the Board's agents (*e.g.*, its investigators and AC members) should not be attributed to the Board acting in its capacity as a quasi-judicial body.

During the pendency of this judicial proceeding, the administrative hearing on CBA's accusation against KPMG commenced on March 15, 2000 before Administrative Law Judge Humberto Flores, and concluded on December 29, 2000. On behalf of the Board, the Attorney General's Office submitted its closing briefs on February 15, 2001, and—at this writing—KPMG is scheduled to submit its closing briefs on May 7, 2001.

RECENT MEETINGS

At its November 19, 1999 meeting, CBA elected public member Baxter Rice as president, CPA Donna McCluskey as vice-president, and CPA Michael Schneider as secretary-treasurer for 2000.

At its November 2000 meeting, CBA elected Donna McCluskey as president and public member Navid Sharafatian as vice-president, and reelected Michael Schneider as secretary-treasurer for 2001.

FUTURE MEETINGS

2001: May 18 in Sacramento; July 20 in San Francisco; September 21 in Los Angeles; November 16 in San Diego.

2002: January 24–25 in San Francisco; March 22–23 in Los Angeles; May 16–17 in San Diego; July 19 in San Francisco; September 20 in Sacramento; November 14–15 in San Diego.

2003: January 23–24 in Redwood City; March 21–22 in Santa Monica; May 15–16 in San Diego; July 25 in San Francisco; September 19 in Los Angeles; November 14 in Sacramento.

State Bar of California

Executive Officer: Judy Johnson ♦ (415) 538-2000 ♦ (213) 765-1000 ♦ Toll-Free Complaint Hotline: 1-800-843-9053 ♦ Ethics Hotline: 1-800-2ETHICS ♦ Internet: www.calbar.ca.gov

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. More than 175,000 lawyers are members of the State Bar.

The State Bar and its subdivisions perform a myriad of functions that fall into six major categories: (1) testing State Bar applicants, accrediting law schools, and promoting competence-based education; (2) enforcing the State Bar Act, Business and Professions Code section 6000 *et seq.*, and the Bar's Rules of Professional Conduct; (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.

The State Bar maintains approximately 40 standing and special committees including over 200 appointees and addressing numerous issues. Sixteen subject-matter "sections" focus on specialized substantive areas of law—ranging from antitrust law to workers' compensation to criminal law. These sections, which are operated by volunteer committees, publish information about their respective subject areas and assist the Bar in administering its Minimum Continuing Legal Education (MCLE) program, which requires most Bar members to complete 25 hours of MCLE every three years. The Bar also operates the Conference of Delegates, which gives a representative voice to local, ethnic, and specialty bar associations statewide. Effective January 1, 2000, the Bar is prohibited from funding its sections and the Conference of Delegates with members' compulsory Bar licensing fees (see MAJOR PROJECTS).

The Bar grants "specialty certification" status to over 3,600 attorneys who practice in one of eight fields: appellate; criminal; estate planning, trust, and probate; family; immigration and nationality; personal and small business bankruptcy; taxation; and workers' compensation. In general, attorneys may practice in these fields without certification, but meeting the Bar's substantive standards allow them to advertise their "specialty certification" status.

The Bar also operates several service programs, including its Legal Services Trust Fund Program. Established by the legislature in the early 1980s, this program is funded by interest-bearing demand trust accounts held by attorneys for their clients; through a grant process, these funds are distributed to legal services programs serving the poor statewide. The Legal Services Trust Fund Program also distributes the Equal Access Fund, a $10 million annual state fund for improving the administration of justice for low-income Californians.

The Bar is funded primarily by fees paid by attorneys and applicants to practice law. Over two-thirds of the Bar's annual budget is spent on its attorney discipline system, which includes a toll-free complaint hotline and in-house professional investigators and prosecutors housed in the Office of the Chief Trial Counsel. The California Bar's attorney discipline system also includes the nation's first full-time professional attorney discipline court which neither consists of nor is controlled by practicing lawyers. The State Bar Court consists of the Hearing Department (which includes five full-time judges who preside over individual disciplinary hearings) and a three-member Review Department which reviews appeals from hearing judge decisions. The State Bar Court recommends discipline to the California Supreme Court,

which—prior to major reforms in the early 1990s—would consider each case and issue a written decision. Under the new system and "finality rules" adopted by the Supreme Court in 1991, State Bar Court decisions must be appealed to the Supreme Court, and its review is discretionary (see LITIGATION). The Bar may impose a wide range of potential sanctions against violators of the State Bar Act or the Rules of Professional Conduct; penalties can range from private reproval to disbarment, and may include "involuntary inactive enrollment" (interim suspension) under Business and Professions Code section 6007. In connection with its discipline system, the Bar operates two client assistance programs: its Client Security Fund, which attempts to compensate clients who are victims of attorney theft; and its Mandatory Fee Arbitration Program, which arbitrates fee disputes between attorneys and their clients in an informal, out-of-court setting.

The State Bar Act designates a Board of Governors to run the Bar. The Board President is elected by the Board of Governors 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 of Governors consists of 23 members: sixteen licensed attorneys, six non-lawyer public members, and the Board President. Fifteen of the sixteen attorney members are elected to the Board by lawyers in nine geographic districts; the sixteenth attorney member is a representative of the California Young Lawyers Association (CYLA), appointed by that organization's Board of Directors each year for a one-year term. The Governor is authorized to appoint four of the six public members; the Assembly Speaker and Senate Rules Committee each appoint one public member. 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). Members' terms are staggered to provide for the election of five attorneys and the appointment of two public members each year.

In December 1999, Senate President pro Tempore John Burton appointed a new public member, Democratic activist and retired investor Manning J. Post, to the Board of Governors. Unfortunately, Post's term ended early with his death on March 13, 2000. Senator Burton appointed retired actress Julie Sommars to fill the vacancy. Sommars previously served on the Commission on Judicial Performance.

In June 2000, Palmer Brown Madden was elected as 75th president of the State Bar and was sworn in at the Bar's annual meeting in San Diego in September 2000. Madden recently opened a mediation service in Alamo after fourteen years as a partner with McCutchen, Doyle, Brown & Enersen in Walnut Creek.

On August 31, 2000, five attorneys were elected to serve three-year terms on the Board of Governors: Robert Keith Persons (District 1) has a general civil practice in Butte County; Erica R. Yew (District 3) is a partner with McManis Faulkner & Morgan specializing in intellectual law and personal injury; Anthony P. Capozzi (District 5) is a sole practitioner working primarily as a federal trial attorney; Nancy J. Hoffmeier Zamora (District 7) practices primarily in bankruptcy law and business litigation; and Judith M. Copeland (District 9) is a probate specialist and partner at Copeland & Tiernan.

The Board of Governors elected Karen S. Nobumoto as State Bar President at a special meeting on March 13, 2001. A Los Angeles County Deputy District Attorney, Nobumoto is the first government lawyer and the first minority woman to serve as State Bar President. Elected from a field of five candidates, Nobumoto will officially take office in September 2001. The early election is a new approach by the Board of Governors, which agreed that a six-month period to prepare to serve as President would be beneficial for the most efficient functioning of the Board.

On March 20, 2001, after two years of inactivity, Governor Gray Davis appointed two public members to the State Bar Board of Governors. Janet M. Green of Riverside is a registered nurse and the Director of Health Services at San Bernardino Valley College. Green has represented the public in law-related matters as a member of the California Judicial Council's Jury Instruction Task Force and a member of the San Bernardino County Youth Justice Center Community Action Council. Dr. John G. Snetsinger is a professor of history and Director of International Education and Programs at California Polytechnic University at San Luis Obispo. He served on the legislative committee of the California Faculty Association. At this writing, two Governor-appointed public member slots remain vacant.

MAJOR PROJECTS

Bar Hires Executive Director

In April 2000 after a nationwide search, the Board of Governors selected Judy Johnson, the Bar's Chief Trial Counsel since 1994, as the Bar's new executive director. Johnson, the first woman and first African-American appointed to the job, oversees the day-to-day activities of the $80 million organization. Johnson replaces Steve Nissen, who left the office in March 1999. *[17:1 CRLR 205]* Johnson graduated from Stanford University in 1971 and received her law degree from the University of California at Davis' King Hall School of Law in 1976. She worked briefly for the Legal Aid Society of Alameda until 1977, when she became a deputy district attorney in San Francisco, specializing in consumer and major fraud cases. She left that office in 1994 to become the Bar's chief prosecutor. Johnson served on the Bar's Judicial Nominees Evaluation Commission from 1982–85, and was a member of the Board of Governors from 1990–93.

Bar Resumes Collecting Dues, Implements SB 144

In 1999, Governor Davis signed SB 144 (Schiff and Hertzberg) (Chapter 342, Statutes of 1999), which once again authorizes the Bar to collect mandatory licensing fees from its members to support most of its traditional activities; SB

144 is the Bar's first regular dues authorization since 1996. Unhappy with many activities of the Bar, former Governor Pete Wilson vetoed the Bar's dues bill in 1997, causing the Bar to essentially shut down in 1998. Along with authorization to collect licensing fees, SB 144 also imposes restrictions on the use of those fees and on the Bar's legislative activities, amends the provisions of its continuing education program, and enacts other reforms aimed at perceived problems with the Bar's previous operations. Thus, thanks to SB 144, the Bar regained its funding source, but is struggling to implement new limitations on how its funds may be used and the scope of permissible activities.

SB 144 restricts total licensing fees to $395 annually (compared to $478 in 1996 and $458 in 1997) and requires the Bar to discount its fees for attorneys earning less than $40,000 per year. SB 144 prohibits the Bar from using mandatory licensing fees to support two programs that have proven controversial—its Conference of Delegates (which gives a voice to local bar associations) and its subject-matter "sections." The bill authorizes the Bar to collect voluntary donations for the Conference and the sections, but essentially requires these entities to become self-supporting.

SB 144 restricts total licensing fees to $395 annually (compared to $478 in 1996 and $458 in 1997) and requires the Bar to discount its fees for attorneys earning less than $40,000 per year.

SB 144 also addresses the issue of Bar lobbying on subjects unrelated to its regulatory functions. In *Keller v. State Bar*, 496 U.S. 1 (1990), a unanimous U.S. Supreme Court struck down as violative of the first amendment 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 Court also required the Bar to adopt adequate procedures, such as those outlined in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), to protect the interests of objectors by offering them a way to "opt out" of paying for *Keller*-violative lobbying activities. In response to *Keller*, the Bar adopted procedures under which it analyzes and categorizes its expenses as "chargeable" or "nonchargeable," and offers all Bar members an opportunity to decline to pay for the nonchargeable portion (the so-called "*Hudson* deduction"). The Bar's calculation of minimal *Hudson* deduction amounts in the late 1980s resulted in the decade-long *Brosterhous* lawsuit (see LITIGATION). SB 144 attempts to avoid future disputes by imposing a $5 *Hudson* deduction and by establishing a formula that restricts the amount of *Keller*-violative lobbying in which the Bar may engage; the bill precludes the Bar from spending a sum on non-*Keller* lobbying that exceeds the $5 deduction multiplied by the number of attorneys paying their dues who do not request the deduction.

The Board must first agree, by a two-thirds majority, that the legislative proposal being considered complies with *Keller*, in that it is related to the regulation of the legal profession or improving the quality of legal services. The Board must then also approve any position taken on the legislation by a two-thirds vote.

Further, SB 144 requires the Bar to undergo external and independent financial audits. It requires the Bar to contract with a nationally recognized public accounting firm to conduct an audit of the Bar's financial statements for each fiscal year after December 31, 1998. It also requires the Bureau of State Audits (BSA) to conduct a performance audit of the Bar's operations from July 1, 2000, through December 1, 2000 (see below). Beginning in 2002, the Bar must contract with BSA to conduct a performance audit every two years of its operations for that fiscal year. These audits must be submitted to the Board of Governors, the Chief Justice of the Supreme Court, and the Judiciary Committees of the Senate and the Assembly. *[17:1 CRLR 203–05; 16:2 CRLR 168–70; 16:1 CRLR 190–94]*

The Bar has taken numerous actions to implement the various provisions and limitations of SB 144, as follows:

◆ ***Lobbying Limitations***. At its December 1999 meeting, the Board of Governors adopted a resolution to implement procedures designed to respond to challenges to the Bar's use of its funds to support lobbying activities. The new procedures require the Board to pass two separate motions, both by supermajority vote, before taking a position on legislation. Under the new procedures, the Board must first agree, by a two-thirds majority, that the legislative proposal being considered complies with *Keller*, in that it is related to the regulation of the legal profession or improving the quality of legal services. The Board must then also approve any position taken on the legislation by a two-thirds vote. The Board reaffirmed this policy at its April 1, 2000 meeting.

Also at its December 1999 meeting, the Board voted in principle to require the Conference of Delegates and Bar sections to indicate clearly on any legislative position statement that the position taken is not that of the State Bar, and that Conference and section legislative activity is paid for entirely with voluntary donations. The Board approved the exact language of the required notice on February 5, 2000 and reaffirmed the policy at its April 1, 2000 meeting.

Also in December 1999, the Board voted to publish notice of any legislative position taken by the Board in the *California Bar Journal* immediately following the meeting at which the position is taken. At its April 1, 2000 meeting, the Board voted to apply these requirements to legislative positions taken by all Bar entities. After circulating this action for public comment and receiving no comments, the Board reaffirmed the procedures at its August 2000 meeting.

◆ ***Expenditure Limitations***. At its December 1999 meeting, the Board of Governors voted to suspend then-existing provisions of article 1A of its rules and regulations regarding chargeable and nonchargeable amounts and annual fees on

an interim basis. The Board approved a description of its activities and legislative program for 2000, together with the chargeability determinations made by the Bar regarding these activities and programs, and directed staff to publish the description in the January 2000 issue of the *California Bar Journal*. The Board then adopted interim procedures regarding annual membership fees, chargeable and nonchargeable amounts, reductions, and appeals. The interim rule sets forth procedures for determining chargeable and nonchargeable amounts, provides members with notice of the chargeability determinations of the Bar, and gives members an opportunity to object. The Board authorized staff to circulate the interim procedures for a 90-day public comment period. Having received no comments, the Board approved these procedures at its April 1, 2000 meeting.

On February 5, 2000, the Board approved the distribution of an informational document outlining the tests for chargeability under the *Keller* and *Brosterhous* decisions (see LITIGATION) and summarizing Bar activities permitted and prohibited under the *Brosterhous* analysis. The Board also decided, pending clarification or appellate review of that decision, that no matter falling outside the parameters of *Brosterhous* will be placed on the agenda of any Bar committee or commission unless the matter or its consideration involves no expenditure of mandatory dues.

◆ ***Fee Scaling.*** At its December 1999 meeting, the Board of Governors approved a change to article 1, section 7.1 of the rules and regulations of the State Bar to provide for a scaling option for Bar dues for members earning less than $40,000 per year or less than $25,000 per year from the practice of law, as required by SB 144. Under the amended rule, Bar members who believe they are eligible for fee scaling must provide documentation of income to the Bar by February 1 of the year in which the fee is payable. Attorneys earning less than $40,000 qualify for a 25% fee reduction; those earning less than $25,000 qualify for a 50% fee reduction.

On February 5, 2000, the Board again amended article 1, section 7.1 of its rules and regulations to give a member whose application for fee scaling is denied the opportunity for review of the denial by the Board's Committee on Administration and Finance or its designee. The amendments also specify the documentation required to prove eligibility for fee scaling.

At its April 2001 meeting, the Board again modified article 1, section 7.1 of its rules and regulations regarding fee scaling to extend the deadline for applying for scaled fees to March 15 of each year, to correspond with the date late penalties attach for non-scaling members.

◆ ***Minimum Continuing Legal Education.*** SB 144 also made substantive changes to the Bar's MCLE program requirements. Specifically, SB 144 reduces the Bar's MCLE requirement from 36 hours every three years to 25 hours every three years, makes express legislative findings that it is in the public interest to continue the MCLE requirement for attorneys licensed to practice law, deletes a previous exception to the MCLE requirement for retired judges, makes express legislative findings underlying the remaining exceptions to the requirement, and requires the Bar to provide and encourage the development of no-cost and low-cost programs and materials for satisfying the MCLE requirement (with special emphasis upon the use of Internet capabilities and computer technology in the development and provision of these programs). *[17:1 CRLR 204, 206]* In December 1999, the Board published proposed amendments to Rule 958, California Rules of Court (Minimum Continuing Legal Education) and the Bar's MCLE Rules and Regulations to conform with the requirements of SB 144. The Board accepted public comment on the proposed changes through March 10, 2000. On June 10, 2000, the Board voted to slightly modify the proposed changes in response to comments received and to recommend that the California Supreme Court approve the amendments to Rule 958. The Supreme Court approved the Bar's amendments to Rule 958 on September 27, 2000.

Also in June 2000, the Board of Governors approved the expenditure of $40,000 to conduct a poll of about 600 lawyers concerning their opinions of the Bar's MCLE program. The poll results will be used by the Bar's MCLE Evaluation Commission, which was appointed in June 1999 and charged with examining all aspects of the MCLE program and making recommendations to the Board.

◆ ***BSA Completes SB 144-Required Audit.*** In April 2001, the Bureau of State Audits (BSA) released *State Bar of California: It Has Improved Its Disciplinary Process, Stewardship of Members' Fees, and Administrative Practices, but Its Cost Recovery and Controls Over Expenses Need Strengthening*, its report on the State Bar required by SB 144. BSA noted that after January 1, 2000, SB 144 prohibits the Bar from using mandatory fees to support voluntary programs such as the Conference of Delegates and its subject-matter sections, or to support certain lobbying activities that exceed the *Keller* mandate; however, SB 144 authorizes the Bar to collect voluntary fees to support the Conference and the sections.

BSA noted that, in response to SB 144, the Bar established two new funds to account for the activities of the Conference of Delegates and for lobbying activities outside the scope of *Keller* (a separate fund for section activities was already in place). BSA found that the Bar also took action to ensure that mandatory fees are not used to provide administrative support for section activities.

On annual membership statements for 2000, members were asked to make voluntary contributions of $3 to support the Conference; these contributions totaled about $84,000. Expenses for Conference activities for the year were approximately $70,000; according to BSA, no mandatory fees were used to support Conference activities during 2000.

Also in response to SB 144, the Bar created the Legislative Activities Fund to account separately for revenues and expenses related to lobbying activities that exceed the *Keller* mandate. Revenues recorded to this account in 2000 included $644,000 (from attorneys who chose to support *Keller*-viola-

tive lobbying by the Bar by not taking the $5 *Hudson* deduction) and $35,000 in interest income. Expenses paid from this fund were primarily payroll expenses for staff time spent on 2000 lobbying on legislation that was not chargeable to mandatory fees. BSA noted the Bar's improved procedures in tracking and reporting staff time spent on legislative activities. The auditor's findings and recommendations concerning attorney discipline are discussed below.

◆ ***2001 Bar Dues.*** In contrast to SB 144, SB 1367 (Schiff) (Chapter 118, Statutes of 2000)—the Bar's dues bill for 2001—was enacted with little or no controversy and signed by the Governor on July 7, 2000. SB 1367 again authorizes the Bar to collect a maximum of $395 per member for annual dues—including $318 in basic membership fees plus $77 in other required fees (see 2000 LEGISLATION).

◆ ***2002 Bar Dues.*** At its November 2000 meeting, the Board voted unanimously to seek 2001 legislation reducing Bar dues by $50 for 2002. The maximum $345 annual payment would include a $295 basic membership fee, $10 for the Bar's building fund, and $40 for the Client Security Fund. The proposed reduction in fees was attributed to a $15 million budget surplus caused by continuing staff shortages resulting from the Bar's 1998 shutdown.

At this writing, SB 352 (Kuehl)—pending in the legislature—would enable the Bar to fulfill its promise. SB 352 is actually a two-year dues bill that would authorize the Bar to charge up to $310 in basic membership fees during both 2002 and 2003 (see 2001 LEGISLATION).

Bar Rebuilds Attorney Discipline System

After then-Governor Wilson vetoed the Bar's dues bill in 1997, the Bar twice petitioned the California Supreme Court to order attorneys to pay their license fees. When the Court initially declined to intervene, the Bar was forced to lay off almost 500 employees—including most of its enforcement staff. In December 1998, the Court granted the Bar's second petition and issued a special order requiring all California attorneys to pay $173 to enable the Bar to resurrect its attorney discipline system. The Court appointed a special master, retired Court of Appeal Justice Elwood Lui, to oversee the Bar's expenditure of this special charge. *[17:1 CRLR 203–06; 16:2 CRLR 168–70; 16:1 CRLR 190–94]*

Overall, as of March 1, 2000, OCTC maintained an inventory of 7,478 open matters (including 1,603 cases in its "backlog"—the "backlog" consists of non-complex matters pending in OCTC for more than six months and complex matters pending in OCTC for more than one year). That total inventory figure is down from 10,572 on March 1, 1999.

◆ ***Final Report on Attorney Discipline System.*** On March 28, 2000, Special Master Lui filed his fourth and final report documenting the progress of the State Bar in rebuilding its attorney discipline system. In his initial February 1999 report, Justice Lui reported that the Bar's discipline system faced an unprecedented backlog of over 7,000 open complaints and reports against attorneys from consumers and courts. To deal with the backlog, the Bar instituted new prioritization policies, default rules, and early settlement conference policies, and slowly rehired discipline system staff—including prosecutors, investigators, and support staff. Subsequent reports issued in June and September 1999 documented progress made as the Bar slowly worked to rebuild its discipline system.

During his term as Special Master, Justice Lui authorized the hiring of 390.5 discipline-related staff; by March 11, 2000, the Bar had filled 331.5 of those positions (some with previous Bar employees and some with new employees). Justice Lui's final report analyzed the status of enforcement system staffing and the status of case backlogs at the Office of the Chief Trial Counsel, the State Bar Court, and the Office of General Counsel, and made general recommendations regarding State Bar operations and appropriate uses for the remaining balance in the Discipline Fund, as follows:

• *Office of the Chief Trial Counsel.* Accumulated cases—which now consist not only of old complaints and cases that came in and were abated during the shutdown but also new complaints filed since January 1999—are divided into (1) inquiries—written complaints about the conduct of an attorney that are initially reviewed by the intake unit of the Office of the Chief Trial Counsel (OCTC), (2) investigations—matters that have survived intake and are currently being investigated by OCTC's investigative staff, and (3) trial counsel matters—completed investigations that are being reviewed or prosecuted by OCTC attorneys before the State Bar Court.

With the benefit of added staff, OCTC has substantially reduced the number of inquiries in intake from 4,050 on March 1, 1999 to 2,201 on March 1, 2000. Justice Lui noted that the number of pending inquiries on March 1, 2000 is up from the 1,697 that were pending as of his third report in September 1999. To remedy this problem, the Bar—in January 2000—created and filled six complaint analyst positions for its intake unit and temporarily assigned three attorneys to review these inquiries; the Bar believes this infusion of resources will reduce its intake inventory to the normal level of 1,600 soon.

The number of pending investigations in OCTC decreased from 2,800 on March 1, 1999, to 2,748 on March 1, 2000. According to Justice Lui, OCTC acknowledges that its investigations inventory remains high, but attributes this to the staff reorganization issues and the steep learning curve for new hires. Trial counsel matters decreased from 1,450 on March 1, 1999 to 926 on March 1, 2000. Overall, as of March 1, 2000, OCTC maintained an inventory of 7,478 open matters (including 1,603 cases in its "backlog"—the "backlog" consists of non-complex matters pending in OCTC for more than six months and complex matters pending in OCTC for more than one year). That total inventory figure is down from 10,572 on March 1, 1999. In his report, Justice Lui attributed this improvement largely to OCTC's use of a prioritization system.

• *State Bar Court.* In his final report, Justice Lui found that as of March 1, 2000, the State Bar Court had filled 27 of its 37 authorized positions, but noted that many of the vacant positions will remain unfilled unless and until they are justified by increases in the State Bar Court's workload. As of March 1, 2000, 356 open cases remained in the Hearing Department and 42 open cases were pending in the Review Department. As of March 3, 2000, the State Bar Court reported that 26 cases were held in abatement, the majority of which were proceedings in which there was a mental competency proceeding pending or in which a recommendation of disbarment had been filed or was pending before the Supreme Court in another proceeding.

The report found that the number of new cases initiated in the State Bar Court remained below historical levels. In 1999, 516 new cases were filed, including 456 disciplinary cases and 51 regulatory matters (moral character admission matters, reinstatement petitions, and requests for involuntary inactive enrollment). In contrast, in 1996, 901 disciplinary proceedings and 180 regulatory proceedings were filed in the State Bar Court; in 1997, 956 disciplinary proceedings and 168 regulatory matters were filed.

• *Office of General Counsel.* By March 2000, the Bar's Office of General Counsel (OGC) had filled all authorized staff positions. OGC reported that, as of March 3, 2000, there were 15 discipline cases before the California Supreme Court or on appeal before the U.S. Supreme Court, 22 pending *In re Walker* petitions, and one pending request for depublication of a Review Department decision, which OGC filed on behalf of OCTC. In addition, OGC reported that, as of March 3, 2000, it had 66 open discipline-related civil matters, including actions brought by complaining witnesses or respondents against the State Bar, subpoenas for discipline records, labor-related cases involving disciplined staff employees, and bankruptcies in which the debtor owes discipline costs and/or reimbursement to the Client Security Fund.

• *Other Recommendations.* Justice Lui's final report also contained the following recommendations concerning the general structure and operations of the Bar, as well as suggestions for the disbursement of funds remaining in the Discipline Fund:

(1) Justice Lui suggested that the current budget process be amended to permit the Bar to budget for a three-year period rather than a one-year period. "Currently, representatives of the State Bar must spend a large portion of each year in Sacramento lobbying for the State Bar's fee bill for the following year. Not only does this create an unhealthy obsession with the annual budget, but more significantly, it precludes the State Bar from making long-term strategic plans." Justice Lui recommended that the Bar seek legislation establishing a "rolling three-year budget," during which period the Bar would be permitted to seek budget increases from the legislature as necessary.

(2) The Board of Governors should focus on policy issues affecting the State Bar, and permit State Bar executives and administrators to focus on the day-to-day management of the Bar. "Although the Board's interest in the daily affairs of the State Bar evidences the Board's legitimate concern for the operations of the State Bar," Lui wrote in his report to the Supreme Court, "when the Board becomes overly involved with such details, both the Board and the State Bar (and therefore its members and the public) suffer....The able and full-time State Bar executives and administrators are in a better position to make, and should be free to make, day-to-day management decisions and to implement the Board's policy directives." In this regard, Justice Lui urged the Bar to recruit and hire as its Executive Director a strong management-oriented person with full authority to make day-to-day management and budget decisions.

(3) The Bar should continue to improve its information management system, restructure its information systems and technology department, create a Director of Information Systems and Technology position reporting directly to the Executive Director, provide for routine maintenance and updating of computer hardware and software, create staff positions in each department to address technology-related problems, and utilize contract services and Bar employees to maintain and expand its Web site and online services.

(4) With respect to the discipline system itself, Justice Lui recommended that OCTC improve and streamline its process of drafting notices to show cause (the formal disciplinary complaint); refine its procedures for determining appropriate sanctions; simplify the processing of default cases, in conjunction with the State Bar Court; develop and implement, with the State Bar Court, a minor misconduct program to deal with minor disciplinary cases; develop and implement a volunteer attorney specialist program to mediate lower-priority cases; and improve its phone line service for judicial inquiries regarding attorney discipline records. Justice Lui recommended that the State Bar Court reduce the length of its opinions; improve and formalize effective case management, including procedures for Early Neutral Evaluations; and conduct initial and substantive status conferences.

• *Fund Status.* Justice Lui reported that as of March 23, 2000, more than $3.7 million in unappropriated funds remained in the Discipline Fund. He suggested that the funds be used on either the Bar's discipline functions or on the maintenance and enhancement of State Bar technology.

Justice Lui's service as Special Master of the State Bar Attorney Discipline Fund was concluded by order of the Supreme Court on July 23, 2000. Following Justice Lui's recommendations, the Court ordered that the money remaining in the Discipline Fund be held in a separate account and that a decision concerning their use to improve the discipline system and the Bar's technology be made by the Bar's Senior Executive Team, and authorized by the Executive Director.

◆ ***ABA Committee to Study Workload Standards and Disciplinary System in California.*** SB 1420 (Burton) (Chapter 246, Statutes of 2000) requires the State Bar to review its workload standards with respect to disciplinary activities "in-

cluding, but not limited to, the State Bar Court and the Client Security Fund, and provide guidance to the State Bar and the Legislature in allocating resources," and submit a report to the legislature by June 30, 2001 (see 2000 LEGISLATION). On August 26, 2000, the Board unanimously voted to ask the American Bar Association's (ABA) Standing Committee on Professional Discipline to conduct the study required under the legislation. The ABA committee has conducted more than 40 similar reviews of state bar discipline systems since 1980. The ABA will pay some of the costs of the review itself, but asked for a State Bar contribution of $10,000.

◆ ***BSA Reports Improvements in Bar's Disciplinary Process.*** As noted above, BSA released its SB 144-required report on the State Bar's disciplinary process in April 2001. The auditors found that the State Bar has made significant progress in improving its disciplinary process since the 1998 shutdown. The audit attributed these gains to the complaint prioritization system that allows investigators to focus on the most serious disciplinary cases—those that pose the most significant threat of harm to the public—first. "The State Bar has implemented reasonable methods for dealing with the numerous complaints that have accumulated in its backlog of disciplinary cases," according to the report. Further, BSA noted that the State Bar has revised its cost model, which should result in greater cost recovery from attorneys being disciplined. Using the new model, the State Bar has more than doubled the maximum amount it can charge an attorney for the costs of investigating and pursuing disciplinary action.

BSA released its SB 144-required report on the State Bar's disciplinary process in April 2001. The auditors found that the State Bar has made significant progress in improving its disciplinary process since the 1998 shutdown.

However, BSA also found that the costs actually collected from offending attorneys declined in 2000 compared with amounts collected in 1995. Of $1,079,922 billed to disciplined attorneys in 2000, the State Bar collected only $311,061 (28.8%). The only way the State Bar can collect these amounts is by pursuing a formal court judgment against the attorney, or by adding the costs to the attorney's annual dues bill. Since the disciplined attorney may be insolvent or no longer in practice, the potential for actual collection of this cost recovery is limited. BSA stated: "Because the State Bar's recovery efforts are poor, it uses a greater portion of membership fees than necessary to support its Client Security Fund and disciplinary programs. Consequently, members must pay a fee that is higher than necessary." The auditors recommended that the State Bar participate in the state's "Offset Program," which allows the State Controller's Office and the Franchise Tax Board to offset from an individual's tax return any amounts owed from state agencies. According to the Bar, legislation is required to authorize its participation in this program, and previous efforts in 1997 to obtain legislative support for this proposal were unsuccessful. BSA also recommended that the State Bar update its cost model using current salary costs.

Effective November 1, 2000, SB 143 (Burton) (Chapter 221, Statutes of 1999) changed the composition of the State Bar Court and transferred the appointing authority for three of the five State Bar Court judges from the California Supreme Court to the Governor, the Senate Rules Committee, and the Speaker of the Assembly.

SB 143 Changes State Bar Court Composition, Appointment Authority

Effective November 1, 2000, SB 143 (Burton) (Chapter 221, Statutes of 1999) changed the composition of the State Bar Court and transferred the appointing authority for three of the five State Bar Court judges from the California Supreme Court to the Governor, the Senate Rules Committee, and the Speaker of the Assembly. Prior to the enactment of SB 143, the State Bar Court consisted of a hearing panel of five judges who preside over evidentiary hearings, and a three-judge Review Department consisting of the Presiding Judge of the State Bar Court, one attorney judge, and one non-attorney judge. Each of the judges was appointed by the California Supreme Court upon nomination by the court's Applicant Evaluation and Nomination Committee. SB 143 eliminates the non-attorney judge position on the Review Department and replaces it with an attorney judge position. Further, SB 143 permits the Supreme Court to appoint only two of the five Hearing Department judges, with the remaining three judges to be appointed by the Governor, the Senate Rules Committee, and the Speaker of the Assembly. According to the bill's author, the intent in revamping the appointment authority was to bring a broader diversity of opinion to the State Bar Court and to make that court more closely resemble the structure of the Commission on Judicial Performance, which disciplines judges. The Bar took no position on SB 143 because it was double-joined to SB 144, its dues bill. *[17:1 CRLR 209]*

In January 2000, three State Bar Court judges petitioned the California Supreme Court for a writ of mandate, asking that the new law be struck down. In *Obrien v. Jones*, the State Bar Court judges argued that the new law politicizes the appointment process, infringes upon the Supreme Court's own inherent power over attorney discipline, and violates the state constitution's separation of powers doctrine. By a 4–3 vote, the Supreme Court upheld the constitutionality of the provisions, holding that its primary authority over the practice of law is not defeated or materially impaired by SB 143's changes to the State Bar Court appointment process (see LITIGATION).

In November 2000, two Review Department judges were reappointed and three new hearing judges were appointed under the new procedures. Senate President pro Tempore John

Burton, the author of SB 143, appointed Senate Judiciary Committee staff attorney Jodi Remke to a hearing judge post; Remke previously served as a legal advocate on housing issues, was a legal services attorney, and practiced real estate law in Oakland. Remke will serve a four-year term. Assembly Speaker Robert Hertzberg appointed Los Angeles attorney Paul Bacigalupo as a hearing judge, replacing Madge Watai (who was elevated to the Review Department by the Supreme Court). Prior to his appointment, Bacigalupo was a litigator at Castle & Lax; his appointment is for two years. Governor Davis named Robert Talcott, a former member of the Bar of Governors, to a six-year term as a hearing judge. Talcott served as the president of the Los Angeles Police Commission and is the senior and founding partner of Talcott, Lightfoot, Vandevelde, Sadowsky, Medvene & Levine.

The Supreme Court announced its reappointment of Judge Ronald Stovitz to the Review Department and named Judge Watai to the Review Department to replace Kenneth Norian, the public member of the Department whose position was eliminated by SB 143. Stovitz has been a Review Department judge since 1989 when the State Bar Court was established. Watai was a Superior Court judge in Los Angeles before becoming a hearing judge in the State Bar Court.

Diversion Program for Impaired Attorneys

At its January 26, 2001 meeting, the Board of Governors agreed to cosponsor legislation to create an Attorney Diversion and Assistance Program for lawyers with substance abuse or mental illness problems. The bill, SB 479 (Burton), would require the Board to establish and administer an attorney diversion and assistance program (see 2001 LEGISLATION). As amended April 30, 2001, SB 479 would fund the program through an annual charge of $10 to each active member of the Bar. The bill would add sections 6230–6238 to the Business and Professions Code. New section 6230 would state the intent of the legislature that the Bar "seek ways and means to identify and rehabilitate attorneys with impairment due to abuse of dangerous drugs or alcohol, or due to mental illness, affecting competency so that attorneys so afflicted may be treated and returned to the practice of law in a manner that will not endanger the public health and safety."

New section 6231 would provide for the establishment and administration of the attorney diversion program, and establish a committee to oversee the operation of the program. The committee would consist of twelve members—eight appointed by the Board of Governors (including one physician and two other licensed mental health professionals with knowledge and expertise in the identification and treatment of alcoholism and substance abuse, one member of the board of directors of a statewide nonprofit organization that assists lawyers with alcohol or substance abuse problems, and four attorney members—one of whom is in recovery with at least five years' sobriety), two public members appointed by the Governor, one public member appointed by the Speaker of the Assembly, and one public member appointed by the Senate Rules Committee. Committee members would serve three-year terms and would be authorized to adopt regulations as needed to implement and operate the program. Section 6232 would allow the committee to establish criteria for acceptance, denial, or termination of attorneys in the diversion program. Section 6232 would also provide that attorneys may enter the program through voluntary self-referral, or by referral from the Office of the Chief Trial Counsel or the State Bar Court. New section 6235 would provide that participants in the program are responsible for all expenses related to treatment and recovery, but would require the Bar to establish a financial assistance program to ensure that attorneys would not be denied acceptance into the program based solely on inability to pay.

At the Board's April 11, 2001 meeting, James D. Otto, Chair of the Board's Committee on Regulation and Discipline, briefed the Board concerning estimated costs and funding for the proposed diversion program. Using the Medical Board's physician diversion program as a model, the Bar estimates that, after initial evaluation costs of $300–$5,000 per participant, the cost of participation for each attorney participant will be about $5,000–$6,000 annually. A five-year minimum period of participation is expected. Otto also outlined the proposed staffing level and budget requirements to operate the program, but stated that attorneys will not be denied access if they cannot afford the cost of the diversion program.

Bar to Improve Public Disclosure of Attorney Discipline

Like the Web sites of many other California occupational licensing agencies, the State Bar's Web site includes a "licensee look-up" feature enabling members of the public to determine whether an attorney is in fact a member of the California Bar. If so, the Bar discloses the attorney's current membership status, address and telephone number of record, the date of the member's admission to practice, and the name of the college and law school attended. Unlike many other agencies, however, the Bar does not disclose details about its own prior disciplinary actions on its Web site; nor does it disclose information about disciplinary charges filed, criminal convictions, civil malpractice judgments, other-state disciplinary actions, or other public information indicating unfitness to practice. The Bar's Web site simply reveals whether a given attorney has a "public record of discipline" or "no public record of discipline." If an attorney has a "public record of discipline" and a member of the public wants more information, he/she must write a letter to the Bar requesting that information, and include a blank check. In other words, whereas other agencies instantly disclose licensee misconduct information on their Web sites for free, the Bar limits disclosure to its own final disciplinary actions, charges up to $30 for that information, and requires people to wait weeks to get it.

The public disclosure issue has been complicated by the Bar's fiscal status and by the pendency of a lawsuit filed by

attorney Michael Mack challenging the Bar's public disclosure policy regarding private reprovals (see LITIGATION). At its December 1999 meeting, however, the Board's Committee on Regulation and Discipline finally recommended that more detailed information regarding State Bar members' disciplinary records and changes in membership status be posted on the Bar's Web site. The Committee recommended that the following information be added to the Web site: (1) information on changes in the membership status of a member (including the type of suspension or inactive enrollment, the year in which the suspension or inactive enrollment was imposed, and the case number, if any, relating to the suspension or inactive enrollment); and (2) enhanced information on disciplinary actions taken, including the type or level of discipline imposed, the year in which discipline was imposed, and the State Bar Court or Supreme Court case number relating to the particular imposition of discipline. Interested members of the public must still write to the Bar and pay a charge for detailed information on Bar disciplinary action.

Whereas other agencies instantly disclose licensee misconduct information on their Web sites for free, the Bar limits disclosure to its own final disciplinary actions, charges up to $30 for that information, and requires people to wait weeks to get it.

However, the Committee recommended that information regarding stipulated "private reprovals"—which, despite their name, are public information if issued following the filing of formal charges—not be posted on the Web site until the Bar amends its rules of procedure; instead, members of the public will be instructed to call the Bar for information on private reprovals. On February 5, 2000, the Board of Governors approved the Committee's proposal, and subsequently amended Rule 270 of the Bar's Rules of Procedure to clarify—effective July 1, 2000—that private reprovals issued after the filing of a notice to show cause (so-called "private reprovals with public disclosure") are public information and will be disclosed on the Bar's Web site; private reprovals imposed prior to the filing of a notice to show cause will not be posted on the Bar's Web site or disclosed in response to public inquiries. In other words, information about "private reprovals with public disclosure" will appear on the Bar's Web site if they are issued after July 1, 2000; if they were issued prior to that date, the Web site will instruct an interested party to call the Bar for more information.

On May 17, 2000, the Los Angeles County Superior Court dismissed attorney Mack's challenge to the Bar's disclosure of his private reproval. As a result, Bar senior management unanimously recommended that the Committee on Regulation and Discipline reconsider its February 2000 decision, and instead treat all "private reprovals with public disclosure" equally by disclosing all of them on the Bar's Web site regardless of when they were issued. Staff argued that all information on "private reprovals with public disclosure" is public anyway, and posting that information on the Web site would benefit the public and lighten staff workload. At its August 25, 2000 meeting, the Committee voted 4–3 against Web site disclosure of "private reprovals with public disclosure" imposed prior to July 1, 2000.

At this writing, the Bar has not yet implemented the Board's February 2000 decision.

Multidisciplinary Practice

Since 1999, both the ABA and the State Bar have struggled with the "multidisciplinary practice" (MDP) concept, under which lawyers could share fees and establish business partnerships with nonlawyers—both of which are prohibited under current rules of professional conduct.

In June 1999, the ABA's Commission on Multidisciplinary Practice recommended that the ABA amend its model rules to "permit lawyers, subject to carefully defined standards, to deliver services to clients through a new practice vehicle, a multidisciplinary practice." The Commission defined an MDP as "a partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all of its purposes, the delivery of legal services to a client(s) other than the MDP itself or that holds itself out to the public as providing nonlegal, as well as legal, services. It includes an arrangement by which a law firm joins with one or more other professional firms to provide services, and there is a direct or indirect sharing of profits as part of the arrangement." Under the recommendation, lawyers in MDPs would remain subject to all rules of professional conduct, except that they would be permitted to form an MDP and share legal fees with a nonlawyer in an MDP for the purpose of the delivery of legal services. Further, the MDP would be subject to certain certification and audit procedures designed to protect the interests of clients and the public while maintaining the core values of the legal profession—"specifically, professional independence of judgment, the protection of confidential client information, and loyalty to the client through the avoidance of conflict of interest." The ABA Commission stressed that its recommendation does not permit a nonlawyer to deliver legal services.

The Commission's initial recommendation would have required the amendment of ABA Model Rule of Professional Conduct 5.4, which prohibits a lawyer from sharing legal fees with a nonlawyer or forming a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law. The ABA's adoption of the recommendation (which, absent action by the State Bar to amend California's Rules of Professional Conduct, is not binding in California) would have created an exception to Model Rule 5.4 in the case of MDPs that conform to nine specified safeguards.

In July 1999, the Board of Governors approved a recommendation from the Bar's Committee on Professional Responsibility and Conduct (COPRAC) that the Board instruct its delegates to the 1999 ABA convention to suggest deferral of

the MDP issue until the ABA further studies and solicits comments from outside the ABA on this important issue. At its August 1999 meeting, the ABA's House of Delegates considered the MDP Commission's recommendation, but voted 304–98 to defer action until the issue has been further studied by state and local bar associations and the ABA itself. *[17:1 CRLR 207–08]* The ABA resolution said that the ABA should make no changes to the Model Rules until additional study demonstrates that such changes "will further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients."

In July 2000, after two years of investigation and discussion of the issue, the ABA's House of Delegates again rejected the recommendation of the MDP Commission, voting by a 3–1 margin that multidisciplinary practice is "inconsistent with the core values of the legal profession."

In response to the ABA's August 1999 resolution, the MDP Commission conducted more public hearings and solicited additional comment with respect to this issue and issued an updated background report in December 1999. At its February 2000 midyear meeting, the ABA conducted a Town Hall Meeting and webcast on multidisciplinary practice. On March 22, 2000, the MDP Commission issued a "Draft of a Possible Recommendation to the ABA House of Delegates" with a narrower proposal than that contained in its 1999 report. The 2000 report and recommendation was posted on the ABA's Web site in May 2000. The MDP Commission recommended:

• Lawyers should be permitted to share fees and join with nonlawyer professionals in a practice that delivers both legal and nonlegal professional services (multidisciplinary practice), provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services. The term "nonlawyer professionals" means members of recognized professions or other disciplines that are governed by ethical standards.

• This recommendation must be implemented in a manner that protects the public and preserves the core values of the legal profession, including competence, independence of professional judgment, protection of confidential client information, loyalty to the client through the avoidance of conflicts of interest, and *pro bono publico* obligations.

• Regulatory authorities should enforce existing rules and adopt such additional enforcement procedures as are needed to implement these principles and to protect the public interest.

• The prohibition on nonlawyers delivering legal services and the obligations of all lawyers to observe the rules of professional conduct should not be altered.

• Passive investment in a multidisciplinary practice should not be permitted.

Simultaneously, in May 2000, then-State Bar President Andy Guilford appointed a Task Force on Multidisciplinary Practice and charged it with determining whether there are viable MDP models for California that preserve the critical role of the attorney as an officer of the court in the administration of justice and the "core values" of that role.

In July 2000, after two years of investigation and discussion of the issue, the ABA's House of Delegates again rejected the recommendation of the MDP Commission, voting by a 3–1 margin that multidisciplinary practice is "inconsistent with the core values of the legal profession." The House of Delegates also voted against a resolution of the MDP Commission, supported by the California delegation, to defer action on MDP until more reports on the issue from 33 state bars—including California's—are received. The House of Delegates thanked and discharged the Commission on Multidisciplinary Practice, essentially referring all future MDP issues to its Standing Committee on Ethics and Professional Responsibility.

At this writing, the State Bar's Task Force on Multidisciplinary Practice is still engaged in its study of various MDP models, and is expected to submit its report and findings to the Board of Governors in mid-2001.

Ethics 2000 Commission Releases Proposed Changes to Attorney Ethics Rules

On November 27, 2000, a blue-ribbon ABA commission called the "Ethics 2000 Commission" released its proposals to revise professional ethics rules for attorneys—proposals that prompted much scrutiny and attention from attorney groups across California and the United States. The Ethics 2000 report does not amend the ABA's Model Rules of Professional Conduct—such action could occur only through the ABA's House of Delegates. Further, the Model Rules themselves are not binding unless adopted by a state. At this writing, ABA delegates are scheduled to convene and address the suggested changes at their annual meeting in Chicago in August 2001.

Although the ABA's Model Rules are not binding in California, changes to them may prompt the legislature to amend the State Bar Act or the State Bar to recommend revisions to the Rules of Professional Conduct. Notable changes in the Ethics 2000 proposal include modifications to rules regarding disclosure of client confidences, discipline of law firms, and standards for conflicts of interest. The Commission proposes that lawyers should be allowed to disclose client confidences to prevent or mitigate financial harm or fraud. Currently, disclosure of client confidences under the existing Model Rules is allowed only to prevent imminent death or great bodily harm. Critics of the proposal claim that such disclosures would violate fiduciary duties inherent in a lawyer's role as a professional and undermine client confidence. Business and Professions Code section 6068(e) requires that an attorney keep client confidences "inviolate" and provides no exception for imminent death, bodily harm, financial harm, or fraud.

The Commission's proposal allowing the discipline of law firms is also controversial. The proposed rule would require a law firm to "make reasonable efforts to ensure that

the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." Critics point out logistical problems with disciplining a firm, which is not licensed by the state; only individual attorneys are licensed and subject to discipline under the existing system.

The Commission also suggests changes in the conflict of interest rules to allow a law firm to "screen off" a lawyer in order to avoid conflicts of interest involving the lawyer's former clients. Other proposals would require written fee agreements between attorneys and clients and would prohibit attorneys from having sexual relationships with clients; California already has laws in these latter two areas.

Task Force on Multijurisdictional Practice

SB 1782 (Morrow) (Chapter 247, Statutes of 2000) states the legislature's intent that the California Supreme Court adopt rules allowing attorneys who are licensed in other states to be admitted to practice law in California without passing the California Bar examination, and requests the Supreme Court to establish a task force to study the issue of reciprocity for Bar admissions (see 2000 LEGISLATION). In response, the Supreme Court created an 18-member panel to study this issue, chaired by former Bar president Raymond Marshall of McCutchen Doyle Brown & Enersen. At this writing, the task force is expected to make its recommendations to the Supreme Court in fall 2001.

The ABA has formed a Commission on Multijurisdictional Practice of Law, which has also been studying the issue of multijurisdictional practice and is expected to issue its final recommendations in May 2001. At its January 2001 meeting, the Board of Governors voted to ask the ABA commission to extend its consideration of this issue to allow the State Bar and other states more time to provide input.

Bar Considers Shorter Examination

In December 2000, State Bar executives met with law school deans from around the state to discuss proposals to shorten the three-day Bar examination to two days, and to discuss the possible addition of new areas of law to the examination. The proposed changes are intended to cut costs of administering the examination and to make the test less burdensome for applicants. The Bar is considering either eliminating the California Performance Test or adopting the National Conference of Bar Examiner's Multistate Performance Test, which is 90 minutes shorter than California's performance test. The Bar suggests adding to or expanding the essay portion of the test to address business associations, civil procedure, contracts and commercial law, evidence, and family law. At this writing, no action on the proposal has been taken.

Recent Bar Exam Pass Rates

The July 1999 Bar examination had a 51.2% pass rate. First-time takers enjoyed a 68.5% pass rate; only 18.9% of repeat applicants passed. First-time applicants who attended ABA-accredited law schools had a pass rate of 68.5%; first-time applicants who attended schools accredited by the State Bar had a 33.3% pass rate.

For the February 2000 examination, the pass rate was 40%, as compared to 41.1% on the February 1999 examination. First-time takers had a 51.3% pass rate; 34.7% of repeat takers passed the examination. Graduates of ABA-accredited schools who took the test for the first time had a 50.1% pass rate; first-time takers who attended State Bar-approved schools had a 30.3% pass rate.

The overall pass rate for the July 2000 bar examination was 55.3%. First-time takers enjoyed a 64.3% pass rate; 25.3% of repeat takers were successful. First-time applicants from ABA-accredited law schools passed at a 71.7% rate; only 28.6% of those attending State Bar-accredited schools passed.

2000 LEGISLATION

SB 1367 (Schiff), as amended March 9, 2000, extends the Bar's 2000 basic membership fee of $318 to 2001. Together with other fees totaling $77, this bill authorizes the State Bar to collect $395 in total Bar dues during 2001. This provision was contingent on the passage of SB 1420 (Burton), which became law on August 24, 2000 (see below). SB 1367 was signed into law on July 7, 2000 (Chapter 118, Statutes of 2000).

SB 1420 (Burton), as amended June 27, 2000, repeals existing law authorizing the Board of Governors to screen and rate all applicants for appointment or reappointment as a State Bar Court Hearing Department judge, and instead provides that those applicants must be screened and reviewed by an applicant evaluation committee as directed by the California Supreme Court (see LITIGATION). SB 1420 also provides that the Review Department will employ a *de novo* standard of review in reviewing decisions, orders, or rulings by a hearing judge of the Hearing Department, as established by the California Supreme Court in February 2000 in Rule 951.5 of the California Rules of Court (or as otherwise specified by the Supreme Court in Rule 951.5).

Existing law authorizes the Board of Governors to appoint *pro tempore* State Bar Court Hearing Department judges when a regular judge is unavailable to serve without delaying a proceeding. SB 1420 also allows the California Supreme Court to appoint *pro tempore* State Bar Court Hearing Department judges.

Finally, SB 1420 requires the Bar to review its workload standards to measure the effectiveness and efficiency of its disciplinary activities, including but not limited to the State Bar Court and the Client Security Fund, and provide guidance to the Bar and the legislature in allocating resources. The standards must be used to reassess the numbers and classifications of staff required to conduct the activities of the State Bar's disciplinary activities. The results of the study—which must cover calendar years 1998, 1999, and 2000—

must be submitted to the legislature by June 30, 2001 (see MAJOR PROJECTS). Governor Davis signed this bill on August 24, 2000 (Chapter 246, Statutes of 2000).

SB 1782 (Morrow), as amended June 29, 2000, states the legislature's intent that the Supreme Court of California adopt rules allowing admission to practice in California to attorneys licensed in other states without passing the California Bar examination; and requests the Supreme Court to establish a task force to study the issue of reciprocity for Bar admissions. The bill specifies that the task force should consider all of the following factors: years of practice in other states; admission to practice law in another state; specialization of the attorney's practice in another state; the attorney's intended scope of practice in California; the admission requirements in the state(s) in which the attorney has been licensed to practice; reciprocity with and comity with other states; moral character requirements; disciplinary implications; and consumer protection (see MAJOR PROJECTS). SB 1782 was signed by the Governor on August 24, 2000 (Chapter 247, Statutes of 2000).

AB 2107 (Scott), as amended August 24, 2000, primarily pertains to the marketing of Medicare supplemental and long-term insurance policies to senior citizens, and clarifies the definition of "financial abuse" for the purpose of the Elder Abuse and Dependent Civil Protection Act. As it relates to the Bar, AB 2107 requires the State Bar to file an annual report to the legislature about financial services provided by lawyers to elders. The report must include the number of complaints filed and investigations initiated, the types of charges made, and the number and nature of disciplinary actions taken by the State Bar. The Governor signed AB 2107 on September 13, 2000 (Chapter 442, Statutes of 2000).

AB 2069 (Corbett), as amended August 18, 2000, requires the State Bar to conduct a study concerning the legal and professional responsibility issues that may arise as a result of the relationship between an attorney and an insurer when an attorney is retained by the insurer to represent an insured, and the attorney is subsequently retained to represent a party against another party insured by the insurer. The Bar must submit a report on the study and any recommendations to the legislature and the Supreme Court by July 1, 2001. This bill, sponsored by California Defense Counsel, is designed to address issues raised by the decision in *State Farm Mutual Automobile Insurance Co. v. Federal Insurance Co.*, 72 Cal. App. 4th 1422 (1999), *review denied* Sept. 29, 1999. In this case, the Fifth District Court of Appeal held that a law firm is disqualified from bringing an action against an insurance company while representing a policyholder of that same company in an unrelated insurance defense case. The court said that such representation is inconsistent with an attorney's duty of undivided loyalty under Rule 3-310 of the Bar's Rules of Professional Conduct. Governor Davis signed AB 2069 on September 16, 2000 (Chapter 472, Statutes of 2000).

SB 1988 (Speier), as amended August 25, 2000, deals with insurance fraud. As it relates to attorneys, SB 1988 makes engaging in insurance fraud grounds for disbarment or suspension of an attorney and requires the State Bar to investigate such fraud unless the district attorney objects to such an investigation. Governor Davis signed SB 1988 on September 28, 2000 (Chapter 867, Statutes of 2000).

AB 1042 (Cedillo). Existing law requires law students attending unaccredited law schools to pass the so-called "Baby Bar" examination after the first year, and precludes them from receiving credit for the first year or subsequent years of study until they have passed the examination. As enrolled August 30, 2000, AB 1042 would have, until January 1, 2003, required a student attending an unaccredited law school to take the "Baby Bar," after which the student would be notified, based on his/her score, of the probability of passing the general Bar examination. It further would have provided that, until January 1, 2003, passing the "Baby Bar" is not a condition for receiving credit for law study or for eligibility to take the general Bar examination. As of January 1, 2003, the bill would have repealed the "Baby Bar" requirement for students attending unaccredited law schools.

Following former Governor Wilson's lead on two similar bills during the 1990s *[15:4 CRLR 250; 14:4 CRLR 215]*, Governor Davis vetoed AB 1042 on September 25, 2000, saying, "The Baby Bar was established in 1935 by the State Bar to protect those individuals ill-suited for a legal career from expending further time, money, and effort, and to provide others with the opportunity to measure the quality of the education from unaccredited law schools. The California Supreme Court has agreed that there is a legitimate state interest in requiring this examination because the Baby Bar protects students by informing them about their ability to practice law, and the results of the examination indicate to the student the quality of the legal education the student is receiving. For these reasons, I cannot sign this bill."

AB 1858 (Romero), as amended August 18, 2000, enacts specific advertising requirements for State Bar members who practice in the areas of immigration and naturalization law. This bill requires each member of the State Bar to include in all advertisements offering to provide services relating to immigration and naturalization a statement that he/she is a member of the State Bar and is licensed to practice law in California. Law firms or corporations advertising such services are also required to include in these advertisements a statement that all legal services are provided by an active member of the State Bar or under the supervision of an active member of the State Bar. This bill further specifies that those required statements be in the same language as the advertisement. Advertisements in telephone and business di-

AB 1858 (Romero), as amended August 18, 2000, enacts specific advertising requirements for State Bar members who practice in the areas of immigration and naturalization law.

rectories that state only the name, address, and telephone number of the entity, as well as Bar members employed by public agencies or by nonprofit entities registered with the Secretary of State, are exempt from these requirements. AB 1858 makes violation of these provisions cause for discipline by the State Bar.

Existing law regulates the practice of "immigration consultants," defined as persons who provide nonlegal assistance or advice in an immigration matter. With certain exceptions, this bill requires immigration consultants who print, display, publish, distribute, or broadcast, or who cause to be printed, displayed, published, distributed, or broadcasted, any advertisement for services as an immigration consultant within the meaning of Business and Professions Code section 22441, to include in that advertisement a clear and conspicuous statement that the immigration consultant is not an attorney. The bill also increases the civil penalty for the unauthorized practice of law by immigration consultants from $10,000 to $100,000. Governor Davis signed AB 1858 on September 24, 2000 (Chapter 674, Statutes of 2000).

AB 1761 (Brewer), as amended August 18, 2000, defines the term "paralegal" and specifies the qualifications for practice as a paralegal. The bill also creates educational requirements for paralegals, and sets forth permissible paralegal activities. This legislation is intended to protect consumers from untrained and unqualified professionals who perform poor quality legal services.

New Business and Professions Code section 6450 defines "paralegal" as a person who contracts with or is employed by an attorney, law firm, corporation, governmental agency, or other entity, who performs substantial specifically delegated tasks under the direction and supervision of an active member of the State Bar or an attorney practicing law in the California federal courts. The terms "paralegal," "legal assistant," "attorney assistant," "freelance paralegal," "independent paralegal," and "contract paralegal," are synonymous with "paralegal" for purposes of the new law. The new provisions do not apply to a "legal document assistant" or "unlawful detainer assistant" as defined in Business and Professions Code section 6400. Paralegals employed by the State of California are specifically exempted from these rules.

Under AB 1761, a paralegal may not contract with or be employed by a person other than an attorney to provide paralegal services. Tasks that may be performed by a paralegal under the supervision of an attorney include case planning, development, and management; legal research; interviewing clients; fact gathering and retrieving information; drafting and analyzing legal documents; and collecting, compiling, and utilizing technical information to make an independent decision and recommendation to the supervising attorney. A paralegal may also represent a client before state or federal administrative agencies if such representation is allowed by agency statute or regulation.

A paralegal may not provide legal advice, represent a client in court, or otherwise engage in conduct that constitutes the unauthorized practice of law. For example, a paralegal may not select, explain, draft, or recommend the use of any legal document to or for any person other than the supervising attorney. The paralegal may also not act as a runner or capper to solicit clients for an attorney.

This bill requires a paralegal to have either (1) a certificate of completion or a degree from an approved paralegal program or postsecondary institution; (2) a bachelor's degree combined with one year of legal experience under the supervision of a qualified attorney; or (3) a high school diploma or GED and three years of supervised legal experience. The third option will sunset in 2003. The supervising attorney must be an active member of the State Bar for at least three years or have practiced in California federal courts for three years.

AB 1761 also requires paralegals to complete four hours of continuing education in legal ethics every four years and four hours in either general law or a specialized area of law every two years. The courses must meet the same requirements as attorney MCLE. The bill requires the supervising attorney to certify completion of the continuing education requirements and requires the paralegal to keep a record of the certification.

The bill also makes it unlawful for an individual to hold him/herself out as a paralegal on any advertisement, letterhead, business card, sign, or elsewhere unless he/she meets the educational requirements and works under the supervision of a qualified attorney. The business card of a paralegal must include the name of the law firm employing the paralegal or a statement that the paralegal is employed by or contracting with a licensed attorney. Violation of the unlawful activities rules or the advertising rules in this bill is an infraction punishable by a fine of up to $2,500 as to each consumer to whom a violation occurs. Subsequent violations are misdemeanors punishable by a fine of up to $2,500 or imprisonment of up to one year. Further, the attorney who uses the services of a paralegal is liable for any harm caused as a result of the paralegal's negligence, misconduct, or violation of the statute governing paralegals. Governor Davis signed AB 1761 on September 13, 2000 (Chapter 439, Statutes of 2000).

AB 2810 (Pacheco), as amended August 10, 2000, clarifies the bonding requirements for legal document assistants (LDAs) and unlawful detainer assistants (UDAs). The bill requires LDAs and UDAs to post a single bond of $25,000 in favor of the State of California for the benefit of any person who is harmed as a result of a violation of the UDA or LDA law. The bond will indicate the name of the county in which it is filed, but is applicable statewide. This bill clarifies existing law by requiring an LDA or UDA to register in any county in which he/she performs acts for which registration is required (deemed secondary registration). Any registration in a county other than the county of the person's place of business is required to state the person's principal place of business and provide proof that the registrant has satisfied the bonding requirement. The Governor signed AB 2810 on September 8, 2000 (Chapter 386, Statutes of 2000).

SB 1927 (Haynes), as amended August 7, 2000, would have reduced the amount of the bond required of LDAs who limit their practice solely to assisting parties in small claims court in Riverside County from $25,000 to $5,000. Governor Davis vetoed this bill on September 7, 2000. In his veto message, the Governor said: "There has been no evidence that the current registration requirement is overly burdensome or that it is limiting the availability of legal assistants. In addition, consumers who use small claims court often are the ones most in need of the protection that registration and bonding provide. There is nothing unique to Riverside County that would warrant that consumers who live there should not receive the same level of protection as consumers elsewhere in the state."

2001 LEGISLATION

SB 352 (Kuehl), as amended April 30, 2001, is a two-year Bar dues bill applicable to 2002 and 2003. SB 352 would decrease the Bar's 2001 maximum basic membership fee from $318 to $310, and require the Bar to permit members to deduct $5 per year if they do not wish to support Bar lobbying activities that exceed the *Keller* mandate (see MAJOR PROJECTS). SB 352 would also continue to authorize the Bar to charge annual fees of $40 for its Client Security Fund, $10 for its building fund, $25 for disciplinary activities, and $10 for the new attorney diversion program contained in SB 479 (Burton), to which SB 352 is joined (see below). The bill would also amend Business and Professions Code section 6068(f) to delete a provision imposing upon an attorney the duty to "abstain from having an offensive personality," as that term has been invalidated as "void for vagueness" by the U.S. Ninth Circuit Court of Appeals. *[S. Jud]*

SB 479 (Burton), as amended April 30, 2001, would require the Bar to establish and administer a diversion and rehabilitation assistance program for attorneys with substance abuse problems or mental illness (see MAJOR PROJECTS). The program, which would be overseen by a 12-member committee, would monitor chemically dependent and/or mentally ill attorneys and route them to appropriate treatment, rehabilitation, and recovery services. The bill would authorize the Bar to charge an annual fee of up to $10 to each member of the State Bar to finance the program. The proposed diversion program is modeled after the Medical Board of California's Diversion Program for physicians with substance abuse problems and/or mental illness.

A Senate committee analysis of SB 479 quotes a February 2001 Senate Office of Research report as saying that "[s]ubstance abuse and mental illnesses are factors in a significant share of the malpractice and misconduct charges filed against members of the legal profession. The ABA's Commission on Lawyer Assistance Programs recently reported that 'a majority of [lawyer] disciplinary problems involve chemical dependency or emotional stress.'" Further, an ABA commission estimated that about 15–18% of the nation's lawyers abuse alcohol or drugs, compared to only 10% of the general population; another 10% reportedly suffer from some form of psychological distress. *[S. Jud]*

SB 817 (Johnson), as introduced February 23, 2001, is a Bar-sponsored bill that would revise one pathway of the educational requirements for admission to the Bar. That pathway requires a person, in addition to meeting other requirements, to have graduated from an accredited law school requiring three years of full-time study, or four years of part-time study in order to be eligible to take the Bar exam. This bill would revise that requirement to instead require the person to earn a law degree from an accredited law school. According to the Bar, the change is intended to focus the statute on the fact that it is graduation from an accredited law school, not the number of years attended, that is the key to eligibility to take the Bar exam under this pathway.

SB 817 would also shorten by 15 days the time period in which a late application to take the Bar exam must be filed; and would also permit an out-of-state attorney to take the Attorney's Bar Exam instead of the general Bar exam when he/she has been licensed for four years in another United States jurisdiction, counting from the first day of the examination (instead of from the date of the application). This bill would except the Multistate Bar Examination portion of the Bar examination from provisions allowing a person who has failed the Bar examination to inspect his/her examination papers and the grading of the papers. *[S. Jud]*

AB 363 (Steinberg), as amended April 26, 2001, would enact the Public Agency Attorney Accountability Act. The Act would make a finding by the legislature of the competing obligations of public agency attorneys to protect the interests of the public and to protect the confidences of their client, and a declaration that a rule of professional conduct should be adopted to clarify the circumstances under which public agency attorneys may act to protect the public when doing so may disclose client confidences.

An April 30, 2001 Assembly committee report quotes the author as stating, "Public agency attorneys face sometimes competing obligations not faced in the private sector: the concomitant obligations to protect both the public interest and the confidentiality of client confidences. This issue was dramatically highlighted last year in the case of Department of Insurance attorney Cindy Ossias, who courageously came forward to the Legislature to disclose wrongdoing on the part of former Commissioner Chuck Quackenbush and other agency employees that ultimately helped lead to the resignation of Mr. Quackenbush. Ms. Ossias was offered protection from criminal prosecution for her disclosures, but she was temporarily relieved of her job at the Department and risked potentially serious discipline by the State Bar, including the loss of her livelihood. Although the State Bar ultimately exonerated Ms. Ossias, and Ms. Ossias was reinstated to her position at the Department of Insurance, her case underscores the need for the State Bar to quickly clarify in the California Rules of Professional Conduct the types of cir-

cumstances under which an attorney can seek to protect the public interest even if that mean disclosing client confidences. Once these Rules become clear on this important issue, public agency attorneys in California will no longer have to risk their Bar licenses, and even their livelihoods, to protect the public from serious government misconduct" (see agency report on DEPARTMENT OF INSURANCE for further information). *[A. Jud]*

AB 935 (Hertzberg), as amended April 16, 2001, would create the Public Interest Attorney Loan Repayment Program to provide loan repayment assistance, not to exceed $15,000 per year, for licensed attorneys who practice or agree to practice in public interest areas of the law. The program would be administered by the state Student Aid Commission (SAC). AB 935 would require that SAC create an advisory committee, to include one representative from the State Bar, one representative from the California Commission on Access to Justice, one representative with at least ten years experience managing a nonprofit legal services organization, and not more than three representatives from California law schools, to guide SAC in adopting regulations to administer the program, publicizing the program, selecting eligible participants, and other duties. The bill would create the Public Interest Attorney Loan Repayment Endowment Account, which would consist of funds appropriated by the legislature for the program, private contributions to the program, and receipts from participant repayments. The bill would require each recipient to practice for one year in a public interest area of the law for each year of loan repayment received, and would restrict grants to a maximum of five years per participant. At this writing, the bill appropriates no funds from the state into the endowment account. *[A. Appr]*

SB 1194 (Romero), as amended April 30, 2001, would permit those injured by persons practicing without a license to be awarded damages and other relief in an action brought by the Attorney General, a district attorney, or a city attorney acting as a public prosecutor. This bill would also make it unlawful for a person to disseminate a statement indicating that he/she is acting as an immigration consultant without having filed the required $50,000 bond with the Secretary of State. *[S. Jud]*

SB 1218 (Romero), as amended April 30, 2001, would repeal Business and Professions Code section 6034, which created the "California Legal Corps" (CLC) as an arm of the State Bar in 1993; section 6034 authorizes the CLC to receive unpaid residues from class action lawsuits under Code of Civil Procedure section 384 and award them to nonprofit organizations engaged in preventive law projects, alternative dispute resolution efforts, legal support for victims of disasters, and other activities designed to help improve access to justice for all Californians. *[13:4 CRLR 216–17]* Despite much publicity by the Bar, the CLC was never officially formed. This bill would abolish the CLC and its section 384 authorization to receive unpaid residuals from class action litigation, and instead provide that unpaid residuals from class action litigation will be paid either to nonprofit organizations to support projects beneficial to the class or to promote the law consistent with the objectives of the litigation, or to child advocacy programs or nonprofit legal services programs. *[S. Jud]*

AB 830 (Cohn), as amended March 27, 2001, would require the Department of Aging to establish a task force to study and make recommendations to the legislature on issues relating to legal services for seniors. *[A. Appr]*

AB 913 (Steinberg), as introduced February 23, 2001, is a "spot bill" stating legislative intent that the provision of *pro bono* legal services is the professional responsibility of California attorneys as an integral part of the privilege of practicing law in this state. The bill makes findings that in recent years, many law firms in California have been fortunate to experience a robust increase in average attorney income; however, during the same time period, there has regrettably been a decline in the average number of *pro bono* services being rendered by attorneys in this state. Without legislative action to bolster *pro bono* activities, there is a serious risk that the provision of critical *pro bono* legal services will continue to substantially decrease. *[A. Jud]*

AB 1083 (Bates), as amended April 25, 2001, would clarify provisions enacted in AB 1761 (Brewer) (see 2000 LEGISLATION). This bill would require that a person hold him/herself out as a paralegal in order to be considered a paralegal (such that the person is required to meet AB 1761's education and training requirements), and would exclude persons performing certain law-related tasks or jobs from the definition of "paralegal" if they are employed by a lawyer or law firm and work under the direction and supervision of a member of the State Bar. *[A. Jud]*

LITIGATION

During 2000–01, the California Supreme Court decided three cases challenging the constitutionality of alleged legislative incursion into the Court's sacred territory—the State Bar's attorney discipline system. Despite the Court's recent affirmation of its "inherent constitutional authority over the discipline of licensed attorneys in this state" in *In Re Attorney Discipline System*, 19 Cal. 4th 582 (1998) *[16:1 CRLR 193–94]*, the Court upheld the legislature's actions in all three cases.

In *In Re Mason Harry Rose V*, the California Supreme Court—in a 5–2 decision—upheld the constitutionality of significant legislatively-prescribed structural changes to the State Bar Court.

In the first case, ***In Re Mason Harry Rose V***, 22 Cal. 4th 430 (Mar. 6, 2000), the California Supreme Court—in a 5–2 decision—upheld the constitutionality of significant legislatively-prescribed structural changes to the State Bar Court. Attorney Mason Harry Rose V—an attorney who suffered at least three disciplinary suspensions between 1989 and 1995, and who was subsequently recom-

mended for disbarment by a State Bar Court hearing judge and the Review Department—challenged the validity of the post-1989 State Bar Court, and particularly the Supreme Court's "finality rules" which enable it to summarily deny an attorney's petition for review of a disbarment recommendation of the State Bar Court.

Prior to 1989, the State Bar's disciplinary system was operated primarily with the assistance of volunteer attorneys who acted as referees and made recommendations to the Board of Governors; the Board, in turn, made disciplinary recommendations to the California Supreme Court. The Court routinely granted petitions for review of recommendations of disbarment or suspension, and issued written opinions following briefing and oral argument. In fact, the Court—which expressed public dissatisfaction with the quality of State Bar disciplinary decisionmaking in *Maltaman v. State Bar*, 43 Cal. 3d 924 (1987)—often reviewed and modified recommendations forwarded by the State Bar without the filing of any petition for review. *[7:3 CRLR 1]*

Effective January 1, 1989, however, the provisions of SB 1498 (Presley) (Chapter 1159, Statutes of 1988) became effective. Among many other things, SB 1498 (Presley)—drafted by Professor Robert C. Fellmeth during his five-year tenure as State Bar Discipline Monitor pursuant to now-repealed Business and Professions Code section 6086.9—did away with the use of volunteers to investigate, prosecute, and hear attorney discipline cases, and replaced the volunteer system with professional investigators, professional prosecutors, and a professional State Bar Court that is not appointed or controlled by the attorney-dominated Board of Governors. Under the 1988 legislation, all State Bar Court judges were appointed directly by the California Supreme Court. The State Bar Court consists of a Hearing Department, whose full-time judges preside over individual evidentiary hearings in State Bar attorney discipline matters and render written decisions recommending whether the respondent attorney should be disciplined. Any disciplinary decision is reviewable by the State Bar Court Review Department at the request of the attorney or the State Bar. In Review Department proceedings, matters are fully briefed, the parties are given an opportunity for oral argument, and the Review Department issues a written opinion recommending discipline.

Judicial review of a State Bar Court decision is governed by Business and Professions Code section 6081 *et seq.* and by Rule 950 *et seq.* of the California Rules of Court (the so-called "finality rules"). Under these laws, any recommendation of suspension or disbarment must be transmitted, along with the accompanying record, to the California Supreme Court after the State Bar Court's decision becomes final. An aggrieved attorney may file a petition to review, reverse, or modify such a State Bar Court decision with the Supreme Court within 60 days of its issuance, and the petitioner has the burden of establishing error. When no petition is filed, the decision or order of the State Bar Court is final and enforceable. When a petition is filed, Supreme Court review of the case is discretionary. SB 1498 amended Business and Professions Code section 6087, which generally reserves to the California Supreme Court all authority to disbar or discipline attorneys in California, to provide that "[n]otwithstanding any other provision of law, the Supreme Court may by rule authorize the State Bar to take any action otherwise reserved to the Supreme Court in any matter arising under this chapter or initiated by the Supreme Court; provided, however, that any such action by the State Bar shall be reviewable by the Supreme Court pursuant to such rules as the Supreme Court may prescribe." Rule 954(a) of the California Rules of Court, approved by the Supreme Court in 1991, sets forth the circumstances under which the Supreme Court will grant review. In the event the Supreme Court denies review, Rule 954(b) provides that the denial "shall constitute a final judicial determination on the merits and the recommendation of the State Bar Court shall be filed as an order of the Supreme Court." *[11:2 CRLR 180; 11:1 CRLR 148]*

As noted above, the Review Department recommended disbarment of attorney Rose, who sought review of that recommendation in the California Supreme Court. The Supreme Court summarily denied Rose's petition for review without oral argument or a written decision explaining the reasons for its denial. Rose argued that the Court's summary denial deprived him of procedural due process and of his constitutional right to a judicial determination of whether he should be disbarred. Specifically, Rose claimed that (1) the procedural scheme violates his right to *de novo* review by an Article VI court of the State Bar Court's determination of questions of law and fact; (2) a summary denial of review violates Article VI, section 14 of the California Constitution, which provides that decisions of the Supreme Court that determine "causes" must be in writing with reasons stated; and (3) the procedure violates Article VI, section 2 of the California Constitution, which—according to Rose—confers a right to oral argument.

Rose argued that the Court's summary denial deprived him of procedural due process and of his constitutional right to a judicial determination of whether he should be disbarred.

Rose first argued that he is entitled to judicial review of the State Bar's administrative decision by a court vested with "judicial power" under Article VI, section 1 of the California Constitution. Courts authorized to exercise "judicial power" include the Supreme Court, courts of appeal, superior courts, and municipal courts; Article VI, section 1 does not include the State Bar Court. In rejecting this argument that the legislature has improperly invested the State Bar Court with "judicial power" by rendering its decisions final upon the Supreme Court's denial of a petition for review, the Court reiterated that—in Business and Professions Code section 6087—the legislature has expressly reserved to the Supreme Court (and not the State Bar Court) the "judicial power" over attor-

ney discipline. The State Bar Court is simply an administrative arm of the Supreme Court which makes recommendations to the Supreme Court; it exercises none of the "judicial power" of the Supreme Court. When the Supreme Court denies a petition for review, it is not the State Bar Court's recommendation that becomes "final"; what becomes "final" is the Supreme Court's order denying the petition for review and adopting the State Bar Court's recommendation as its own, and that decision is guided by the criteria the Supreme Court has established for itself in Rule 954(a). "[O]ur denial of a petition for review of a State Bar Court disciplinary decision is a final judicial determination on the merits for purposes of establishing federal jurisdiction and res judicata....[T]he circumstance that we may summarily deny such a petition does not preclude an attorney from having an adequate opportunity to litigate federal claims in this court....The procedural scheme for our review of State Bar Court decisions does not invest the State Bar Court with judicial power, nor does it deprive an attorney of the right to an independent determination, by an article VI court, of whether he or she should be disbarred or suspended."

The Supreme Court also rejected Rose's contention under Article VI, section 14 of the California Constitution, which provides that "[d]ecisions of the Supreme Court...that determine causes shall be in writing with reasons stated." Here, the Supreme Court found that its denial of a petition for review of the State Bar Court's recommendation of disbarment or suspension does not decide a "cause" within the meaning of this provision because, historically, the term "cause" has been limited to criminal actions and civil suits—not specialized proceedings such as attorney discipline matters. The Supreme Court similarly rejected Rose's contention that Article VI, section 2 of the California Constitution confers a right to oral argument prior to issuance of the order.

Specifically, petitioners argued that the California Supreme Court has "plenary authority" over the State Bar's attorney discipline system and alleged that the legislature's attempt to divest the Supreme Court of its power to select and appoint all State Bar Court hearing judges and to eliminate the lay judge position in the Review Department violates the separation of powers doctrine.

Based upon the foregoing rulings, the Supreme Court rejected Rose's contention that "because the attorney receives no indication that the merits have ever been considered by judicial minds," its summary denial of his petition for review fails to afford him procedural due process as guaranteed by the U.S. Constitution. In the words of the Court, "our summary denial of such a petition for review necessarily includes a judicial determination on the merits (rule 954(b)), including an independent evaluation of the facts and the law."

Justices Joyce Kennard and Janice Rogers Brown dissented. Comparing the Bar's attorney discipline system to the Administrative Procedure Act that governs discipline of other regulated professionals, Justice Kennard argued that "[a]ttorneys are the only persons whose state occupational licenses can be revoked or suspended without a judicial hearing. When the right to continue practicing a trade or profession is at stake, only attorneys are denied their day in court." Similarly, Justice Brown argued that "attorneys penalized for professional misconduct get less in the way of genuine judicial review of discipline than licensed nonattorneys do." In a footnote, the majority responded to their comments by saying that "attorneys are the only professional licensees who, as a matter of right in every case, can obtain judicial review on the merits by the highest appellate court in the state, before their license can be revoked or suspended."

In the second case, ***Obrien v. Jones***, 23 Cal. 4th 40 (June 1, 2000), a four-member majority of the California Supreme Court upheld provisions of SB 143 (Burton) (Chapter 221, Statutes of 1999) that permit elected officials to appoint some of the State Bar Court's hearing judges and eliminate a non-lawyer judge from the State Bar Court's Review Department.

SB 143 was a controversial bill that changed the composition of the State Bar Court and the way its judges are appointed (see MAJOR PROJECTS). As noted above, the 1988 statute creating the State Bar Court required each of its judges to be appointed directly by the California Supreme Court. As implemented during the 1990s, the State Bar Court consisted of a hearing panel of five judges and a three-judge Review Department consisting of the Presiding Judge of the State Bar Court, one attorney judge, and one non-attorney judge; each judge was appointed by the California Supreme Court upon the nomination of that court's Applicant Evaluation and Nomination Committee. Effective November 1, 2000, SB 143 permits the Supreme Court to appoint only two of the five hearing judges; the remaining three judges are appointed by the Governor, Senate Rules Committee, and Assembly Speaker. SB 143 also eliminates the non-lawyer judge position on the Review Department and replaces it with an attorney judge position. *[17:1 CRLR 209]*

Three sitting State Bar Court judges whose terms were set to expire on November 1, 2000—James Obrien, H. Kenneth Norian (the Review Department's non-lawyer judge), and Nancy R. Lonsdale—filed suit in January 2000, challenging SB 143 as violative of the separation of powers provision of the California Constitution. Specifically, petitioners argued that the California Supreme Court has "plenary authority" over the State Bar's attorney discipline system and alleged that the legislature's attempt to divest the Supreme Court of its power to select and appoint all State Bar Court hearing judges and to eliminate the lay judge position in the Review Department violates the separation of powers doctrine. In support of petitioners, former State Bar Discipline Monitor Robert C. Fellmeth filed an *amicus curiae* brief arguing that the appointment and (more importantly) reappointment of State Bar Court judges by elected officials would impermissibly politicize what should be a purely judicial process and

cause judges seeking reappointment to conform their decisions to the will of their appointing authorities.

Rejecting the arguments of petitioners and Professor Fellmeth, the four-member majority held that the disputed provision of SB 143, as codified at Business and Professions Code section 6079.1(a), does not violate the separation of powers provision of the state Constitution. Although repeatedly affirming the Supreme Court's "expressly reserved, primary, inherent authority over [attorney] admission and discipline," the majority noted that "the separation of powers principle does not command 'a hermetic sealing off of the three branches of Government from one another,'" and acknowledged that "in the field of attorney-client conduct, we recognize that the judiciary and the Legislature are in some sense partners in regulation." Citing to several instances of the Supreme Court's refusal to implement express legislative command in the area of attorney discipline, the majority reiterated that "this court retains ultimate control over all the admission and disciplinary functions of the State Bar Court," but found that allowing executive and legislative branch officials to appoint some of the Hearing Department judges does not materially impair that inherent and ultimate power because (1) the requirements for legislative and executive branch appointment of Hearing Department judges are almost identical to the requirements specified in Supreme Court rules, and (2) the legislative and executive branches are permitted to appoint only Hearing Department judges, while the Supreme Court retains ultimate authority to appoint the Review Department judges who independently review appeals from hearing judge decisions.

Further, the majority rejected one provision of SB 143 that purports to authorize the Board of Governors to screen and rate all applicants for hearing judge positions, and instead reaffirmed its existing requirement that all applicants for State Bar Court judge positions be screened and evaluated by its own Applicant Evaluation and Nomination Committee; thus, legislative and executive branch appointing authorities are limited to appointing applicants found qualified by the Supreme Court's screening body. The majority stated: "In light of the requirement that an applicant must be found qualified by the Applicant Evaluation and Nomination Committee or by this court before he or she may be appointed as a State Bar Court hearing judge, and the broad authority of the Review Department (all of whose members we appoint) to evaluate and to accept or reject independently the findings and recommendations of hearing judges, to order additional evidentiary proceedings, and to render the State Bar Court's ultimate findings and recommendations, we presently discern no reason why we may not continue to repose confidence in and to rely upon a State Bar Court in which some hearing judges are appointed by the executive and legislative branches pursuant to section 6079.1."

In conjunction with its ruling, the majority amended section 961 of the California Rules of Court, effective July 1, 2000, to provide for staggered terms of the hearing judges to be appointed effective November 1, 2000; and abrogated one provision of SB 143 by announcing that it would continue to use its own appointed Applicant Evaluation and Nomination Committee to screen and evaluate all applicants for the State Bar Court.

Writing for two dissenters, Justice Joyce Kennard traced the origins of the separation of powers doctrine and noted that the framers of the U.S. Constitution deliberately refused to permit Congress to appoint any officers of the judicial or executive branches.

Writing for two dissenters, Justice Joyce Kennard traced the origins of the separation of powers doctrine and noted that the framers of the U.S. Constitution deliberately refused to permit Congress to appoint any officers of the judicial or executive branches. According to Justice Kennard, "[i]t is worth noting that, consistent with the federal Constitution's limitations on Congress's role in the appointment and removal of executive and judicial branch officers, the California Constitution gives the Legislature no role at all in the appointment of judges." Justice Kennard wrote that "interbranch appointments...raise serious separation of powers concerns,...must be carefully scrutinized and should be permitted only if there exists either a special justification for the interbranch appointing mechanism or particular safeguards to protect the appointee from extrabranch influence after appointment. Because here the proponents of the challenged law have shown neither a special justification nor particular safeguards, the challenged law is invalid."

Leading off with the statement "[t]he wanton pursuit of power is not a new problem," Justice Janice Rogers Brown wrote her own dissent. Justice Brown quoted the U.S. Supreme Court for the proposition that "[a] Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of Government." Justice Brown noted that Professor Fellmeth, in a 1988 progress report to the legislature on the State Bar Discipline Monitor project, characterized legislative and executive branch involvement in the State Bar's attorney disciplinary function in California as "perhaps...unprecedented," in light of the fact that "in 33 states, the state supreme court appoints not only the adjudicators, but also the commission overseeing the entire disciplinary system operation, including investigations and trial counsel....Perhaps, more importantly, this is a judicial position and one unique to the very special jurisdiction of the Supreme Court." Justice Brown concluded that "[t]he legislation examined here shows disrespect for this court as a co-

Justice Brown concluded that "the legislation examined here shows disrespect for this court as a coordinate branch of government. The majority's abject acceptance of such legislative impudence goes far beyond comity and cooperation. This is abdication."

ordinate branch of government. The majority's abject acceptance of such legislative impudence goes far beyond comity and cooperation. This is abdication."

And finally, on March 1, 2001 in ***In re Paguirigan***, 25 Cal. 4th 1 (2001), the California Supreme Court unanimously upheld a Review Department decision recommending summary disbarment of Cristeta Paguirigan under Business and Professions Code section 6102(c). That statute requires the summary disbarment of an attorney convicted of a felony that involves moral turpitude or where an element of the offense is the specific intent to deceive, defraud, steal, or make or suborn a false statement. Paguirigan pled no contest to one count of forgery after forging the signature of a witness in a civil action. Her conviction falls squarely with the summary disbarment statute; and the Review Department recommended summary disbarment. Paguirigan petitioned the California Supreme Court for review, arguing that—as interpreted by the Bar—section 6102(c) usurps the plenary authority of the California Supreme Court over attorney discipline because it does not permit a respondent to present or the court to consider evidence of mitigating factors. *[17:1 CRLR 214]*

After a flurry of litigation activity during 1999–2001, the decade-long *Brosterhous* saga is finally reaching an end.

Following its decision in *Obrien* (see above), the Supreme Court reaffirmed its "primary authority over the discipline of attorneys" and found that "the legislature's enactment of a statute relating to attorney discipline does not in and of itself infringe on this court's inherent authority in this area." The Court noted that the legislature has provided for summary disbarment in statutes dating back to 1872, found that the summary disbarment statute does not conflict with judicially adopted rules, and stated that "[t]raditionally, we have respected the Legislature's reasonable regulation of the practice of law by providing, among other things, for summary disbarment under certain circumstances." Citing caselaw from 1922, the Supreme Court also rejected Paguirigan's argument that the summary disbarment statute is "fundamentally unfair" because it does not give the attorney an opportunity to be heard; the court held that Paguirigan was afforded full due process in the criminal proceeding and found that she must be deemed to have known that one result of her conviction of that particular crime would be disbarment.

In a similar case, ***In re Lesansky***, 25 Cal. 4th 11 (2001), the California Supreme Court rejected a different challenge to Business and Professions Code section 6102, the summary disbarment statute. Attorney Stuart K. Lesansky pled no contest to one count of an attempted lewd act on a child. After receiving briefs from both sides but without holding oral argument, the Review Department determined that Lesansky's conviction necessarily involves moral turpitude and thus falls within the summary disbarment statute. Lesansky petitioned for review, arguing that the summary disbarment statute should apply only if the underlying offense demonstrates unfitness to practice law and that his conviction concerned "a wholly private act unrelated to the practice of law." In rejecting this argument, Justice Kennard wrote for a unanimous court: "Petitioner's attempt to commit a lewd or lascivious act on a child who was 14 or 15 years old and at least 10 years younger than himself was such a serious breach of the duties of respect and care that all adults owe to all children, and it showed such a flagrant disrespect for the law and for societal norms, that continuation of petitioner's State Bar membership would be likely to undermine public confidence in and respect for the legal profession. Therefore, we agree with the State Bar Court that petitioner was convicted of a felony involving moral turpitude, and we accept the State Bar Court's recommendation that he be summarily disbarred under Business and Professions Code section 6102, subdivision (c)."

After a flurry of litigation activity during 1999–2001, the decade-long *Brosterhous* saga is finally reaching an end. In August 1999 in ***Brosterhous v. State Bar of California***, No. 95AS03901, Sacramento County Superior Court Judge Morrison C. England Jr. ruled that the Bar illegally spent its members' mandatory licensing fees on improper political and ideological activities in 1989. *Brosterhous* arose from the U.S. Supreme Court's unanimous decision in *Keller v. State Bar*, 496 U.S. 1 (1990), in which the Court struck down as violative of the first amendment 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." In response to *Keller*, the Bar adopted procedures under which it analyzes and categorizes its expenses as "chargeable" or "nonchargeable," and offers all Bar members an opportunity to decline to pay for the nonchargeable portion (the so-called "*Hudson* deduction"). In 1992, the *Brosterhous* plaintiffs challenged the Bar's 1991 calculation of its chargeable vs. nonchargeable expenses during 1989; whereas the Bar calculated its nonchargeable expenses at $3 per lawyer, plaintiffs alleged that the Bar's calculations failed to include numerous nonchargeable activities and argued that their *Hudson* deduction for that year should have been $87 per lawyer. In his "phase one" ruling on liability only, Judge England ruled that numerous Bar activities classified as "chargeable" to all Bar members should have been classified as "nonchargeable," and announced his intent to proceed to "phase two" regarding damages. *[17:1 CRLR 211–12]*

On December 24, 1999, the Bar filed an unusual mid-trial petition for writ of mandate in the Third District Court of Appeal, asking the appellate court to reverse Judge England's phase one decision. On January 14, 2000, the Third District denied the State Bar's petition, No. C034486, saying that the Bar would have an adequate remedy at law by appeal from the final judgment. The case then returned to Judge England, who—pursuant to the parties' stipulation—ruled in July 2000 that the 43 State Bar members who challenged the Bar's calculations are due an additional $10

each, plus interest. Significantly, Judge England also ruled that plaintiffs are entitled to costs and attorneys' fees. Although the Bar initially appealed this ruling, the Board of Governors voted to withdraw its notice of appeal during a closed session at its January 6, 2001 meeting. According to State Bar President Palmer Brown Madden, "The ultimate verdict in this case was of such a limited scope that the Board has decided an appeal is unnecessary. This case was about the way the Bar was ten years ago. We're a different Bar today."

On March 4, 2001, plaintiffs filed their motion for attorneys' fees, seeking a total award of $2.36 million based on the complexity and importance of the case and what they claim was the Bar's bad faith and delay in defending it. At this writing, Judge England is scheduled to hold a hearing on plaintiffs' motion on May 11, 2001.

On February 11, 2000, the U.S. Supreme Court declined to review the U.S. Ninth Circuit Court of Appeals' September 1999 dismissal of ***Morrow, et al. v. State Bar of California***, 188 F.3d 1174, another challenge to the Bar's political activities. In *Morrow*, the Ninth Circuit held that it is constitutional to compel attorneys to pay dues to a unified bar that engages in political activities so long as dissenting members are not compelled to fund those activities with mandatory dues and mandatory bar membership does not impede dissenting members from expressing their own views and/or disagreeing with the view of the bar. *[17:1 CRLR 212]*

Conservative legal groups continue their attacks on Interest on Lawyers' Trust Accounts (IOLTA) programs, which have been created in almost every state (including California) to fund legal services for the indigent. Under California's IOLTA law (Business and Professions Code section 6210 *et seq.*), lawyers are required to deposit client retainers into special interest-bearing checking accounts; banks then transfer interest earned on these accounts to the State Bar's Legal Services Trust Fund, which in turn awards it to qualified legal services organizations to provide legal services to indigent people. In ***Phillips v. Washington Legal Foundation***, 524 U.S. 156 (1998), the U.S. Supreme Court analyzed the Washington Legal Foundation's (WLF) challenge to a similar IOLTA program created by the Texas State Bar, and concluded that the interest earned on client funds held in IOLTA accounts is the "private property" of the client for purposes of the takings clause of the fifth amendment of the U.S. Constitution. The Court remanded the case to the district court for consideration whether the IOLTA funds had been "taken" by the state, as well as the amount of "just compensation," if any, which is due to the challengers. *[16:1 CRLR 198]* Following a two-day bench trial in September 1999, U.S. District Court Judge James R. Nowlin held in ***Washington Legal Foundation v. Texas Equal Access to Justice Foundation***, 86 F. Supp. 2d 624 (Jan. 28, 2000), that the Texas IOLTA program does not qualify as "confiscatory regulation" of client property because there is neither a compensable loss nor a taking. According to Judge Nowlin, absent the IOLTA program and its creation of a "unique class of revenue," there would be no interest to confiscate, such that the client whose funds are being held in the checking account cannot show an identifiable compensable loss. At this writing, WLF's appeal of Judge Nowlin's decision is pending before the U.S. Fifth Circuit Court of Appeals.

In the meantime, WLF challenged the state of Washington's similar IOLTA program which was created by the Washington Supreme Court in 1984; under that state's law, the interest is transferred to the Legal Foundation of Washington, a charitable organization established by the Washington Supreme Court. Again alleging that IOLTA works an unconstitutional taking of client funds, WLF lost in the district court and appealed to the U.S. Ninth Circuit Court of Appeals. Relying on the U.S. Supreme Court's 1998 decision in *Phillips v. WLF* (see above), the Ninth Circuit held in ***Washington Legal Foundation v. Legal Foundation of Washington***, 236 F.3d 1097 (Jan. 10, 2001), that the interest generated by IOLTA accounts is the property of the clients and customers whose money is deposited into the accounts, such that the fifth amendment's takings clause applies. The Ninth Circuit concluded: "IOLTA programs spread rapidly because they were an exceedingly intelligent idea. Money that lawyers deposited in bank trust accounts always produced earnings, but before IOLTA, the clients who owned the money did not receive any of the earnings that their money produced. IOLTA extracted the earnings from the banks and gave it to charities, largely to fund legal services for the poor. That is a very worthy purpose. But as *Phillips* reminds us, the interest belongs to the clients. It does not belong to the banks, or the lawyers, or the escrow companies, or the state of Washington. If the clients' money is to be taken by the State of Washington for the worthy public purpose of funding legal services for indigents or anything else, then the state of Washington has to pay just compensation for the taking. That serves the purpose of imposing the costs on society as a whole for worthwhile social programs, rather than on the individuals who have the misfortune to be standing where the cost first falls." The Ninth Circuit remanded the case for determination of the amount of compensation required (if any). At this writing, the Legal Foundation of Washington's petition for rehearing *en banc* is pending before the Ninth Circuit.

In *Legal Services Corp. v. Velazquez*, the U.S. Supreme Court invalidated federal restrictions on arguments that attorneys who are funded through the Legal Services Corporation are allowed to make on behalf of clients in pursuing welfare claims.

In ***Legal Services Corp. v. Velazquez***, 531 U.S. 533 (Feb. 28, 2001), the U.S. Supreme Court invalidated federal restrictions on arguments that attorneys who are funded through the Legal Services Corporation (LSC) are allowed to make on behalf of clients in pursuing welfare claims. Since 1996, Con-

gress has prohibited LSC from funding any organization that represents clients in an attempt to amend or challenge existing welfare laws. These funding restrictions apply even if the constitutional or statutory challenges become apparent only after the legal representation is under way. In a 5–4 decision, the majority found that this funding restriction constitutes impermissible viewpoint discrimination that interferes with the proper functioning of attorneys and the court system. In its decision, the majority distinguished *Rust v. Sullivan*, 500 U.S. 173 (1991), which upheld a federal policy prohibiting family planning agencies which receive federal funds from providing abortion counseling. According to the majority, *Rust* involved government speech because the physicians in *Rust* spoke on behalf of the government. Here, the attorneys are clearly not speaking for the government but on behalf of their client—often against the government, and the funding restrictions prevent legal services attorneys from carrying out the traditional role and responsibilities of attorneys to "present all the reasonable and well-grounded arguments necessary for proper resolution of the case" and therefore distort the functioning of the judicial system. The majority held that the statute is "an attempt to draw lines around the LSC program to exclude from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider."

Writing for the dissent, Justice Scalia found the case to be indistinguishable from *Rust*, stating: "Today's decision is quite simply inexplicable on the basis of our prior law. The only difference between *Rust* and the present case is that the former involved 'distortion' of (that is to say, refusal to subsidize) the normal work of doctors, and the latter involves 'distortion' of (that is to say, refusal to subsidize) the normal work of lawyers. The Court's decision displays not only an improper special solicitude for our own profession; it also displays, I think, the very fondness for 'reform through the courts'—the making of innumerable social judgments through judge-pronounced constitutional imperatives—that prompted Congress to restrict publicly funded litigation of this sort."

On March 20, 2000, the U.S. Supreme Court declined to review the California Supreme Court's decision in ***Warden v. State Bar of California***, 21 Cal. 4th 628 (1999), in which the California court upheld the constitutionality of the State Bar's Minimum Continuing Legal Education (MCLE) program. In *Warden*, plaintiff unsuccessfully argued that the State Bar's MCLE program violates his right to equal protection by exempting certain Bar members from its requirements; subsequent to the California court's decision, the legislature enacted and the Governor signed SB 144 (Schiff and Hertzberg) (Chapter 342, Statutes of 1999), which repeals one of those exemptions from the MCLE requirement and makes legislative findings supporting the remaining exemptions. *[17:1 CRLR 209, 212–13]*

On January 26, 2000 in ***Greenberg v. State Bar***, 78 Cal. App. 4th 39 (2000), *rehearing denied* Feb. 10, 2000, *review denied* Apr. 26, 2000, the First District Court of Appeal held that the Bar's requirement of MCLE courses relating to substance abuse, emotional distress, and elimination of bias does not violate the first amendment. In *Greenberg*, California attorneys required to comply with the State Bar's MCLE requirements challenged the constitutionality of the MCLE program based on equal protection grounds, as in *Warden*, and on first amendment grounds. The trial court granted summary judgment to the State Bar.

The First District affirmed the trial court's ruling as to the equal protection claim, saying that it is bound by the recent majority opinion of the California Supreme Court in *Warden* to affirm the judgment in favor of the State Bar with respect to this issue. The First District then considered plaintiffs' first amendment claim. The attorneys argued that the MCLE program violates their first amendment right "to be free of compulsory governmental propaganda in favor of an ideological purpose with which appellants do not agree, and which is not 'germane' or rationally related to the legitimate goals of legal education for practitioners." The court first noted that *Warden* had apparently decided that the MCLE program requirements are rationally related to the "consumer protection" goals of the legislation and needs of the legal profession. In response to appellants' specific objections to MCLE requirements mandating a certain number of classes relating to the prevention of substance abuse and emotional distress and the elimination of bias, the First District concluded that, in light of *Warden*, these subjects are rationally related to the consumer protection goals of the MCLE program.

In ***Mack v. State Bar of California***, attorney Michael Mack of Corona del Mar is challenging the Bar's public disclosure of discipline to which he stipulated. In 1994, the Bar filed formal disciplinary charges against Mack; under Business and Professions Code section 6086.1(a), that filing converts a previously confidential State Bar investigation into a matter of public record. In 1995, Mack stipulated to the issuance of a "private reproval" as the discipline for his misconduct. The stipulation provided: "The parties understand that although this reproval is termed 'private,' it arises in a public proceeding. Although the State Bar of California will not affirmatively provide any publicity to the disposition, the file, including the stipulation, [and] any order approving it, in this case will remain public and will be available on any specific inquiry by a member of the public." In 1999, Mack discovered that the Bar was disclosing the fact that Mack has a "public record of discipline" on its Internet Web site. The Web site did not disclose the nature of the discipline, but rather invited interested parties to contact the Bar, in writing or by telephone, and pay a charge in order to obtain more information concerning Mack's disciplinary record. In December 1999, Mack brought suit against the Bar, alleging that it had violated the terms of his stipulation by posting notice of his disciplinary record on its Web site. The Bar opposed Mack's suit, contending that it did not "affirmatively provide any publicity to the disposition," and that its Web site is merely a far more efficient means of providing public access to its public records of attorney discipline. In a May 2000 decision, No. BC221528, Los Angeles County Su-

perior Court Judge Madeleine Flier agreed with the Bar and dismissed Mack's case, emphasizing that the information available via the Internet is public information and is no different from the information that would be available through a phone call or office visit to the State Bar (see MAJOR PROJECTS). At this writing, Mack's appeal of Judge Flier's decision is pending in the Second District Court of Appeal.

On August 14, 2000 in ***In re Eben Gossage***, 23 Cal. 4th 1080 (2000), the California Supreme Court rejected a State Bar Court recommendation that Eben Gossage be admitted to the practice of law. At the age of 20, Gossage was convicted of voluntary manslaughter for the 1975 killing of his sister. Gossage also suffered numerous other criminal convictions, including multiple felony convictions for forgery, a crime of moral turpitude. After graduating from law school in 1991 and passing the Bar exam in 1993, Gossage applied for a moral character determination with the Committee of Bar Examiners in 1994. Finding that he had since been rehabilitated, the State Bar Court recommended that he be admitted to the State Bar. The Supreme Court rejected that recommendation, finding that Gossage failed to sustain his burden of proving rehabilitation. The court noted Gossage's apparent recovery from substance abuse, his academic achievements, and his community involvement since his last discharge from parole in 1984. However, the court also found that Gossage continued a pattern of misdemeanor convictions involving, for the most part, willful failures to appear in court for traffic violations and to obey court orders from the time he was paroled until he applied for admission to the Bar. Moreover, the court noted that Gossage was untruthful on his moral character application and failed to disclose the full extent of his criminal history. "In order to safeguard the public and protect the integrity of the profession," the Supreme Court concluded, "we cannot conclude Gossage has established his present good moral character. We therefore reject the State Bar Court's recommendation and decline to admit Gossage to the practice of law."

Unlike numerous other states, the California Bar does not offer reciprocity licensure to attorneys licensed in other states. An out-of-state attorney who is licensed in another state and who wishes to temporarily practice law in California must apply for *pro hac vice* admission under California Rule of Court 983, associate with a California State Bar member, and pay a $50 fee to the State Bar. However, this limited admission is not available to attorneys who live in California or do substantial business in the state—those attorneys must take and pass the Attorney's Bar examination (a somewhat shortened version of the California Bar exam). In ***Paciulan v. George***, 229 F.3d 1226 (Oct. 17, 2000), *cert. denied* Jan. 8, 2001, the U.S. Ninth Circuit Court of Appeals rejected a challenge that this rule unconstitutionally discriminates against Californians. The court first noted that appellants were represented by Joseph Giannini, who has challenged admissions requirements to the State Bar in at least six other cases since 1987 on a variety of grounds. *[10:4 CRLR 187–88; 8:3 CRLR 131]* Here, the Court ruled that residents of this state who are licensed elsewhere are not deprived of their privileges and immunities under Article IV, or their first amendment rights to speak for or associate with their clients or to petition the government. According to the court, if these arguments were accepted, "[a] California resident wishing to practice in California but wanting to avoid the difficult California bar examination could become a member of the bar of the state with the least restrictive admissions requirement, then demand admission to the California bar as a matter of right. The Constitution does not compel such a result. States have traditionally enjoyed the exclusive power to license and regulate members of their respective bars."

The Ninth Circuit also noted that "[w]hile the California Legislature may choose to alter the requirements for *pro hac vice* admission to practice in California courts, it is not within the province of the federal courts to do so." The California legislature has taken a first step toward reciprocity licensure with its 2000 passage of SB 1782 (Morrow), which asks the California Supreme Court to convene a task force to study the issue and adopt rules allowing California admission of other-state attorneys without passing the California Bar exam (see 2000 LEGISLATION).

RECENT MEETINGS

On March 31, 2000, the Committee on Communications and Member Relations discussed the impact of fee scaling now allowed for State Bar members who earn less than $40,000 per year and/or less than $25,000 per year from the practice of law (see MAJOR PROJECTS). According to staff, 11,000 attorneys qualified for scaling, and 9,000 of those members were eligible for scaling as earning less than $25,000 in 1999. The numbers are expected to increase as several members complained that they did not realize that there is an option to scale and are requesting to do so after having already paid their 2000 dues.

In November 2000, the Board approved Rule XVII of its Rules Regulating Admission to Practice Law in California, regarding testing accommodations for applicants with disabilities. The proposed rule was circulated for public comment in December 1999; no comments were received. The new rule sets forth general policies and defines "disability," "physical impairment," "mental impairment," "qualified applicant with a disability," and "reasonable accommodation" for purposes of applying for the First Year Law Students' Examination or the California Bar Examination. The rule sets forth procedures for submitting a petition for testing accommodations and provides for review of staff's decision if a request for accommodation is modified or denied.

At its April 2001 meeting, the Board of Governors rejected a Conference of Delegates recommendation calling for legislation to establish a five-year statute of limitations on the commencement of attorney discipline matters, except when the discipline is based upon a criminal conviction involving the practice of law or when the respondent waives

the statute of limitations. The recommendation was opposed by both the Committee on Regulation and Discipline and the Committee on Legislation and Court Relations. OCTC also opposed the legislation, saying that it does not properly balance public policy favoring the resolution of disputes and the extinction of stale claims and because existing Rule 51 of the Rules of Procedure provides a rule of limitations and appropriate tolling provisions.

FUTURE MEETINGS

2001: June 8–9 in San Francisco; July 27–28 in Los Angeles; September 6–9 (annual meeting) in Anaheim; October 19 (new member orientation) in Santa Barbara; December 7–8 in Los Angeles.

2002: January 25–26 in Los Angeles; March 15–17 in Sonoma; May 3–4 in Los Angeles; June 21–22 in San Francisco; August 23–24 in Los Angeles; October 10 (new member orientation) in Monterey; October 10–13 (annual meeting) in Monterey; December 6–7 in San Francisco.

2003: January 24–26 in Oxnard; March 21–22 in Long Beach; May 16–17 in San Francisco; July 25–26 in Los Angeles; September 3–4 (new member orientation) in Anaheim; September 5–8 (annual meeting) in Anaheim; October 17–18 in Los Angeles; December 5–6 in San Francisco.