



vice subject to the PUC's jurisdiction with rates, terms or conditions differing from the schedules on file with the PUC, except under specified conditions. This bill would also provide that a local agency is exempt from any requirement to make available for public inspection a contract negotiated by the local agency for the provision of gas, but may disclose the contract information under specified conditions. The provisions of the bill would be repealed January 1, 2001. [S. Inactive File]

**SB 25 (Leonard, Peace)**, as amended July 15, is an urgency bill which would prohibit the PUC from requiring utilities to purchase specific "resource additions" from alternative independent power producers; this bill would abolish the Biennial Resource Plan Update procedure implemented by the PUC through which alternative energy producers bid for the right to sell their energy to utilities at a PUC-determined price. [15:1 CRLR 166-67] [A. U&C]

## LITIGATION

On December 18 in *Assembly of the State of California v. PUC (Pacific Telesis, Real Party in Interest)*, 12 Cal. 4th 87, the California Supreme Court annulled the PUC's 1994 disposition of approximately \$50 million assessed against Pacific Bell for research and development costs for wireless and cellular systems financed through phone rates between 1974 and 1983.

In its 1994 ruling, the PUC decided that when PacBell spun off Pacific Telesis's wireless operations into the extensive cellular enterprise "Airtouch," it took with it into the competitive market sector \$7.9 million in research and development costs derived from ratepayer contribution; accordingly, in order to repay the ratepayers and preclude the unjust enrichment of the spin-off for-profit enterprise, the PUC ordered Pacific Telesis to pay \$7.9 million plus 18% interest (a total of \$42.1 million in interest) into a designated account. The Commission ordered that the \$7.9 million in "refund principal" be allocated to PacBell ratepayers through a surcredit on monthly bills. It further allocated \$40 million in interest to be used for telecommunications programs and facilities in public schools statewide; and allocated \$2.1 million in interest to continue its Telecommunications Education Trust. [14:4 CRLR 201-02] Petitioners challenged the Commission's action, contending that the PUC violated Public Utilities Code section 453.5 by failing to order a refund of the entire amount of the Pacific Telesis refund account to PacBell customers; the petitioners further contended that in diverting a

portion of the funds for a different, public use of its own choosing, the PUC improperly invaded the legislative domain of taxation and appropriation.

The California Supreme Court explained that Pacific Telesis was obligated to refund money to ratepayers pursuant to a 1982 FCC order; the amount of the refund ordered by the PUC was calculated based upon the refund principal (\$7.9 million) plus interest on the principal. The court explained that as an alternative to charging the high interest rate of 18% on the refund principal, the PUC could have sought to impose a penalty against Pacific Telesis or PacBell—separate from the rate refund—because of their disregard of the FCC order; however, the PUC chose not to proceed in that fashion, and elected to obtain interest on the refund principal.

The court then found that because the funds were deposited by Pacific Telesis pursuant to its existing obligation to distribute a rate refund to PacBell's customers, the disbursement of the funds by the PUC is governed by section 453.5, which provides—among other things—that whenever the PUC orders rate refunds to be distributed, the Commission shall require public utilities to pay refunds to all current utility customers and, when practicable, to prior customers on an equitable pro rata basis. According to the court, the legislative history on section 453.5 indicates that a purpose of the enactment was to restrict the PUC's discretion with respect to the use of ratepayer refunds ordered by it.

Further, the court explained that nothing in section 453.5 suggests that, once having ordered the distribution of a rate refund to a utility's current customers, the PUC may refuse to refund to those customers the interest that the PUC has assessed against the utility on the basis of the refund principal; according to the court, "[t]he interest charged on the ratepayer refund constitutes part of the refund" and must be refunded to ratepayers pursuant to section 453.5.

In *San Diego Gas & Electric v. Superior Court (Covalt)*, 36 Cal. App. 4th 1461 (1995), the Fourth District Court of Appeal dismissed Martin and Joyce Covalt's suit against an electric utility for damages from electromagnetic field (EMF) emissions caused by power lines near their home. The court reasoned that the PUC has exclusive jurisdiction over this matter, which precludes a suit for damages. On April 7, the Covalts filed a petition for review to the California Supreme Court; on May 11, the high court granted it. [15:2&3 CRLR 208]

On September 25, the American Medical Association and the California Medi-

cal Association filed a brief stating that no scientifically documented health risk has been associated with the usually occurring levels of electromagnetic fields. In a separately filed brief, 14 scientists who have studied the effects of EMF, including six Nobel laureates, state that the current concern over EMF health hazards is not supported by the weight of credible scientific evidence.

The high court is expected to make a decision before the end of 1996.

In *Southern California Gas Company v. City of Vernon*, 41 Cal. App. 4th 209 (Dec. 20, 1995), the Second District Court of Appeal ruled that the design and construction of a Southern California Gas Company (SoCalGas) pipeline under the City of Vernon is within the regulatory purview of the PUC, not the city.

SoCalGas holds a franchise to lay and use pipes beneath Vernon's streets. In May 1992, SoCalGas submitted two alternate routes for a gas pipeline under the city. In June 1992, Vernon informed the gas company that its applications failed to satisfy City safety requirements. After losing an appeal to the city council, SoCalGas filed a petition for a writ of mandate in superior court. The trial court granted the SoCalGas' petition and, on May 25, 1993, directed the city to approve the pipeline permit. On appeal, the Second District affirmed the trial court's ruling because the regulation of pipeline safety is within the exclusive jurisdiction of the PUC, and Vernon did not object to the pipeline on the limited ground available to it under the franchise it granted to SoCalGas.

## FUTURE MEETINGS

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

## STATE BAR OF CALIFORNIA

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The State Bar of California was created by legislative act in 1927 and codified in the California Constitution at Article VI, section 9. The State Bar was estab-



lished 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 Califor-

nia 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 its July meeting, the Board of Governors elected James E. Towery to succeed Donald Fischbach as State Bar President. Towery defeated candidate Dorothy Tucker from Los Angeles, who sought to be the first non-lawyer president in the Bar's history. Towery is a partner in the San Jose firm of Hoge, Fenton, Jones & Appel and chairs the board of directors of the Alexian Brothers Hospital in San Jose. He served as president of the Santa Clara Bar Association in 1989. Towery began his one-year term as president at the Bar's annual meeting on September 28–October 1 in San Francisco.

Also at the annual meeting, six new lawyer members joined the Board of Governors. District 2 elected Samuel L. Jackson, the Sacramento City Attorney. District 3 elected Ann M. Ravel, a chief assistant county counsel in Santa Clara. District 4 elected Raymond C. Marshall, a partner in the firm of McCutchen, Doyle, Brown & Enersen, who served as president of the Bar Association of San Francisco last year. Jeffrey A. Tidus, a principal in the Los Angeles firm of Horn, Tidus & Loomis, and Leon Goldin, a sole practitioner, were elected to fill two open spots in District 7. The California Young Lawyers Association elected Constantine Buzunis, from the San Diego firm of Neil, Dymott, Perkins, Brown & Frank. Each of the new governors will serve three-year terms, except the CYLA member who serves for one year.

## ■ MAJOR PROJECTS

**State Bar Court Judges Ousted.** In July, State Bar Court (SBC) Presiding Judge Lise Pearlman and incumbent hearing judges Jennifer Gee, Alan Goldhammer, Ellen Peck, and JoAnne Robbins were effectively given pink slips when the seven-member Applicant Evaluation and Nomination Committee appointed by the California Supreme Court failed to nominate them for second terms in the positions they have held for the past six years.

When the SBC was created by SB 1498 (Presley) (Chapter 1159, Statutes of 1988), its members were appointed by the Supreme Court for six-year terms, upon nomination by the Board of Governors. The statute also provided that, "unless otherwise directed by the Supreme Court," the Board of Governors would also screen, rate, and nominate all candidates for reap-

pointment to the Court. Because the Board administratively controls the investigation and prosecution of cases, critics argued that it was in a position to exert special influence over SBC judges by potentially not recommending them for reappointment—thus compromising the court's independence.

After a lengthy internal skirmish between the SBC and the Board of Governors over the procedures governing the reappointment process, the California Supreme Court rejected both sides' proposals and adopted its own procedure in December 1994. The Court amended Rule of Court 961 to provide for its appointment of a seven-member Applicant Evaluation and Nomination Committee, consisting of four lawyers, two active or retired judges, and one public member. The amended rule requires that no more than two members of the Committee may be current members of the Board of Governors, neither of whom may sit on the Board's Discipline Committee, which directly oversees the Office of the Chief Trial Counsel. The Committee must evaluate the qualifications of all applicants for appointment and 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. Additionally, the Committee must notify any incumbent seeking reappointment if he or she is not among the candidates recommended for reappointment to a new term at the time it submits its recommendations. [15:1 CRLR 174-75]

Although the Supreme Court's revision of the rule was close to the suggestion of Presiding Judge Pearlman, outside critics feared that the appointed committee members might be influenced by current Bar staff and might seek to retaliate against incumbent SBC judges. This fear was exacerbated by an ongoing effort by the State Bar to control the detailed administration of the court. [15:2&3 CRLR 212] However, that possibility seemed unlikely given the noted success of the SBC, including lavish praise from the Discipline Evaluation Committee which recently undertook a comprehensive evaluation of the Bar's disciplinary system. Specifically, the report recognized the fact that the Supreme Court had granted almost no writs of review since the SBC was created, which may be interpreted as a vote of confidence from the state's highest court. [14:4 CRLR 209-10]

However unlikely that contingency seemed, the Applicant Evaluation and Nomination Committee's recommendations did not include the aforementioned names of incumbent SBC judges seeking reappoint-



ment. Although the judges were given no reason as to why they were not recommended for reappointment, the justification for nonrenewal was characterized in the legal press as "excessive leniency" by the court. However, only one of the Review Department judges (Presiding Judge Pearlman) was not recommended for renewal, and its decisions have been consistently unanimous.

In a July 17 letter to the Supreme Court, former State Bar Discipline Monitor Robert C. Fellmeth of the Center for Public Interest Law urged the Court not to adopt the recommendations of its screening committee. He argued that the nonrenewal is the latest attempt by the Bar to deter the SBC from realizing "necessary independence." He cautioned that "without sufficient separation from the prosecution and from the practicing profession," the SBC cannot warrant the reliance of either the Supreme Court or the public.

Despite the pleas of Fellmeth and other critics, in August the Supreme Court adopted the recommendations of its committee and announced the new members of the State Bar Court. The new presiding judge will be James Obrien, 68, of Costa Mesa. Obrien was a member of the Board of Governors from 1987 to 1990, and served as Bar Vice-President in 1989-90. He will join two incumbents, Ronald Stovitz of San Francisco (who was reappointed for a full six-year term) and H. Kenneth Norian of Los Angeles, the public member of the Review Panel (who was reappointed for a three-year term to create a staggered appointment schedule).

At the Hearing Department level, the new SBC judges include former Los Angeles Deputy District Attorney Michael Marcus (appointed to a six-year term); Oakland attorney Nancy Lonsdale, who has served as pro tem on the SBC (appointed to a three-year term); Oakland white collar criminal defense specialist Eugene Brott (appointed to a six-year term); and Los Angeles County Superior Court Judge Madge Watai (appointed to a three-year term). All new judges will begin their terms on November 1 with the exception of Watai, who will delay the move until January 1 in order to ease the transition for her successor on the Superior Court bench.

Los Angeles' Carlos Velarde was reappointed as a Hearing Department judge for a four-year term. The Hearing Department's sixth judge, David Wesley, does not come up for reappointment until 1999.

**Implementation of the Recommendations of the Discipline Evaluation Committee.** The Discipline Evaluation Committee (DEC), created by the Bar to

evaluate the impacts of recent changes to its discipline system, made a series of recommendations in August 1994; the Board of Governors' Discipline Committee has been considering these recommendations for the past 18 months. [15:2&3 CRLR 210; 15:1 CRLR 172-73; 14:4 CRLR 209]

**• State Bar Court Staffing Changes.**

Pursuant to suggestions from the DEC, the Discipline Committee has been working on a set of proposed organizational changes to the State Bar Court and its staff. The Committee hired court administration consultant Alexander B. Aikman to investigate possible formats for the changes; the Committee also relied heavily on the recommendations of State Bar Court senior executive Stuart Forsyth in producing the proposal.

The proposal involves changes to sections 100-116 of the Bar's Transitional Rules of Procedure (TRP), including the controversial new rule 116, called "Administrative Functions." The rule effectively places State Bar Court staff under the supervision of the State Bar, rather than the SBC judges for whom they work. [15:2&3 CRLR 210-11] At its June 22 meeting, the Committee decided to circulate the proposed revisions for public comment. Following public comment, the Committee made additional minor changes at its September 27 meeting. In light of the changes, the Committee sent the revised proposal out for an additional 30-day public comment period.

Public comment was heavily critical of portions of proposed new rule 116. California Judges Association (CJA) Executive Director Constance Dove commented that proposed TRP 116 would be a direct violation of the Code of Judicial Ethics Canons 3B(9), 3C(1) and (2). Dove also noted that, because the judges of the State Bar Court are members of the CJA and are subject to the Code of Judicial Ethics, they might be subject to discipline for operating under the proposed rule. Presiding State Bar Court Judge Lise Pearlman and SBC judges Alan K. Goldhammer and Ronald W. Stovitz all opposed vigorously the proposed usurpation of judicial control over the court's own staff. The judges stressed that sufficient independence from the State Bar is essential in the administration of justice, and would be severely impaired by the proposal.

CPIL's Professor Robert Fellmeth also commented against the proposed changes. As noted above, Fellmeth was the State Bar Discipline Monitor from 1987 to 1992 and helped to draft the legislation creating the State Bar Court. In his comment, Fellmeth stressed the legislature's intent to

create an independent court, which is necessary because the Bar has retained control over the prosecutory component of the discipline system through its appointment and control of the Chief Trial Counsel. He argued that the prosecutor should not unduly influence the court, particularly where—as here—the court's decisions are entitled to "finality" (there is no assured judicial review of SBC decisions). [11:1 CRLR 148] Fellmeth also noted that the State Bar is controlled by a board consisting of 23 members, 17 of whom are elected by the profession; he argued that the use of a profession-dominated body exercising control over the staff and facilities of the judges charged with disciplining that profession undermines public confidence in a fair and independent process.

Despite the disapproving nature of most public comments received, the Discipline Committee recommended that the Board of Governors adopt the proposed rule changes at its October 27 meeting. The Board of Governors followed the recommendation and adopted the proposed changes. The final language included some softening deference to the SBC judges. However, the structure created ensures that the Board of Governors controls the hiring, promotion, firing, compensation, and even job descriptions of all court personnel. The rule requires the Bar to adequately support the court's function, not interfere directly with its independent judicial decisionmaking, and consult the judges in making major personnel decisions. However, critics argued that the obligation of the Bar to "consult" is window-dressing over the *de facto* control of facilities and personnel of the court, an outside control which would not be countenanced as constitutional or ethically proper in any other court.

**• Complainants' Grievance Panel Changes.** In 1987, the Complainants' Grievance Panel (CGP) was statutorily created in order to review closed Bar discipline cases in which no formal charges have been filed. Since then, the CGP has conducted random audits of such cases and also reviewed matters referred by complainants who were dissatisfied with the fact that no charges were filed pursuant to their complaints. In 1994, the DEC recommended that the CGP be abolished. At its April 1995 meeting, following a yearlong consideration of the matter, the Discipline Committee approved a proposal to seek amendments to Business and Professions Code sections 6086.11, 6086.13(a)(11), 6093.5, and 6095(c). The proposal, presented to the Committee by State Bar Court senior executive Stuart Forsyth, would replace the CGP with a Discipline Audit



Panel (DAP). The DAP would serve a similar purpose as the CGP, but would not have the authority to review case closures at the request of complainants. Those requests to review closures constituted most of the workload of the CGP. [15:2&3 CRLR 211]

Following approval by the Board of Governors at the April meeting, the proposed changes were amended into AB 1414 (Brown). The legislation was enacted and becomes effective as of January 1 (see LEGISLATION). Panel members have objected to the details of the new law's implementation, complaining that resources and authority have been denied the new Discipline Audit Panel, and contending that it no longer serves as a meaningful outside check on the performance of the State Bar's discipline system. Over 95% of the complaints to the Bar are disposed of privately; thus, this change may remove or limit the major outside source of independent review of these decisions to close cases without investigation or discipline.

• **Mandatory Remedial Education.** After a 90-day public comment period ending on June 8, the Discipline Committee and the Board of Governors approved amendments to State Bar Rule of Procedure 290. The new rule, effective August 26, implements the DEC's recommendation that disciplined attorneys be required to attend the State Bar Ethics School or a comparable remedial education course offered by a certified provider (if the attorney resides a substantial distance from the school). Attorneys who have attended such a course in the past two years, or are excused by the Supreme Court, are exempt from the rule. [15:2&3 CRLR 211]

• **Disbarment Extension in Lieu of Permanent Disbarment.** Early in 1995, the Discipline Committee considered the DEC's recommendation that certain attorneys be permanently disbarred with no chance of reinstatement. At its February 22 meeting, the Committee decided the suggestion was too harsh, and rejected a proposed change to California Rule of Court 951(f) that would have enacted the DEC's recommendation. As an alternative to the DEC's recommendation, the Office of Trial Counsel suggested an amendment to Rule 662 of the Bar's Rules of Procedure. The proposal would require attorneys to wait ten years before being allowed to petition for reinstatement if they have been convicted of felonies involving moral turpitude, or convicted of misappropriation of client funds in an amount qualifying as grand theft. Currently, any disbarred attorney may petition for reinstatement after five years. The Committee re-

leased the proposal for a 90-day comment period in April. [15:2&3 CRLR 211-12]

The Board of Governors was scheduled to discuss and approve the proposal at its August meeting; however, then-Discipline Committee Chair James Towery pulled the item off the agenda because of last-minute objections from three of the state's largest local bar organizations. Letters from local bars in San Francisco, Los Angeles, and Orange County requested an additional 90 days to consider the issue. The requests stated that the Bar's original request for public comment did not make the terms and implications clear.

Towery's acquiescence to the local bar associations prompted the strong dissent of Wendy Borchardt, a public member of the Board. Ms. Borchardt felt that the proposed rule had already been "watered down" in an effort to appease opponents, and that the local bar associations and other public commentators had already been given an excessive amount of time to respond to the proposal. She noted that the public comment period began in April 1995, and had been repeatedly publicized in the legal press. Chair Towery scheduled reconsideration of the issue for the Committee's December 1995 meeting, at which time the Committee stayed action on the matter. Observers expect no change in the current arrangement which permits a petition for reinstatement after "disbarment"—even for the most egregious violators—after only five years.

• **Summary Disbarment of Attorneys.** The Chief Trial Counsel presented an amendment to Business and Professions Code section 6102 at the May 1995 meeting of the Discipline Committee. The proposal is a refinement of an earlier version presented at the Committee's April meeting. The Committee approved draft legislative changes which would apply summary disbarment to attorneys convicted of felonies involving moral turpitude. After its approval by the Discipline Committee, the proposal was referred to the Board Committee on Courts and Legislation for consideration in July 1995. [15:2&3 CRLR 212] At the July meeting, that committee decided to circulate the proposal for a public comment period ending on September 8.

At the Bar's annual meeting in September, the Board of Governors approved the proposed bill to change Business and Profession Code section 6102 as recommended by the Discipline Committee and the Committee on Courts and Legislation. This item is now on the Bar's legislative agenda, meaning the Bar will attempt to have the changes introduced in 1996.

**Implementation of the Recommendations of the "Futures Commission."**

During the spring of 1993, the Bar's Commission on the Future of the Legal Profession and the State Bar (the "Futures Commission") began a lengthy study of the basic structure of the State Bar. Convened by 1992 Bar President Harvey Saferstein, the Commission was spawned by AB 687 (W. Brown), which would have abolished the current "integrated" Bar and replaced it with a more traditional occupational licensing agency within the Department of Consumer Affairs. In response to Bar opposition, Speaker Brown later amended his bill to create a 21-member task force to study structural alternatives to attorney regulation. Governor Wilson vetoed the bill, objecting that its charter was not broad enough and included no gubernatorial appointees. However, the State Bar regarded the serious challenge as a "wake-up call" and created the Commission, broadening its scope as the Governor suggested, to examine the need for legal services over the next quarter century, the vision of the Bar in meeting those needs, and the proper framework to fulfill that vision. [13:2&3 CRLR 219; 13:1 CRLR 140-41] The Futures Commission issued its final report and recommendations in April 1995. [15:2&3 CRLR 209-10; 15:1 CRLR 175]

One key—and very divisive, as the vote was 13-8—recommendation of the Futures Commission is retention of the "integrated" bar structure (the combination in a single entity of private trade association selected by the membership and state regulatory agency exercising state police powers). The Board of Governors followed suit in August, voting to retain the mandatory integrated structure. As noted below, SB 60 (Kopp) was recently enacted, and requires a plebiscite of California's 120,000 attorneys as to their thoughts on the structure of the Bar (see LEGISLATION). Supporters of the plebiscite, such as San Francisco chief deputy public defender (and Board of Governors member) Peter Keane, contend that the State Bar is a bloated, overly expensive bureaucracy. He and other critics would like to see it replaced with a smaller, less expensive public agency (not controlled by the practicing profession) which reports directly to the California Supreme Court, or which is located under the Department of Consumer Affairs with other occupational licensing agencies, and whose duties are limited to admissions, standard-setting, and discipline. Any attorney would be free to voluntarily join an attorneys' trade association.

Faced with this serious opposition, Bar President Jim Towery is actively campaigning to retain the current structure. In October, he urged lawyers to preserve



"our rights of self-governance and independence." He contended that abolition of the mandatory bar would eliminate lawyers' ability to govern themselves, a trait unique among professionals in California. He added that such an action would result in no coordination of legal assistance programs for the poor, no ethics hotline, and no voice to represent lawyers' interests in the legislature. The plebiscite will be presented to the attorneys in May 1996.

At the Board of Governors' July 7 meeting, the Coordinating Committee on Recommendations of the Futures Commission announced that recommendations concerning over one-third of the conclusions reached by the Futures Commission either are general position statements that require no Board action or continue a specific policy that is the status quo. Such recommendations of the Futures Commission were classified as "no referral necessary," meaning that no further action be taken by the Board.

With regard to other Futures Commission recommendations, the following actions have been taken. Consideration of the recommendation that only graduates of ABA- or California-approved law schools should be allowed to take the California Bar exam has been put over until the February 1996 meeting of the Board Committee on Admissions and Competence. At its December meeting, that committee decided that the question of reciprocity of admissions to persons licensed three years or longer in another jurisdiction (if that jurisdiction reciprocates) requires additional study; a report will be issued to the committee during its June meeting. The recommendation calling for mandatory professional liability insurance for all active members has been referred to the Discipline Committee. The Coordinating Committee recommended that no further action be taken on the recommendation that adjudication of discipline cases be transferred as under the aegis of the Supreme Court.

**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:

• **Trial Publicity Rule.** On September 14, the California Supreme Court rejected the Bar's formulation of the trial publicity rule required by SB 254 (Kopp) (Chapter 868, Statutes of 1994). As submitted by the Bar, proposed Rule of Professional Conduct 5-120 would have prohibited a lawyer who is participating or has participated in the investigation or litigation of a matter from, directly or indirectly, making an out-of-court statement "that a reasonable person would expect to be disseminated by means of public communication,"

if the lawyer knows or reasonably should know the statement will present a "clear and present danger" of influencing a jury's verdict. The Bar's version rejects the standard in ABA Model Rule 3.6, which prohibits out-of-court statements which a lawyer knows or should know will have a "substantial likelihood of materially prejudicing" an adjudicative proceeding in the matter. [15:2&3 CRLR 213-14]

The Supreme Court instead adopted the "substantial likelihood of materially prejudicing" language of Model Rule 3.6. The rule applies not only to jury trials but also to any other "adjudicative proceeding," and took effect on October 1.

• **Monetary Penalties for Attorneys Disciplined.** At this writing, the Discipline Committee has yet to consider 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 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; an upper range (\$2,600-\$5,000 per violation) applicable to the most serious statutory or rule violations, and a lower range (\$100-\$2,500 per violation) applicable to all other statutory or rule 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. [15:2&3 CRLR 214; 14:4 CRLR 213; 14:2&3 CRLR 224-25]

• **Gifts to Attorneys from Clients.** In October 1994, the Bar forwarded its proposed amendments to Rule of Professional Conduct 4-400, regarding gifts to attorneys from clients to the California Supreme Court for approval. As amended, the rule reads as follows: "[A State Bar] member shall not: (A) induce a client to make any gift, including a testamentary gift, to the member or to a person whom the member knows is related to the member; or (b) prepare an instrument which provides for any gift from a client, including a testamentary gift, to the member or to a person who the member knows is related to the member, except where the client is related to the member or transferee." The Court has yet to act on these proposed amendments.

• **Employment of Disbarred, Suspended, or Involuntary Inactive Attorneys.** At its July meeting, after referral

from the Discipline Committee, the Committee on Admissions and Competence reviewed proposed new Rule of Professional Conduct 1-311 governing the duties of attorneys who employ disbarred, suspended, or involuntary inactive attorneys. Rule 1-311 arose from anecdotal cases of suspended or disbarred attorneys continuing to work under the license of another attorney, and engaging effectively in the continued practice of law without licensure.

The proposed rule would require that an attorney not employ, associate professionally with, or aid a person the attorney knows or reasonably should know is a disbarred, suspended, resigned, or involuntary active member to perform such tasks that would constitute the practice of law. In addition, prior to or when hiring such a person, the attorney must notify the Bar of the employment and describe the duties to be performed.

The rule was recommended to the Board of Governors, which adopted it and transmitted it to the Supreme Court for approval. At this writing, Rule 1-311 awaits consideration.

• **Copies of Significant Documents for Clients.** In December 1994, the Bar forwarded to the Supreme Court proposed new Rule of Professional Conduct 3-520, which would require attorneys to provide to a client, upon request, with copies of significant documents or correspondence received or prepared by the attorney relating to the employment or representation. [14:1 CRLR 176; 13:1 CRLR 142; 15:2&3 CRLR 214] At this writing, the Court has not yet acted on the rule.

• **Uncontested Admissions.** A proposed amendment to California Rule of Court 953(b) would give "finality" to unchallenged recommendations of the State Bar Court in moral character proceedings and in reinstatement matters. [15:2&3 CRLR 212] After a 90-day public comment period ending on July 6, the Board of Governors approved the proposal at its August meeting, upon recommendation of the Admissions and Competence Committee. Before the rule goes into effect, it must be approved by the California Supreme Court.

• **Rules for Accrediting Specialty Certification Programs.** The Committee on Admissions and Competence has proposed new Rule of Professional Conduct 1-400(D)(6), which would allow the State Bar to certify specialty certification entities. Under the rule, an attorney would not be allowed to advertise as a "certified specialist" unless the attorney is certified by the California Board of Legal Specialization, or one of the entities certified by the



Board. The proposal would also require certified attorneys to state in their advertising the complete name of the entity which granted certification. The deadline for public comment on this proposal was November 27; at this writing, the Admissions and Competence Committee plans to readdress the matter in January, and send it to the Board of Governors in March.

• **Legal Services Trust Fund.** The Board Committee on Legal Services has proposed a rule that would allow organizations that receive legal service grants to charge clients a "processing fee" fee of up to \$20; the current rule only allows \$10. On May 19, the committee released the proposal for a 90-day public comment, which ended on August 17. [15:2&3 CRLR 213] The committee has approved the revised rule, but approval from the Board of Governors has been delayed. It is expected that the Board will approve the proposal at its January 1996 meeting.

**Internettet.** The Bar now has a presence on the WorldWide Web. The address of the site is <http://www.calbar.org>. President James Towery announced the Bar's undertaking at its September meeting. Available information at the web site includes a listing of certified lawyer referral services, State Bar continuing legal education programs, information about the Bar's publications, and a complete alphabetical directory of resources.

## ■ LEGISLATION

**SB 60 (Kopp),** as amended July 28, requires the Bar to conduct a plebiscite of its active members in good standing to determine whether they favor abolishing the State Bar as the agency regulating lawyers (see MAJOR PROJECTS). The bill specifies the contents of the ballot for the plebiscite, which includes an analysis by the Legislative Analyst. The Board of Governors is required to report the results of the plebiscite to the Supreme Court, Governor, and legislature by July 1, 1996. This bill also requires the State Bar to contract with the State Auditor to conduct a comprehensive management audit of the State Bar. This bill was signed by the Governor on October 12 (Chapter 782, Statutes of 1995).

**AB 1414 (W. Brown),** as amended April 24, repeals existing provisions creating the Complainants' Grievance Panel and instead provides 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 will conduct specified audits relating to the processing of com-

plaints against attorneys by the State Bar (see MAJOR PROJECTS). This bill was signed by the Governor on July 6 (Chapter 88, Statutes of 1995).

**AB 1435 (Brown),** as amended June 20, establishes annual Bar membership fees for the years 1996 and 1997 in the same amounts as those for the year 1993. This bill also continues the requirement for 1996 and 1996 that Bar charge an additional fee of \$110 to be used exclusively for discipline augmentation.

Existing law authorizes the Board of Governors to increase annual membership fees by an additional amount not exceeding \$10 to be used only for the costs of financing and constructing a facility in Los Angeles to house State Bar staff and for major capital improvement projects related to facilities owned by the Bar. This bill deletes references to a State Bar facility in Los Angeles and instead provides that the additional amount may be used only for the costs of financing, constructing, purchasing, or leasing facilities to house State Bar staff and for major capital improvement projects related to facilities owned by the Bar. The bill also requires the State Bar, at least 30 days prior to entering into an agreement for construction, purchase, or lease of a facility in San Francisco, to submit its preliminary plan and cost estimate for the facility to the Judiciary Committees of the legislature for review. This bill was signed by the Governor on July 24 (Chapter 193, Statutes of 1995).

**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 requires, in addition, that those entities investigate and report any possible fraudulent activities relating to workers' compensation. This bill was signed by the Governor on July 22 (Chapter 167, Statutes of 1995).

**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 may not receive credit for any study subsequent to the first year that is done prior to passing the examination, unless good cause exists for giving credit

for some or all of the study. The examination is given by the Committee of Bar Examiners established by the Board of Governors. As amended July 20, this bill would have eliminated the requirement that a student at a nonaccredited law school pass the 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 have instead required only that a student at a nonaccredited school take the examination. The bill would have further required the Committee to notify a student who has taken the "baby Bar" 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 have required the State Bar to publish the same statistics for the "baby Bar" as it currently publishes for the general Bar examination.

For the second time in as many years, Governor Wilson vetoed this bill on October 8. [14:4 CRLR 215] Among other things, Wilson noted that, unlike the vast majority of states which permit only ABA-approved law schools to confer law degrees, California has three types of law schools: those that are accredited by the ABA, those that are accredited by the State of California, and those that are unaccredited. Students of accredited schools are not required to take the "baby Bar." According to Wilson, "[t]he requirement that the Baby Bar be administered reflects the lack of reasonable assurances that the programs provided by unaccredited schools comport with minimally acceptable legal standards. Some programs clearly do. Some do not."

**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 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 1321 (Calderon),** as amended June 29, 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 can 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 relating 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. [A. Jud]

**AB 1241 (Richter),** as amended September 6, and **SB 141 (Beverly),** as amended August 1, are no longer specifically relevant to the State Bar.

## LITIGATION

In *Brosterhous v. State Bar of California*, 12 Cal. 4th 315 (Dec. 21, 1995), the California Supreme Court affirmed the Third District Court of Appeal's 1994 holding that the Bar may not restrict members who wish to challenge its calculation of "chargeable" and "nonchargeable" expenses to binding arbitration.

The *Brosterhous* 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, particularly for legislative lobbying. The Third District's decision in *Brosterhous* dealt a blow to the Bar's attempt to limit the determination of required Bar fees 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. [15:1 CRLR 179]

The Supreme Court agreed, and thus affirmed the Third District's procedural decision. Each year, the Bar calculates the amount of each member's dues attributable to "nonchargeable" activities under *Keller*. Members who object to use of their dues for these activities are permitted to subtract this amount from their dues payment. The plaintiffs in this action challenged the Bar's determination of the *Keller* amount and the dispute was submitted to arbitration procedures adopted by the Bar. The court held that precluding judicial review of such an arbitration decision would violate congressional intent that a "section 1983" (federal civil rights) cause of action be available "even to persons who have arbitrated a claim that mandatory dues payments are being used for such purposes in violation of their First Amendment rights to freedom of speech and association." The court further held that a section 1983 action may be brought regardless of whether the member has sought judicial review of the arbitrator's decision.

In a related matter, *County of Ventura v. State Bar of California*, 35 Cal. App. 4th 1055 (June 14, 1995), the First District Court of Appeal held that a public agency which makes payment of the voluntary portion of its employees' Bar dues has standing to challenge the disputed amount. The California Supreme Court denied the Bar's petition for review of the First District's decision on September 14.

In *Florida Bar v. Went For It Inc.*, \_\_\_ U.S. \_\_\_, 115 S.Ct. 2371 (June 21, 1995), the U.S. Supreme Court ruled that states may ban targeted mail solicitation by plaintiffs' lawyers of accident or disaster victims within 30 days of the incident.

Writing for the 5-4 majority, Justice Sandra Day O'Connor reasoned that the state has a legitimate interest in "protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers." As such, the Court held that such rules do not violate first and fourteenth amendment rights.

Addressing the contention that the ban interferes with free speech rights to contact potential clients in accident and disaster cases at the very time they are going besieged by insurance companies and others armed with sophisticated legal representation, the Court noted that even though commercial speech by lawyers and others enjoys "a limited measure of protection," the constitutional right is not absolute. States have a "compelling interest in the practice of professionals within their boundaries...as part of their power to protect the public health, safety and other valid interests." Critics contend that the decision affirms a scheme allowing free reign to attorneys for prospective defendants or insurance carriers to contact victims, make token payments, and foreclose informed redress. Although the 5-4 decision is considered narrow, it could open the door for more regulation of advertising.

In *Hirsh v. Justices of the Supreme Court of the State of California*, 67 F.3d 708 (Mar. 29, 1995), the U.S. Ninth Circuit Court of Appeals ruled that attorneys are not entitled to injunctive relief to halt ongoing State Bar attorney disciplinary proceedings conducted pursuant to a procedure which is itself constitutional. Appellant Hirsh and three other attorneys had disciplinary charges pending against them before the State Bar Court. Appellants claimed, *inter alia*, that the process was unconstitutional because of the State Bar Court judge's denial of a recusal motion. Appellants alleged that the judge had a direct and substantial financial interest in the outcome of the disciplinary hearing, and his refusal to recuse himself rendered the process unconstitutional.

Citing *Younger v. Harris*, the Ninth Circuit affirmed the decision of the trial court to dismiss the case on grounds that review is not warranted if the state judicial process is ongoing, implicates important state interests, and provides the plaintiff an adequate opportunity to litigate federal claims. The court held that all of the above requirements were satisfied in this matter. Although the rule provides for an exception where "extraordinary circumstances" (such as bias) exist, the court concluded that plaintiffs here did not overcome the presumption of "honesty and integrity in those serving adjudicators." In the instant



case, plaintiffs failed to offer any evidence to support the allegation that the justices or judges had direct and substantial interests in the outcome of the disciplinary hearings.

The matter of *In Re Ivan O. B. Morse*, 11 Cal. 4th 184 (Sept. 1, 1995), which first came properly before the State Bar Court, involved disciplinary action against attorney Morse. From early 1988 to late 1992, Morse mailed out approximately four million advertisements offering to help in the filing of homestead declarations. The advertisements were mailed to prospective clients with the names of their mortgage lenders displayed on the envelope, leading many recipients to believe that the mailing was from their mortgage lenders. In addition, the mailing implied that the recording of a homestead declaration would bar a creditor from forcing the sale of a home. However, California law provides for an automatic homestead exemption even without the recording of such an instrument.

As a result of the mailings, Morse prepared homestead declarations for upwards of 95,000 individuals. His net profit ranged from \$150,000 to \$200,000 on gross receipts of \$1.9 million. Morse continued to send the mailings despite demands that he cease and desist from the California Attorney General and the Alameda County District Attorney.

Morse suffered a subsequent civil judgment, including an injunction from further violations and penalties of \$800,000. In addition, the Bar commenced disciplinary actions against Morse. The State Bar Court decided that the appropriate discipline in Morse's case was a 60-day suspension.

Upon granting review, the California Supreme Court disagreed with the State Bar Court. It reasoned that Morse's protracted pattern of serious misconduct justified the imposition of a three-year suspension from the practice of law. Upon full and timely payment of the \$800,000 ordered by the superior court, the suspension would be reduced to two years. The court noted that it was increasing the punishment in part because the respondent persisted with his advertising campaign even after he was ordered to stop.

## ■ FUTURE MEETINGS

January 26-27 in Los Angeles.

March 1-2 in San Jose.

April 19-20 in Los Angeles.

May 31-June 1 in San Francisco.

July 19-20 in Los Angeles.

