Brownyard and Stan Auerbach, and DCA Chief Deputy Director Claudia Foutz, to assess DCA support of the statutory establishment of a state certification program and continuing education requirements for service technicians. (See CRLR Vol. 9, No. 4 (Fall 1989) p. 56 for background information.) The potential legislative action may be pursued by CSEA upon approval by Association members at CSEA's annual meeting in May. Mr. Brownyard and Mr. Auerbach are members of the CSEA Certification/ Licensing Committee which is, according to Mr. Brownyard, presently completing the "sunrise questionnaire" required by DCA prior to drafting any legislation to establish a state-run regulatory agency or certification system. The questionnaire requires an assessment of the need for the regulatory system proposed. According to Mr. Brownyard, DCA was supportive of the certification proposal, and will attempt to work with CSEA in developing the program. CSEA action should not be confused with the separate action of the Bureau's Appliance Task Force. According to Assistant Chief Boranian, the Appliance Task Force has reported it is also working to complete the sunrise questionnaire for establishment of a certified technician program. If implemented, the program would potentially extend BEAR jurisdiction to technicians certified under the program.

At the May 25 Advisory Board meeting, several invited guests made presentations on service contracts, which have raised issues of major concern to the Bureau since 1985. DCA Supervising Attorney Richard Elbrecht discussed recent changes in the Song-Beverly Warranty Act regarding service contracts, which have imposed disclosure standards for service contracts and given consumers a right of cancellation on service contracts for home appliances and electronic products. Although Elbrecht believes these statutory changes have alleviated many consumer complaints, he suggested the addition of a loss ratio disclosure requirement to inform the consumer of the amount of his/her premium which will be used to pay claims.

Department of Insurance staff attorney John Fogg stated that most home electronic/appliance service contract sales in California are essentially unregulated; any definition of such a service contract as "insurance" would eliminate the small business owner's ability to compete with large operators. He too suggested a loss ratio disclosure requirement.

CSEA representative Stan Auerbach stated that CSEA favors service contracts backed by some form of insurance with a company licensed to do business in California; further, these contracts should disclose in bold type any and all exclusions of coverage for the product covered. Finally, any service dealer or consumer damaged or harmed by a third party administrator should have recourse through the Insurance Commissioner or an appointed arbitrator for reconciliation to avoid court action.

Several other trade association representatives noted the problems of the service dealer, who is often placed between the consumer who has a complaint regarding service contract coverage and the third party administrator. Board President Fay Wood read a letter from Senator Herschel Rosenthal, who is currently carrying SB 2086 (*see supra* LEGISLATION). Senator Rosenthal expressed regret that he had to delete a loss ratio disclosure requirement from his bill this year, but stated that he will seek a stronger and more consumer-protective bill next year when a more proconsumer governor has taken office.

FUTURE MEETINGS:

August 17 in Burlingame.
November 9 in San Pedro.

BOARD OF FUNERAL DIRECTORS AND EMBALMERS

Executive Officer: James B. Allen
(916) 445-2413

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

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

MAJOR PROJECTS:

Preneed Trust Regulatory Changes. On January 12, the Office of Administrative Law (OAL) approved the Board's amendments to sections 1265 and 1275, Chapter 12, Title 16 of the CCR, relating to the use of income from a preneed trust. (See CRLR Vol. 10, No. 1 (Winter 1990) p. 68; Vol. 9, No. 4 (Fall 1989) p. 57; and Vol. 9, No. 2 (Spring 1989) p. 56 for background information.) As amended, section 1265 permits an annual fee for administering a trust of not more than 4% of the year-end trust balance, and eliminates a previous restriction on the use of income for actual trust expenses. The amendment to section 1275 requires all preneed trust agreements or contracts to disclose whether the arrangement is guaranteed or nonguaranteed. The amendments to section 1265 and 1275 became effective on February 11.

At its January 25 meeting, the Board held another public hearing on its proposal to add section 1262, Chapter 12, Title 16 of the CCR, to prohibit the practice of "constructive delivery" of merchandise purchased under a preneed trust arrangement. (See CRLR Vol. 10, No. 1 (Winter 1990) pp. 68-69 and CRLR Vol. 9, No. 4 (Fall 1989) p. 57 for extensive background information.) Industry members expressed concern that the proposed regulation would be applied retroactively to existing contracts and delivered merchandise. Based on the industry's concerns, the Board approved a modification to the proposed regulatory language, which provides that the regulation will not apply to the delivery of merchandise pursuant to written contracts entered into before the effective date of the regulation. The Board issued public notice of the modified language and requested written comments. At this writing, the rulemaking file is being prepared for submission to OAL.

Also at its January 25 meeting, the Board held a public hearing on a proposal to add new section 1265.1 and amend existing section 1267, Chapter 12, Title 16 of the CCR, relating to accounting and bookkeeping practices. (See CRLR Vol. 10, No. 1 (Winter 1990) p. 69 for background information.) Proposed section 1265.1 would require monthly posting of income to preneed accounts, and amended section 1267 would clarify the requirements for maintaining accounting records. At the

hearing, there was no public comment regarding the amendments to section 1267. However, industry members did comment on section 1265.1. One concern was whether the term "income" includes unrealized capital gains and losses. Others argued that the proposed regulation is inconsistent with the recent amendment to section 1265 (4% administrative fee, discussed above). Section 1265 assesses the 4% fee on the trust balance as of December 31, before current year income is posted to the trust. Thus the 4% fee is based on all the corpus received, plus all accumulated income from prior years. In contrast, proposed section 1265.1, by requiring the monthly posting of income, permits the 4% fee (assessed on the year-end trust balance) to be collected on not only the corpus and accumulated income from prior years, but also on any current year income. Industry members expressed concern that it is premature for the Board to implement a regulation which alters or contradicts the recent amendment to section 1265 until the impact of section 1265 can be assessed. The Board discussed the issues raised by the industry and decided to refer the proposed regulations back to the Preneed Committee for further study.

At the Board's March 22 meeting, the Preneed Committee stated that it had reevaluated the proposed addition of section 1265.1, and recommended that the Board abandon the idea until the impact of the recent changes to section 1265 can be assessed. The Board approved the Committee's recommendation and has abandoned the proposed addition of section 1265.1.

Also in March, the Board received public comment regarding the proposed changes to section 1267. As proposed, section 1267 would require that certain financial records be maintained by funeral establishments. Some industry members expressed concern that the Board is overreaching its authority in specifying which specific records be maintained. They noted that the financial records of a funeral establishment must be maintained in accordance with generally accepted accounting principles. However, they argued that the specific documents and schedules required to be prepared by the business should be determined by the individual funeral establishment in conjunction with its accountant. Based on the industry comments, the Board decided to continue the public hearing at its July meeting in San Diego.

Proposed Repeal of Notice Requirement. At its January meeting, the Board reconsidered its proposed repeal of regulatory section 1258, which requires prominent display of a notice on all caskets having or represented as having a sealing device. (See CRLR Vol. 10, No. 1 (Winter 1990) p. 69; Vol. 9, No. 4 (Fall 1989) p. 57; and Vol. 9, No. 2 (Spring 1989) p. 56 for background information.) The Director of the Department of Consumer Affairs (DCA) had previously disapproved the repeal, concluding that the consumer education provided by the regulatory requirement offset any minimal burden on the industry. In light of the fact that there is little industry objection to the notice requirement, the Board agreed to drop the repeal and leave section 1258 intact.

LEGISLATION:

SB 2294 (Roberti) would have required applicants for licensure as an embalmer or funeral director to have a two-year community college degree or the equivalent thereof. This bill was dropped by its author.

The following is a status update on bills reported in detail in CRLR Vol. 10, No. 1 (Winter 1990) at page 70:

SB 26 (Lockyer) would, among other things, amend section 7739 of the Business and Professions Code to provide that a person who willfully violates the laws regarding preneed trusts is guilty of a Class E felony, punishable by no more than six months in county jail or no more than a $500 fine, or both. This bill is pending in the suspense file of the Assembly Ways and Means Committee.

SB 722 (Hill) would require a local registrar to issue a permit for the disposition of human remains immediately upon presentation to the local registrar of a certificate of death or fetal death, except under specified circumstances. This bill is pending in the Assembly Judiciary Committee.

LITIGATION:

On February 9, Funeral Securities Plans, Inc. (FSP) filed a complaint for declaratory relief against the Board and individual Board members (No. 512564, Sacramento County Superior Court). FSP sells preneed funeral arrangements in California. The complaint alleges that the Board violated the Bagley-Keene Open Meetings Act (Act), Government Code section 11120 *et seq.*, by deliberating and taking action on public business in closed sessions of regularly scheduled meetings, in unscheduled closed committee meetings, and in unofficial private communications. The Board, through the Attorney General's office, filed an answer and demurrer to the complaint on March 12.

FSP alleges that the Board violated section 11126.3(a) and (c) of the Act, which requires the Board to state the specific statutory authority under which a closed session is being held, including the particular section, subdivision, and paragraph. Specifically, FSP claims that the Board's November 28, 1989 and January 25, 1990 meeting notices did not cite the paragraphs of section 11126, subdivision (q) of the Act, under which the closed sessions were held. The Board contends that FSP's complaint regarding the November 28 meeting is barred by the Act under section 11130.3, which requires that a complaint for declaratory relief be filed within thirty (30) days of the alleged illegal action. Concerning the closed session on January 25, the Board acknowledges that the notice was not in technical compliance with the Act. However, the Board claims it was in substantial compliance with the Act since the notice did reference the appropriate section (11126) and subdivision (q). Therefore, the Board argues that under section 11130.3(b)(3), the actions taken at the closed session may not be declared null and void.

FSP's complaint further alleges that the Board's Preneed Committee held unscheduled closed meetings in violation of section 11123 of the Act. The complaint alleges that the Committee is a "state body" governed by the Act because it exercises factfinding and other authority delegated from the Board (section 11121.2). FSP also alleges that the Committee, though consisting of only two Board members, was in fact a four-person committee since the Board's Executive Officer and Auditor, by meeting and deliberating with the Committee, became an integral part of the Committee. Thus, FSP claims that the Committee, even if an advisory body under section 11121.8, is governed by the Act since it consists of three or more members. In response, the Board contends that the Committee is an advisory body consisting of only two Board members. The Board cites section 11121.8, which specifically exempts from the Act's requirements advisory bodies consisting of less than three persons. The Board also claims that the Act applies only to "meetings", which the Board defines as a gathering of a quorum of the state body where business is discussed or transacted.

FSP also alleges that Board members discussed public business and recommended official action with one or more other members by telephone and personal communications. FSP claims that

activity of this type outside public or closed sessions of regularly scheduled meetings violates section 11123 of the Act. In response, the Board notes that FSP fails to cite any specific occurrence of wrongdoing. In addition, the Board denies that its members have engaged in a series of personal communications which taken as a whole would constitute a "meeting" under the Act.

Finally, FSP alleges that certain matters discussed during the closed sessions at the November 30, 1989 and January 25, 1990 meetings were outside the scope of topics which may be a closed session. The Board contends that the topics discussed at both closed sessions were specifically authorized by section 11126. The Board further contends that the complaint regarding the actions at the November 30 meeting is barred by section 11130.3(a), which requires filing of the complaint within thirty (30) days.

FSP requests a declaration that the Board violated the Act. FSP also seeks to enjoin the Board from allowing any person who is not a Board member from attending any scheduled closed session (except the Board's attorney under section 11126(q)); receiving any information in a closed session except for legal advice under section 11126(q); deliberating on any subject during a closed session which is not specifically authorized under the Act; and giving or receiving any information regarding public business from the Board's staff unless at a public meeting or hearing.

The superior court heard oral argument on the Board's demurrer on April 27. The court denied the motion, finding that FSP has stated a valid cause of action and that issues of fact exist. At this writing, the parties are currently in the process of discovery; no hearing on the issues has been scheduled.

RECENT MEETINGS:

At the Board's January meeting, the Publications Committee reported that the Board's proposed consumer information guide had been reviewed by DCA. (See CRLR Vol. 10, No. 1 (Winter 1990) p. 70 for background information.) The Department is concerned that the guide's advocation of preneed arrangements is too strong. The Board also indicated that the final version of the guide should include a section on constructive delivery, and decided to postpone completion of the consumer guide until the constructive delivery rulemaking (discussed above) is finalized. Once final language is adopted, the guide will be resubmitted for review to the Department.

At the March 22 meeting, the Board's auditor reported on industry compliance with section 1261 of the CCR. Section 1261 exempts so-called "Totten trusts" from the regulatory and reporting requirements of preneed trusts. A Totten trust is an account opened by the consumer in which the consumer is trustee for the funeral establishment as beneficiary. To be exempt, the consumer must directly deposit the money into the trust account and retain exclusive power over the account. There may be no direct or indirect delivery of money to the funeral director.

The auditor noted that, in many situations, consumers have given to funeral directors checks made payable to a financial institution. The funeral director, in turn, opens the Totten trust account at that institution in the name of the client as trustee for the funeral director as beneficiary. The consumer maintains exclusive control over the trust account. Funeral directors involved in these transactions contend that there is no direct or indirect delivery of funds to the funeral establishment because the checks are made payable to the financial institution.

The auditor requested that the Board clarify the permissible involvement by funeral directors in the establishment of Totten trusts. The Board stated that the regulation prohibits any direct or indirect involvement of the funeral director in establishing Totten trusts. The Board concluded that even though a check may be made payable to the order of the financial institution, the involvement of the funeral director violates the requirement that the consumer directly deposit the money into the financial institution. The Board instructed the auditor to report violations to the Attorney General.

FUTURE MEETINGS:

September 27 in Sacramento.
November 29 in Los Angeles.
January 24 in San Francisco.

BOARD OF REGISTRATION FOR GEOLOGISTS AND GEOPHYSICISTS

Executive Officer: John E. Wolfe
(916) 445-1920

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

This eight-member Board licenses geologists and geophysicists and certifies engineering geologists. In addition to successfully passing the Board's written examination, an applicant must have fulfilled specified educational requirements and have the equivalent of seven years of professional experience in his/her field. This requirement may be satisfied with a combination of education from a school with a Board-approved program in geology or geophysical science, and qualifying field experience.

The Board has the power to discipline licensees who act in violation of the Board's licensing statutes. The Board may issue a citation to licensees or unlicensed persons for violations of Board rules. These citations may be accompanied by an administrative fine of up to $2,500.

The Board is composed of five public members and three professional members. BRGG's staff consists of two full-time employees (Executive Officer John Wolfe and his secretary) and two part-time personnel. The Board's committees include the Professional Practices, Legislative, and Examination Committees. BRGG is funded by the fees it generates.

MAJOR PROJECTS:

Regulatory Changes. Following a public hearing at its January 26 meeting, BRGG adopted several proposed regulatory changes. (See CRLR Vol. 10, No. 1 (Winter 1990) p. 71 for background information on these changes.) New section 3022 specifies criteria for approval of a foreign school's curriculum in geology or geophysics. Amended section 3305 increases the fee for application for registration as a geologist or geophysicist from $40 to $60. New sections 3028 and 3029 implement the Permit Reform Act of 1981 by setting forth processing deadlines for licensure applications. At this writing, these regulatory changes still await approval by the Office of Administrative Law (OAL).

BRGG also considered a proposed regulatory change requiring its Executive Officer to be a registered professional and increasing his/her salary scale. The Executive Officer deals extensively with professional-level matters such as evaluating experience of applicants, preliminary and final compilation of exams, and pursuing enforcement actions. A higher salary may be necessary to attract such a professional. However, the Board subsequently abandoned the idea of a regulatory change; it