the date the letter was issued. Before a regulation may be enforced as law, it must be promulgated in accordance with specific rulemaking requirements contained in the state’s Administrative Procedure Act (APA).

On October 28, the Board filed a response to Gordon’s challenge. In that response, the BBSE declared that prior to May 7, 1987 (when a revised version of section 1807.2 was approved by OAL and filed with the Secretary of State), it was enforcing section 28 of the Business and Professions Code. The Board claimed that the rule which it had cited in the January 6 letter simply restated section 28.

When OAL receives a request for determination, it must determine whether the challenged rule is a “regulation” within the meaning of the APA, and if so, whether it was promulgated according to APA requirements. In the case of section 1807.2, OAL found that the rule was (1) of general applicability, in that it applied to all MFCCs and LCSWs seeking renewal and all new applicants seeking licensure; and (2) intended to implement, interpret, or make more specific a statute (section 28). Thus OAL concluded that section 1807.2, as presented in the challenged BBSE letter, was a “regulation” within the meaning of the APA.

Because BBSE had not satisfied APA rulemaking requirements with regard to section 1807.2, OAL further determined that the rule was invalid and unenforceable until adopted by the Board in accordance with the APA. As previously reported, a revised version of section 1807.2 was adopted by BBSE and approved by OAL late last spring. (See CRLR Vol. 7, No. 4 (Fall 1987) pp. 41-42.) However, not contained in the approved regulation was some of the original section 1807.2 language published in the challenged letter, which addressed documentation of training and exemption from the rule’s purview. Therefore, OAL’s December 4 regulatory determination found that the provisions of the letter containing that language were invalid and unenforceable, notwithstanding the formal approval of revised section 1807.2.

LEGISLATION:

AB 2300 (Roos) would have required the boards regulating psychologists, LCSWs, and MFCCs to impose continuing education requirements as a condition of relicensure after July 1, 1988. Continuing education would have been defined as “the variety of educational activities and learning experiences including but not limited to, lectures, seminars, and conferences relevant to the practice of the profession.” The bill has been dropped by its author.

SB 683 (Rosenthal) would have added psychotherapy to the schedule of outpatient services covered by the Medical Program, and would have limited outpatient psychotherapy services provided to LCSW or MFCC to those provided pursuant to a written referral by a physician or surgeon licensed to practice medicine in California. The bill would also have limited these services to the extent that federal matching funds are provided. The bill was killed on the Senate floor on January 28.

SB 1642 (Keene), in its original form, would have required all specialized health care service plans which offer mental health benefits to give reasonable consideration to licensed psychologists, MFCCs and LCSWs as providers of mental health or psychological services.

Under this bill as originally written, no plan would be allowed to prohibit a member from selecting a licensed psychologist, MFCC, or LCSW so long as such a professional is directly affiliated with, or under contract to, the health care service plan to which the member belongs.

SB 1642 was amended in the Assembly on August 26, 1987 and no longer contains this language. As amended, the bill would delete provisions in existing law authorizing a disability insurance policy or a health care service plan to provide for coverage of, or for payment for, professional mental health services. As of this writing, Senator Keene’s office is planning extensive further amendments to the measure. The bill remains in the Assembly Ways and Means Committee.

LITIGATION:

In Krikorian v. Barry, No. B024603 (Dec. 10, 1987), the Second District Court of Appeal held that a psychologist who reports instances of child abuse to a child protective agency cannot be sued by the individuals allegedly involved in the incidents, even if the report is false or recklessly made.

The Child Abuse Reporting Act requires child care custodians and medical and non-medical practitioners to report suspected instances of child abuse to a child protective agency; failure to report is a misdemeanor. The appellate court held that individuals subject to the Act are absolutely immune from liability in connection with required reporting.

The case arose from a suit by nine students against two preschools, Peninsula Montessori School No. 1 and Peninsula Montessori School No. 2. The students claimed they had been sexually molested by the school’s owner, Claudia Krikorian. Krikorian cross-claimed against Dr. Helena Barry, a clinical psychologist hired by the parents to counsel their children and investigate their abuse claims.

Krikorian alleged that Barry had been professionally negligent in her methods and also that Barry had conspired with the Lomita Sheriff’s Department, California Department of Social Services, and the Harbor-UCLA Medical Center by fabricating evidence of the abuse.

Barry asked the Los Angeles Superior Court to dismiss the cross-claim, arguing that her actions were absolutely privileged under state law. Judge H. Walter Croskey agreed and Krikorian appealed. On appeal, Krikorian argued that since the Act requires reporting only when the individual making the report “knows or reasonably suspects” that child abuse has occurred, only reports where the reporter actually knew of or reasonably suspected abuse should be protected. The appellate court disagreed, finding that the legislature intended to absolutely immunize from lawsuits individuals who are required to report child abuse.

FUTURE MEETINGS:

April 29 in San Francisco.
June 24 in Los Angeles.
September 2 in San Diego.

Cemetery Board

Executive Officer: John Gill
(916) 920-6078

In addition to cemeteries, the Cemetery Board licenses cemetery brokers, salespersons and crematories. Religious cemeteries, public cemeteries and private cemeteries established before 1939 which are less than ten acres in size are all exempt from Board regulation.

Because of these broad exemptions, the Cemetery Board licenses only about 185 cemeteries. It also licenses approximately 25 crematories and 1,400 brokers and salespersons. A license as a broker or salesperson is issued if the candidate passes an examination testing knowledge of the English language and elementary arithmetic, and demonstrates a fair understanding of the cemetery business.
REGULATORY AGENCY ACTION

MAJOR PROJECTS:

Proposed Legislative Changes. At the Board's December 8 meeting in Los Angeles, legal counsel Anita Scuri presented the finalized draft of the Board's proposed amendments to section 7051, Chapter 12 of the Health and Safety Code, relating to human remains.

Section 7051 currently states that "[e]very person who removes any human remains from any place where it has been interred, or...while awaiting interment, with intent to sell it or to dissect it, without authority of law, or from malice or wantonness, is punishable by imprisonment in the state prison." Under the existing language, local authorities charging a violation of section 7051 (e.g., for a theft of dental gold) must battle the vagueness of that section, specifically the term "without authority of law." The burden of proving that the specific removal was made without authority of law is on the district attorney. In light of commonly-used telephonic authorization and general written authorization forms which do not specifically identify the parts of the remains to be removed, the burden is difficult to carry. As amended, section 7051 would make it a felony to remove any part of any human remains awaiting cremation without specific authorization, and would allow punishment by imprisonment in the state prison or by a fine not to exceed a maximum amount, or both.

Because a maximum $1,000 fine is generally considered to be a misdemeanor or penalty (Penal Code section 19), Scuri recommended that the maximum fine for a violation of section 7051 exceed $1,000 to retain the current felony nature of the crime.

The Board also proposes to add section 7051.1 to the Health and Safety Code to read: "[n]o person shall permanently remove any part of any human remains without separate written or telegraphic authorization from the person having the right...under section 7100. This authorization shall clearly specify each...part to be removed, including but not limited to dental gold." Section 7051.1 would not apply to (a) "[a]natomical gift donations made by the decedent..."; (b) [removals made or authorized by a coroner..."; (c) [removals made by a licensed embalmer," or a registered apprentice embalmer..."]

Cremation Procedures. On September 16, the Board also considered proposing regulations in Chapter 23, Title 16 of the California Administrative Code, to clarify existing commingling statutes. As a result of recent litigation alleging illegal commingling of cremated remains, the industry is experiencing a great deal of uncertainty regarding the meaning of the word "commingling," as used in Health and Safety Code section 7054.7(a)(2). Thus, the profession is operating without a clear definition as to what degree of intermixing of cremated remains, if any, is permissible.

The Board entertained a lengthy discussion regarding possible regulatory changes to address the commingling issue. To assist the Board, several of those in attendance presented oral testimony. In addition, the staff assisted in preparing for the September 16 discussion on proposed regulations by contacting all licensed cemeteries and crematories and the Intermment Association of California requesting written comments on the issue. The Board received five written comments from industry members on their interpretations of the commingling laws.

Several of those members commenting noted that because of the nature of cremation, a certain degree of involuntary commingling is inherent and will occur in the cremation process regardless of the cleanliness of the retort (the vessel used to cremate remains). They suggested that determining what constitutes "recoverable" cremated remains would solve the industry's problem. An attorney representing a Board licensee testified that the commingling statutes do not suit the industry's current practices. He proposed that the solution lies in defining specific actions of industry members as acceptable and legal operations. A second attorney, serving as counsel for various mortuaries and crematories, stated that several factors contribute to the problems faced by the industry. Specifically, he noted litigation in connection with the Elkin scattering (see CRLR Vol. 5, No. 4 (Fall 1985) p. 23), the sifting processes (processing of cremated remains so that they are suitable for disposal), and the industry's difficulty in trying to interpret the laws (see CRLR Vol.7, No. 3 (Summer 1987) pp. 62-63 for discussion relating to interpretation of cemetery laws).

A licensee of both the Cemetery Board and the Board of Funeral Directors and Embalmers testified that his mortuary was sued for commingling as a result of ambiguity in the statute. Conversely, a Cemetery Board licensee stated that the industry has developed some guidelines and procedures and that the law itself is not a major problem. This licensee, as well as several others, cited lack of disclosure of cremation procedures as the source of most litigation. Additionally, several people looked to the intent of the law for clarification and resolution of the issue, stating that the intent of the law is to prevent multiple cremations and the intermixing of cremated remains. They believe the commingling restriction is not intended to cover the disposal of dust or minute residue left in the retort. Notwithstanding the apparent legislative intent, they expressed a necessity to clarify this intent by regulation or further legislation.

After thorough discussion, the Board directed Board members Griffiths and Joslin to draft questions for submission to the Attorney General regarding inadvertent microscopic commingling, foreign substances, and the right to inspect crematories. The Board also requested that legal counsel prepare an opinion in response to the following question: "Does the cremation of the remains of a person in a cremation chamber that was used previously for the cremation of the remains of another person whose cremated remains were removed prior to the new cremation violate Health and Safety Code section 7054.7(a)(1) as a result of the incidental and unavoidable residue remaining in the cremation chamber?"
LEGISLATION:

SB 89 (Boatwright) would repeal the statutes creating the Cemetery Board, transfer that Board’s powers and duties to the Board of Funeral Directors and Embalmers, and increase the membership of the Funeral Board by adding a cemetery industry representative. (See CRLR Vol. 7, No. 3 (Summer 1987) p. 62 and CRLR Vol. 7, No. 2 (Spring 1987) p. 43 for further discussion of this bill.)

RECENT MEETINGS:

At its September 16 meeting in Monterey, the Board unanimously passed a motion which requires all applicants who desire to have their applications placed on the agenda for consideration at a regularly scheduled meeting to have their applications in the Board’s office at least thirty days prior to the meeting.

On December 8 in Los Angeles, the staff presented a summary of the 62 complaints filed against Board licensees during the first six months of 1987. The staff prepares and studies summaries in an effort to detect the development of patterns warranting legislation and/or regulation. On November 6, the staff completed its review, detecting nothing warranting special action. The staff studies only those complaints mailed directly to the Board.

FUTURE MEETINGS:

To be announced.

BUREAU OF COLLECTION AND INVESTIGATIVE SERVICES
Chief: Gary Kern
(916) 739-3028

The Bureau of Collection and Investigative Services is one of over forty separate regulatory agencies within the Department of Consumer Affairs. The chief of the Bureau is directly responsible to the director of the Department.

The Bureau regulates the practices of collection agencies in California. Collection agencies are businesses that collect debts owed to others. The responsibility of the Bureau in regulating collection agencies is two-fold: (1) to protect the consumer/debtor from false, deceptive, and abusive practices and (2) to protect businesses which refer accounts for collection from financial loss.

In addition, eight other industries are regulated by the Bureau, including private security services (security guards and private patrol operators), repossession, private investigators, alarm company operators, protection dog operators, medical provider consultants, security guard training facilities, and locksmiths.

Private Security Services. Private security services encompass those who provide protection for persons and/or property in accordance with a contractual agreement. The types of services provided include private street patrols, security guards, watchpeople, body guards, store detectives, and escort services. Any individual employed for these services is required to register with the Bureau as a security guard. Any security guard who carries a firearm on the job must possess a firearm permit issued by the Bureau. The Bureau operates to protect consumers from guards who unlawfully detain, conduct illegal searches, exert undue force, and use their authority to intimidate and harass.

Repossession. Repossession agencies repossess personal property on behalf of a credit grantor when a consumer defaults on a conditional sales contract which contains a repossession clause. The Bureau functions to protect consumers from unethical methods of repossessing personal property, such as physical abuse resulting in bodily harm, threats of violence, illegal entry onto private property, and misrepresentation in order to obtain property or information about property.

Private Investigators. Private investigators conduct investigations for private individuals, businesses, attorneys, insurance companies, and public agencies. The scope of their job generally falls within the areas of civil, criminal, and domestic investigations. The Bureau oversees private investigators to protect consumers and clients against investigators who misrepresent, impersonate, or make threats in order to obtain desired information; perform inadequate or incompetent investigations; fail to substantiate charges or charge more than the amount agreed upon; and alter, falsify, or create evidence.

Alarm Industry. Alarm company operators install, service, maintain, monitor, and respond to burglar alarms. These services are provided to private individuals, businesses, and public entities. The Bureau regulates this industry in order to protect clients from potential theft or burglary, invasion of privacy or misrepresentation by alarm companies, and failure on their part to render service as agreed.

Protection Dog Operators. Protection dog operators train, lease, and sell dogs for personal and/or property protection. They also provide patrol services using trained dogs. These services are employed by private individuals, business entities and law enforcement agencies. The Bureau serves to protect against possible violations in this industry, such as inadequately trained or physically abused dogs, overcharges for services, invasions of privacy, or potential theft or burglary of property.

Medical Provider Consultants. Medical provider consultants are contract collectors who provide in-house collection services to medical facilities. They contact insurance companies and/or patients to try to collect on medical debts on behalf of the medical provider. Nevertheless, consultants cannot themselves collect on delinquent debts. Instead, they must turn the debt over to an independent, licensed collection agency in order to avoid any conflict of interest.

Security Guard Training Facilities. These facilities provide necessary training for those desiring to become security guards. Training is given in legal procedures, public safety, minimum standards, and professional conduct. Firearm training is especially important for those guards who will carry a firearm on the job. Upon completion of training, guards must pass an exam before they can be registered.

Locksmiths. As of July 1987, SB 1540 became effective, resulting in the creation of a locksmith regulation program within the Bureau. (For additional information on SB 1540, see CRLR Vol. 6, No. 3 (Summer 1986) p. 25.)

The purpose of the Bureau is to protect the health, welfare and safety of those affected by these industries. To accomplish this, the Bureau regulates and reviews these industries by its licensing procedures and by the adoption and enforcement of regulations. For example, the Bureau reviews all complaints for possible violations and takes disciplinary action when violations are found. The Bureau’s primary method of regulating, however, is through the granting or denial of initial/renewal license or registration applications. Education is also utilized to assist in achieving Bureau goals.

Consumers and clients may pursue civil remedies to resolve complaints and disputes currently within the regulatory authority of the Bureau. In addition, class action suits may be filed on behalf of consumers by the Attorney General’s office and local district attorneys against businesses which engage in repetitive unethical business practices.