation and other actions by non-attorneys). The trial court sustained Torkan's demurrer without leave to amend.

The Court of Appeal affirmed, holding that the absolute litigation privilege extends to statements made in judicial proceedings by litigants to achieve the object of the litigation.

The statements must be connected to the judicial proceedings. Torkan's statements were made allegedly to motivate his attorney and to conclude the underlying action before further dissipation of corporate funds and were directly related to the issues under litigation (the value of the shares). Torkan's letter to the district attor-