the provisions of the Public Utilities Act as all facilities for the production, generation, transmission, delivery, underground storage, or furnishing of natural or manufactured gas except propane. As amended May 26, this bill, notwithstanding the provision summarized above or any other provision of law, would require the PUC to assume, no later than July 1, 1994, regulatory jurisdiction over the safety of propane pipeline systems, including inspection and enforcement, for mobilehome parks, condominiums and other multi-unit residential housing, and shopping centers. *[13:2&3 CRLR 213]* It would require the PUC to establish a uniform billing surcharge designed to cover the PUC's cost in implementing these provisions, with all surcharge fees to be deposited by the PUC in the Public Utilities Commission Utilities Reimbursement Account in the general fund, to be used, upon appropriation by the legislature, for these purposes. *[S. E&PU]*

AB 173 (V. Brown), as amended August 30, would limit the amount of salary paid to the President and each member of the PUC, on or after July 1, 1994, to an amount no greater than the annual salary of members of the legislature, excluding the Speaker of the Assembly, President pro Tempore of the Senate, Assembly majority and minority floor leaders, and Senate majority and minority floor leaders. *[S. Inactive File]*

FUTURE MEETINGS

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

STATE BAR OF CALIFORNIA

President: Margaret Morrow
Executive Officer: Herbert Rosenthal
(415) 561-8200 and (213) 765-1000
TDD for Hearing- and Speech-Impaired: (415) 561-8231 and (213) 765-1566
Toll-Free Complaint Hotline: 1-800-843-9053

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 137,000 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 291 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 new 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.

In mid-December, the Bar relocated its Los Angeles staff to the Transamerica Center at 1149 S. Hill Street. Nearly 400 State Bar employees from three separate Los Angeles locations were consolidated at the new location; the Bar now occupies seven floors of the building, and increased its floor space by 25,000 square feet in the move.

MAJOR PROJECTS

Board Maintains Secret Ballot Policy. After a lengthy and sometimes heated debate at its December meeting, the Board of Governors voted 12–8 to maintain the secret ballot it uses to annually elect its president. The issue of the secret ballot has surfaced frequently in recent years, but prior boards have affirmed the policy based on "collegiality" concerns ("a secret ballot fosters collegiality because it removes the discomfort of board members having to vote publicly against those with whom they have a close relationship").

This year, the Board's own Legal Committee urged it to abandon the secret vote in favor of "the Board's overriding responsibility...to be accountable." The Committee's analysis of the issue recognized that "[t]he Bar is both a regulatory agency, accountable to the public; and an organization representing the interests of lawyers, accountable to those lawyers....How does the State Bar show its accountability as to the election of its leaders if the Board maintains a secret ballot? The answer is simple: the secret ballot affords no accountability whatsoever."

The Committee argued that the secret ballot system fosters a lack of respect for the State Bar as an institution, among lawyers and the public at large—which the Bar and the legal profession can ill afford at the present time. *[13:4 CRLR 213]* As to the "collegiality" argument, the Committee said: "The obvious response is that the purpose in serving on the Board is not to be comfortable, but rather to act as leaders, and to make decisions—often difficult—for which Board members are accountable."

In retaining the secret ballot, the Board of Governors rejected not only the recommendations of its own committee, but those of four major metropolitan bar associations (from San Francisco, Los Angeles, Santa Clara, and Orange counties). Several Board members who had argued for opening the ballot hinted that the legislature should take action to overrule the Board's decision.

In other action affecting the selection of its president, the Board voted to abolish its prior practice of permitting absentee ballots, but made it easier for Board members to attend the election by moving the election to a Saturday.

First Progress Report of the Commission on the Future of the Legal Profession and the State Bar. On December 4, chair Patricia Phillips presented the Board of Governors with the first progress report of the Commission on the Future of the Legal Profession and the State Bar. The 30-member Commission has been divided into six subcommittees (Discipline, Admissions and Competence, Administration of Justice Resources, Services To and For Lawyers, Bar Structure and Organization, Trends in the Law, and Lawyers and the Public and Professionalism), and is currently in its information-gathering and research phase. The Commission conducted four public hearings in late October in an effort to "identify trends and driving forces," and is beginning what Phillips called "the visioning process" which will document the Commission's visions of the legal profession in the next quarter-century.

The Commission was originally intended to study the future role of the integrated State Bar in regulating the legal profession, but has significantly broadened its scope such that Bar structure is only one of many foci. *[13:4 CRLR 213–14]* The Commission was also originally unbudgeted, but spent $60,000 in Bar dues from its creation in June to October 31. Phillips estimated that the Commission will spend $250,000 before its duties are completed in December 1994.

Morrow Appoints Task Forces to Improve Attorney-Client Relations, Evaluate Bar's New Discipline System. During the fall, Bar President Margaret Morrow appointed the members of two important task forces whose creation she announced shortly after her election. First, Morrow named several members of the Board of Governors to a new Client Relations Task Force, whose purpose is to develop ways to improve attorney client communication and minimize misunderstandings which lead to client dissatisfaction, complaints to the Bar's disciplinary system, and the poor public image of the legal profession. The Task Force, which is chaired by Board member Susan Troy, includes members Joseph Bergeron, Wendy Borcherdt, Michael Case, Maurice Evans, Donald Fischbach, and James Towery. The Task Force is working toward establishing a pilot program for mediation of attorney-client disputes, a lawyer education program emphasizing the impact of good client relations in a successful practice (which may possibly become required as part of lawyers' minimum continuing legal education obligations), and a public outreach program highlighting the client's role in the attorney-client relationship. The public outreach program may take the form of volunteer attorneys speaking at meetings of community social clubs (such as the Kiwanis, Elks, Rotary, and Optimists clubs) to disseminate information to the public regarding their rights and responsibilities when hiring an attorney, and aspects of an attorney's code of ethics.

Second, Morrow appointed eleven members to a "blue-ribbon" committee which will conduct a review of the Bar's four-year-old revamped discipline system. *[13:4 CRLR 214]* Retired U.S. Ninth Circuit Court of Appeals Judge Arthur L. Alarcon chairs the committee, which began work immediately and is scheduled to conclude the review by September 1994. Other committee members include Aviva K. Bobb, a former presiding judge of the Los Angeles Municipal Court; Robert C. Bonner, a partner in the Los Angeles office of Gibson, Dunn & Crutcher; Cedric C. Chao, a partner with Morrison & Foerster in San Francisco; Los Angeles trial lawyer Johnnie L. Cochran Jr.; William S. Davila, president of Vons Companies and a public member on the Board of Governors; Pamela S. Edwards, a partner with KPMG Peat Marwick of Oakland; Dennis B. Jones, executive officer of the Sacramento Superior and Municipal Courts; Virginia C. Nelson, a sole practitioner from San Diego and former president of the San Diego County Bar Association; Stuart K. Rappaport, public defender of Santa Clara County; and Charles O. Schetter, a director in McKinsey & Company, Inc. The discipline system review committee plans to hold public hearings in several locations throughout the state in the spring of 1994.

State Bar Rulemaking. The following is a status update on proposed regulatory amendments considered by the State Bar in recent months and described in detail in previous issues of the *Reporter*:

• ***Attorney Advertising***. At its October meeting, the Board of Governors considered six proposed new attorney advertising standards under Rule of Professional Conduct 1-400. Among other things, the six standards (which were the subject of a public comment period which ended in June 1993) would prohibit (1) advertising in the form of a trade or fictitious name unless the ad also states the name and State Bar number of the member who practices law under such trade or fictitious name; (2) advertising (except professional announcements) which does not state the name and State Bar number of the attorney responsible for it; (3) the use of dramatizations in advertising, unless they include a disclaimer stating "this is a dramatization"; (4) attorney advertising of "no fee" contingency arrangements unless the ad also specifies whether clients are liable for the attorney's expenses in handling a case; (5) advertising which states or implies that legal services are available in a language other than English unless the ad also states the name and employment title of the person who speaks the language other than English and discloses that such person is not a State Bar member, if that is the case; and (6) mailers (except for professional announcements) that do not bear the word "advertisement" or "newsletter" on every page. *[13:4 CRLR 215; 13:2&3 CRLR 219]* Due to opposition expressed by three major private bar associations, the Board referred the standards back to the Committee on Admissions and Competence for further revision.

At its December meeting, the Committee adopted amendments to the proposed standards. Specifically, the Committee decided to delete standard (1) above regarding trade names, reasoning that it has been substantively incorporated into revised standard (2). The Committee revised standard (2), regarding the identification of the name and State Bar number of at least one attorney behind all advertising, to prohibit "a 'communication,' except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication." The Committee slightly modified standard (3) regarding dramatizations to require attorneys who use them in advertising to state "this is a dramatization" or words of similar import. The Committee amended standard (5), the foreign language provision, to delete the disclosure requirement (a) where the member can personally provide legal services in the advertised foreign language, and (b) regarding the name of the non-member who speaks the foreign language. Finally, the Committee slightly amended standard (6) regarding mailers, to require them to bear the word "advertisement" or "newsletter", or words of similar import, on every page.

At this writing, the Bar does not intend to republish the modified version of these advertising standards for an additional public comment period, and the Board of

Governors is scheduled to consider them at its April meeting.

On December 2, the public comment period closed on two additional proposed advertising standards published by the Committee last August. One standard would require attorneys who regularly solicit business through the mail to disclose to the recipient where the attorney obtained his/her name. The other would require attorneys to charge no more than the fee originally advertised; fees advertised in telephone directories must be adhered to for one year, and fees advertised elsewhere must be effective for 90 days. *[13:4 CRLR 215]* At this writing, the Committee is scheduled to discussed the comments received on the proposed standards at its January meeting.

• *Gifts to Attorneys From Clients.* At its November meeting, the Board's Committee on Admissions and Competence discussed the differences between AB 21 (Umberg) (Chapter 293, Statutes of 1993), a portion of which (with certain exceptions) invalidates donative bequests made in wills, trusts, and similar instruments to the attorney who prepared the instrument, and its proposed amendments to Rule of Professional Conduct 4-400. *[13:4 CRLR 217; 13:2&3 CRLR 220]* The proposed amendments to Rule 4-400 would prohibit State Bar members from (1) inducing a client to make a gift, including a testamentary gift, to the member or the member's parent, child, sibling, or spouse, except where the client is "related to" the member, and (2) preparing an instrument giving any gift from a client to the member or the member's parent, child, sibling, or spouse, except where the client is "related to" the member. Committee staff noted that AB 21 expands the universe of individuals who may not take under an instrument drafted by the attorney to include (1) the attorney who drafted or transcribed, or caused to be drafted or transcribed, such instrument; (2) a cohabitant with such attorney; (3) certain relatives of such attorney by blood or marriage; or (4) certain business associates of such attorney.

Following extensive discussion at its November meeting and again at its December meeting, the Committee released a modified version of Rule 4-400. As revised, the rule states that "[a] member shall not: (A) induce a client to make any gift, including a testamentary gift, to the member or to a person related to the member; or (B) prepare an instrument giving any gift from a client, including a testamentary gift, to the member or to a person related to the member, except where the client is related to the member or transferee." The Discussion section to the revised rule states that a person "related to" the member means the member's spouse or predeceased spouse; relatives and spouses of relatives within the third degree of the member, the member's spouse, or predeceased spouse; cohabitants with the member; partners or shareholders of any partnership or corporation in which any person described previously has a 10% or greater ownership interest, and any employee of such person, partnership, or corporation; and employees of the member. A client "related to" the member means the member's spouse or predeceased spouse, relatives and spouses of relatives within the third degree of the member, the member's spouse, or predeceased spouse; and cohabitants with the member. A client "related to" the transferee means the transferee's spouse or predeceased spouse; relatives and spouses of relatives within the third degree of the transferee, the transferee's spouse or predeceased spouse; and cohabitants with the transferee.

At this writing, the comment period on the revised version of Rule 4-400 closes on March 11.

• *Employment of Disbarred, Suspended, or Inactive Lawyers.* On October 18, the public comment period closed on the proposal of the Committee on Admissions and Competence to adopt new Rule 1-311, which would prohibit a State Bar member from employing a disbarred, suspended, or inactive status lawyer unless (1) the activities of such employee do not constitute the practice of law; (2) the employee has no direct contact with the clients of the member; and (3) the employee does not receive, disburse, or otherwise have any involvement with client trust funds or property. At this writing, the Committee is scheduled to consider the comments at its January meeting.

• *Deposit of Advance Fees in Trust Account.* In June 1992, the Board of Governors adopted amendments to Rules of Professional Conduct 3-700 and 4-100, to require that all advance fees paid by a client to a State Bar member be placed in the member's client trust account unless the member's written fee agreement expressly provides that the fee paid in advance is earned when paid or is a "true retainer" as that term is defined in Rule 3-700(D)(2). *[12:4 CRLR 235]* Although the Bar submitted these rule changes to the California Supreme Court in October 1992, the court has not yet approved them at this writing.

• *Use of the Term "Certified Specialist."* On July 16, the public comment period closed on the Bar's proposal to adopt a new version of Rule of Professional Conduct 1-400(D)(6), which would prohibit a California attorney 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. *[13:1 CRLR 142]* Bar staff is currently reviewing the comments received; at this writing, this proposal has not been scheduled on the Board of Governors' agenda.

• *Discrimination in Management of a Law Practice.* In July 1993, the Board of Governors forwarded to the California Supreme Court proposed Rule 2-400, which would provide that "in the management or operation of a law practice a [State Bar] member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in: (1) hiring, promoting, discharging or otherwise determining the conditions of employment of any person; or (2) accepting or terminating representation of any client." *[12:4 CRLR 235–36]* At this writing, the Court has yet to take action on the proposed rule.

• *Copies of 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. *[13:1 CRLR 142]* At this writing, the rule has not yet been approved by the court.

LEGISLATION

Coalition Drops Proposed Ballot Initiative Limiting Contingency Fees. In November, Californians for Fair Liability Laws (CFLL), a coalition of business groups headed by former Senator Barry Keene, abandoned its efforts to place an initiative on the November 1994 ballot limiting attorney contingency fees to $25,000 or less for the first $100,000 of an award, and to an even lower percentage on larger amounts. *[13:4 CRLR 216]* CFLL dropped the effort after Farmers Group Insurance Company, one of the major backers of the initiative, withdrew its support. Farmers' withdrawal was reportedly due to threats by the California Trial Lawyers Association to air a television commercial publicizing a recent $57 million bad faith judgment against Farmers.

AB 1287 (Moore), as amended September 8, would, until January 1, 1997, enact a comprehensive scheme for the identification, study, and regulation of non-lawyer providers (also called "legal technicians" or "independent paralegals") under the jurisdiction of the Department of Consumer Affairs. The Bar has consistently opposed Assemblymember Moore's attempts to create a registration program to certify non-lawyer "legal technicians" to practice in underserved areas of law such as landlord-tenant, immigration, and consumer law. Several years ago, the Board of Governors opposed a full-blown registration program requiring training, testing, retesting, and limited areas of practice. *[11:4 CRLR 211–12]* Since then, the bill has been watered down by its sponsors in an attempt to secure Bar neutrality, but the Bar now opposes the watered-down version of the bill because it does not require training and testing. *[A. Inactive File]*

AB 602 (Speier), as amended September 8, would authorize recovery of attorneys' fees by a prevailing plaintiff in an action to recover prescribed hospital, medical, or disability benefits for a life-threatening cancer condition; and make unenforceable any contractual waiver of the right to attorneys' fees under the bill. *[S. Inactive File]*

AB 108 (Richter). Under existing law, every pleading is required to be signed by the party or his/her attorney. Existing law authorizes every trial court to order a party, the party's attorney, or both, to pay any reasonable expenses, including attorneys' fees, incurred by another party as a result of bad faith actions or tactics, as defined, that are frivolous or solely intended to cause unnecessary delay, as specified. As amended June 22, this bill would provide as a pilot project applicable only in Butte, San Diego, San Bernardino, and Riverside counties, until January 1, 1998, unless that date is extended or deleted by later enacted legislation, that, except as specified, the signature of an attorney or party on any pleading, motion, and any other paper filed or served in a civil action, constitutes a certificate that he/she has read the paper, has made a reasonable inquiry into the allegations, and presents it in good faith and not for an improper purpose. The bill would require any pleading, motion, or other paper that is not signed to be stricken unless it is promptly signed after the omission is called to the attention of the pleader or moving party. The bill would require an appropriate sanction to be imposed by the court if a paper is signed in violation of these requirements. The bill would also require the Judicial Council to conduct a specified study of the pilot project and report its findings to the Legislature on or before January 1, 1997. *[S. Jud]*

AB 335 (Ferguson). Existing law authorizes the State Bar to establish and administer a minimum continuing legal education program. Existing law also exempts from this program retired judges, officers and elected officials of the State of California, full-time law professors, and full-time employees of the state of California, as specified. As amended June 9, this bill would delete the exemptions for officers and elected officials of the state of California. *[S. Jud]*

AB 500 (Goldsmith). Existing law provides with respect to the settlement of civil actions that, if an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment, the plaintiff shall not recover his/her costs and shall pay the defendant's costs from the time of the offer. A similar provision, at the discretion of the court, applies to offers by a plaintiff which are not accepted by the defendant. As amended June 8, this bill would add reasonable attorneys' fees, at the discretion of the court, from the time of the offer to the costs recoverable under this provision, but these new provisions would not apply to personal injury actions in superior court. The bill would also authorize, in lieu of accepting a settlement offer, an offeree to request binding arbitration which would, at the discretion of the court, preclude the offeror from recovering attorneys' fees under the above provisions. *[A. Jud]*

AB 2302 (Morrow), as amended May 4, would require mandatory mediation in certain civil actions upon the filing of a request for mediation by a party against whom a complaint or cross-complaint has been filed, within thirty days of the latter filing. *[A. Jud]*

AB 2300 (Morrow). Existing law authorizes, and in certain cases requires, the courts to submit civil matters for arbitration by retired judges or licensed attorneys. Under these provisions of existing law, the parties are entitled to a trial de novo after arbitration, but, with certain exceptions, are liable for specified costs of the arbitration and prescribed expert witness fees, and may not recover costs as a prevailing party, unless the party obtaining the trial de novo obtains a more favorable judgment, in either the amount awarded or the type of relief granted, than under the arbitration award. Under existing law, in superior courts with ten or more judges where the amount in controversy, in the opinion of the court, will not exceed \$50,000, the court is required to submit the matter to this arbitration. Under existing law, other superior courts may provide for submittal of these cases to this arbitration by local court rule where the amount in controversy, in the opinion of the court, will not exceed \$50,000. Under existing law, in superior courts with fewer than ten judges and which have not adopted such a local rule, matters are required to be submitted to this arbitration if the plaintiff files an election therefor and agrees that the arbitration award shall not exceed \$50,000. As amended June 9, this bill would, until January 1, 1996, increase the above \$50,000 maximums to \$100,000. *[S. Jud]*

SB 102 (Lockyer). Existing law, as determined by the California Supreme Court in *Neary v. Regents of University of California*, 3 Cal. 4th 273, authorizes an appellate court to reverse a trial court judgment upon the stipulation of the parties. As amended May 13, this bill would specify that an agreement or stipulation of the parties may not be the basis for reversing or vacating a judgment duly entered by a court of competent jurisdiction, except upon a showing of substantial legal or factual justification. The bill would declare agreements to the contrary to be violative of prescribed public policy, except upon a showing of substantial legal or factual justification. *[A. Jud]*

LITIGATION

On November 29, the U.S. Supreme Court denied *certiorari* in ***Lawline v. American Bar Association, et al.***, No. 93-529, thus leaving intact the Seventh Circuit Court of Appeals' decision in the case, 956 F.2d 1378 (1992). The complaint asserted antitrust and constitutional challenges to two legal ethics rules recommended by the ABA and adopted by the Illinois Supreme Court and the U.S. District Court for the Northern District of Illinois. Specifically, plaintiffs challenged ABA Model Rule 5.4(b), which provides that "[a] lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law," and Model Rule 5.5(b), which states that "[a] lawyer shall not: assist a person who is not a member of the bar in the performance of activity that constitutes unauthorized practice of law." [Editor's Note: The California Supreme Court has adopted similar rules in California Rules of Professional Responsibility 1-310 and 1-300, respectively.]

Plaintiffs formed Lawline in 1978, an unincorporated association of lawyers, paralegals, and laypersons. Lawline operates a legal referral service to route low-income members of the public who need legal assistance to young lawyers who charge reduced fees and to legal services organizations, and to answer legal questions from the public without charge over the telephone to assist them in representing themselves in routine legal matters. In February 1988, the U.S. Bankruptcy Trustee complained to the Illinois Supreme Court's Attorney Registration and Disciplinary Commission that non-lawyers at Lawline were giving legal advice to debtors in Chapter 7 bankruptcy proceedings. In response to the Trustee's filing of a motion in a bankruptcy proceeding to enjoin Lawline from engaging in the practice of law in bankruptcy proceedings, plaintiff Lawline and its principals filed this action. Plaintiffs alleged that the two ethics rules at issue are the result of a conspiracy among the ABA House of Delegates, the Illinois State Bar Association House of Delegates, and the Chicago Bar Association to protect traditional law firms and restrain trade; plaintiffs further alleged a conspiracy among the three bar associations, the Illinois federal court, the Illinois Supreme Court, and the Illinois State Bar to monopolize the dissemination of legal advice in violation of the Sherman Act and to deprive plaintiffs of their first amendment, due process, and equal protection rights.

The Seventh Circuit found all defendants immune from federal antitrust liability under *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961). As the disciplinary rules at issue were adopted by the state and federal courts in Illinois, *Noerr*'s holding that "[w]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out" applies. The fact that the defendant private bar associations may have colluded to urge the courts to adopt the rules is "immaterial," because *Noerr* also states that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive [here the judiciary acting in a legislative capacity] to take particular action with respect to the law that would produce a restraint or monopoly."

On plaintiffs' constitutional challenges, the court dismissed the private and federal defendants, as plaintiffs had not demonstrated that they acted "under color of state law." As to the remaining state defendants, the Seventh Circuit concluded that, because the challenged rules do not draw a suspect classification or infringe on a fundamental right, the state need only show that its regulations are rationally related to a legitimate state interest. "As the district court explained, the two rules in question meet this test because they are designed to safeguard the public, maintain the integrity of the profession, and protect the administration of justice from reproach" (citations omitted). The court found that "[t]he partnership rule limitation promotes the independence of lawyers by preventing non-lawyers from controlling how lawyers practice law. The regulation attempts to minimize the number of situations in which lawyers will be motivated by economic incentives rather than by their client's best interests." As to the unauthorized practice rule, the court agreed with the ABA that "[t]he prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services." Although the Seventh Circuit noted that several prominent commentators disagree with government prohibitions against unauthorized practice, it concluded that "the state may choose any regulations that are rational. When employing the appropriate rational basis test, this Court does not require that the state choose the wisest policy, only that it choose a constitutional one."

On November 30, the U.S. Supreme Court agreed to review the U.S. Ninth Circuit Court of Appeals' decision in ***FDIC v. O'Melveny & Myers***, 969 F.2d 744 (1992). In this matter, FDIC—as receiver for a failed savings and loan institution—sued the law firm of O'Melveny & Myers for professional negligence in connection with the legal advice it provided to the institution. The principal activity of the S&L was the purchase, development, and sale of real estate partnerships sponsored by the S&L and its subsidiaries. These activities were funded by the S&L's insured deposits, which totalled $958 million in December 1985. In September 1985, the S&L retained O'Melveny to prepare two "private placement memoranda" (PPMs)—documents designed to induce outside investors to become limited partners in real estate deals sponsored by the S&L. O'Melveny wrote substantial portions of the PPMs, edited other portions, and performed a due diligence review to confirm the accuracy and completeness of the PPMs' disclosures. In preparing the PPMs, O'Melveny apparently never communicated with the S&L's previous attorneys (which had determined that up-to-date audited financial statements were necessary for one of the real estate offerings at issue), two of its prior accountants (who believed that the S&L's net worth was less than zero), or the S&L's state and federal regulators (who had been told by the accountants of the S&L's precarious financial condition). Although the parties disagreed on several issues related to the representations made in the PPMs, all parties agreed that the S&L's financial condition was far from sound, and that the S&L's owners had intentionally and fraudulently overvalued the institution's assets, engaged in the sham sale of the assets in order to show inflated "profits," and "generally 'cook[ed] the books.'"

In February 1986, FDIC concluded that the S&L was insolvent, placed it in receivership, and took over as receiver. Five days later, FDIC filed a lawsuit against the owners of the S&L, alleging breach of fiduciary duty. FDIC also concluded that the PPMs were misleading, and offered to have the partnerships that controlled the two offerings rescind the investments. In the offer of rescission, each investor agreed to assign to FDIC "all actions, causes of action, claims, or suits of any kind or nature whatsoever against any person or entity arising from the Initial Offering...." Three years later, FDIC commenced this action against O'Melveny, alleging professional negligence, negligent misrepresentation, and breach of fiduciary duty.

In the district court, the parties agreed to stipulate to a set of facts for purposes of O'Melveny's motion for summary judgment. O'Melveny argued that it owed no duty of care to the S&L or its affiliates (including the investors) to ferret out the owners' own fraud; the conduct of the owners must be imputed to the institution, and FDIC—as receiver—stands in the shoes of the institution; and, as an ordinary assignee, FDIC is barred from pursuing any claims against O'Melveny. The district court granted O'Melveny's motion for summary judgment.

The Ninth Circuit reversed, characterizing and rejecting O'Melveny's duty of care argument as follows: "The Firm concedes the existence of a duty by a principal and its agent of complete and accurate disclosure to potential investors in a securities offering, but argues that the investors here have all been fully compensated, and that the agent owes no additional duty to the successor in interest of a principal to make inquiries and disclose information which, the Firm argues, the principal already knew and was trying to conceal. In other words, O'Melveny contends that the federal agency created by Congress to rescue the economy and the victims of failing thrifts can claim no stronger ethical position than did the wrongdoers within that corporate entity; that the government agency is subject to all defenses that might lie as between the wrongdoers themselves and those who may have aided and abetted them in bringing about the disaster. We find such a proposition incredible, particularly when applied to the duties of attorneys retained to give advice and assistance with respect to public offerings."

Citing California caselaw and the Rules of Professional Conduct, the court found "a basic duty to give proper advice to the client who is asking the public to invest in its offering...," and moved to the next question—"whether the attorneys are absolved of that duty if there were wrongdoing officers inside the corporation." In this regard, the court noted that a corporation is a distinct legal identity separate from its owners, that—here—the corporation was O'Melveny's client (not the owners), and that the insider/wrongdoers were "acting adversely" to the corporation (such that the misconduct of the officers is not attributable to the corporation now represented by FDIC). The court then rejected the application of "well-established California law" ("a receiver occupies no better position than that which was occupied by the party for whom he acts...and any defense good against the original party is good against the receiver"), finding that "[i]t is now clear beyond doubt that federal, not state, law governs the application of defenses against FDIC. Thus, contrary to O'Melveny's argument, we are not bound by state law, but must instead establish federal law."

In fashioning a federal rule of decision, the court noted that a receiver, "like a bankruptcy trustee and unlike a normal successor in interest, does not voluntarily step into the shoes of the bank; it is thrust into those shoes. It was neither a party to the original inequitable conduct nor is it in a position to take action prior to assuming the bank's assets to cure any associated defects or force the bank to pay for incurable defects....Also significant is the fact that the receiver becomes the bank's successor as part of an intricate regulatory scheme designed to protect the interests of third parties who also were not privy to the bank's inequitable conduct. That scheme would be frustrated by imputing the bank's inequitable conduct to the receiver....In light of these considerations, we conclude that the equities between a party asserting an equitable defense and a bank are at such variance with the equities between the party and a receiver of the bank that equitable defenses good against the bank should not be available against the receiver. To hold otherwise would be to elevate form over substance—something courts sitting in equity traditionally will not do." The Ninth Circuit found that O'Melveny owed a duty of care to its corporate client and that there are genuine issues of material fact as to whether that duty was discharged; the case was reversed and remanded back to the district court for further proceedings.

In petitioning the U.S. Supreme Court for review, O'Melveny's attorneys argued that the Ninth Circuit's application of federal common law and apparent creation of the new federal tort of malpractice was improper and that state tort law applies; that its interpretation of an attorney's duty of care creates a "duty to the world" which will forever alter the way lawyers and other professionals must deal with corporate clients; and that its decision dangerously preempts the authority of states to regulate the practice of law and the attorney-client relationship. At this writing, the Supreme Court is scheduled to hear oral argument in the case in March.

In ***Howard v. Babcock***, 6 Cal. 4th. 409 (Dec. 6, 1993), the California Supreme Court affirmed the validity of a non-competition clause in a law firm partnership agreement. Under the clause which was upheld as enforceable, the partners of the former Orange County firm of Parker, Stanbury, McGee, Babcock & Combs agreed that if more than one of them withdrew from the partnership prior to age 65 and within one year established with others (including other departing members of the Parker firm) a practice engaged in the handling of liability insurance defense work within Los Angeles or Orange counties, the departing partners would forfeit their withdrawal benefits. After the firm split up and the departing members established a new firm in Orange County handling insurance defense cases, litigation ensued. The trial court upheld the validity of the non-competition clause, but the Fourth District reversed, citing Rule of Professional Conduct 1-500, which precludes any private agreement which restricts the right of a member of the State Bar from practicing law. In light of the fact that the Fourth District's decision conflicted with the Second District's decision in *Haight v. Superior Court*, 234 Cal. App. 3d 963 (1991), the California Supreme Court agreed to review the case. *[12:4 CRLR 238; 12:2&3 CRLR 271]*

The Supreme Court reversed the Fourth District's decision, noting that Business and Professions Code section 16602 permits reasonable non-competition clauses under certain circumstances. In this case of first impression interpreting the applicability of section 16602 to the legal profession, the court analyzed section 16602 and found no ambiguity in the terms of the statute, nothing in the express language of the statute which precludes its application to law firms, and nothing in the legislative history of the statute to indicate the legislature's intent to preclude its application to law firms. As to Rule 1-500, the court stated: "We are not persuaded that this rule was intended to or should prohibit the type of agreement that is at issue here. An agreement that assesses a reasonable cost against a partner who chooses to compete with his or her former partners does not restrict the practice of law. Rather, it attaches an economic consequence to a departing partner's unrestricted choice to pursue a particular kind of practice." The court recognized "sweeping changes in the practice of law," including "the propensity of withdrawing partners in law firms to 'grab' clients of the firm and set up a competing practice," and the decline of "institutional loyalty" within once-stable law firms, and stated that "we can see no legal justification for treating partners in law firms differently in this respect from partners in other businesses and professions." The Supreme Court remanded the case to the trial court for a determination whether the agreement was "reasonable."

In ***McEldowney v. National Conference of Bar Examiners***, No. CV-93-3146-AWT (C.D. Cal., Nov. 15, 1993), unsuccessful Bar exam applicant James Kenneth McEldowney sued NCBE, the private organization which prepares and grades the multistate portion of the State Bar exam. Plaintiff alleged that his exam failure was due to NCBE's recognition of answers other than the ones chosen by plaintiff as correct on "one or more" questions on the multistate exam. Plaintiff filed the lawsuit after unsuccessfully petitioning both the State Bar and NCBE for redress.

McEldowney's complaint alleged both negligence and breach of an asserted third-party beneficiary contract between the NCBE and the State Bar, and sought only damages. After denying NCBE's motion to dismiss on grounds of lack of subject matter jurisdiction and absolute quasi-judicial immunity (on the latter issue, the court rejected NCBE's argument that it should be entitled to the same immunity as enjoyed by the State Bar, finding that NCBE's administrative role of drafting and grading an exam is no more "judicial" than "a law school professor who is paid $100 for writing an essay questions for the bar examination"), the court found plaintiff's negligence claim barred by the one-year statute of limitations. The court also dismissed the breach of contract claim, finding that plaintiff is not a third-party beneficiary of the contract between NCBE and the State Bar. "The NCBE correctly contends that the purpose of the bar examination, and the [multistate exam] as a part of that examination, is to protect the public. It has no purpose or function of conferring any benefit on any person who sits for the examination." Thus, the court dismissed plaintiff's complaint with prejudice.

In ***Attorney General Opinion No. 93-416*** (Sept. 17, 1993), Attorney General Dan Lungren concluded that the powers granted to a non-lawyer agent under a statutory form power of attorney under Civil Code section 2494 do not permit the non-lawyer agent to practice law without a license in violation of Business and Professions Code section 6125. Section 2494, part of the Uniform Statutory Form Power of Attorney Act, sets forth precise powers granted for a variety of specified categories, one of which is for "claims and litigation." In determining whether the provisions of section 2494 constitute an exception to the prohibition against the unauthorized practice of law, the AG distinguished between acting as an "attorney in fact" and acting as an "attorney at law." Using a power of attorney, a person may appoint an agent to do the same acts and achieve the same legal consequences by the performance of an act as if he had acted personally; "the person holding a power of attorney is known and designated as an 'attorney in fact,' thus distinguishing such person from an attorney at law." Looking at the plain language of section 2494, the AG noted that "the powers specified therein allow the agent to bind the principal in legal matters pertaining to claims and litigation; whatever legal posture could be assumed by the principal, the agent may also assume on his or her behalf. however, none of the enumerated powers necessarily entails the practice of law as that term has been defined by the courts, and nothing in the language of the statute allows the agent to undertake such functions as preparing legal pleadings and arguing matters before a judge or jury" (citation omitted).

The AG also noted constitutional and policy reasons supporting its conclusion. Specifically, the AG stated that interpreting section 2494 so as to allow the unlicensed practice of law would permit the legislature to dictate minimum standards for engaging in the practice of law—a power constitutionally reserved to the California Supreme Court. The AG also noted that if a power of attorney could authorize the practice of law by an unlicensed person, disbarred persons and others who have failed to pass the bar examination would be able to "hire themselves out on a part-time basis to a number of [clients], creating a cadre of unprofessional practitioners" (citation omitted).

At the end of the opinion, the AG noted that a person may prepare legal pleadings and briefs and represent himself *in propria persona*; however, this activity is not properly considered "the practice of law" since there is no relationship with a client and no rendering of legal advice. Without so stating, the AG implied that a statutorily-empowered agent ("attorney in fact") may stand in the shoes of an *in pro per* principal without violating Business and Professions Code section 6125, because *in pro per* representation is not "the practice of law."

FUTURE MEETINGS

May 13–14 in San Francisco.
June 17–18 in San Francisco.
July 22–23 in Los Angeles.
August 26–27 in San Francisco.
September 22–24 in Anaheim (annual meeting).