AMG obtained an improved, but still insufficient, flooring commitment, Mitsubishi rescinded the termination notice and entered into a six-month conditional interim sales and service agreement on April 16, 1990; this agreement gave AMG six months in which to comply with the flooring requirement. When the six months had passed and AMG still had not acquired a sufficient flooring commitment, Mitsubishi decided to terminate AMG's franchise agreement. Mitsubishi sent AMG a notice of termination, by registered mail, to be effective January 21, 1991; AMG received the termination notice on October 22, 1990.

Vehicle Code section 3060(a) specifies the required form and content of a termination notice and the procedure by which it must be given. Section 3060(b) authorizes the franchisee to protest a termination notice, requiring the franchisee to file a protest with the Board within 30 days after receiving a 60-day notice, or within 10 days after receiving a 15-day notice. After a protest has been filed, NMVB must advise the franchisor that a timely protest has been filed, and the franchisor may not terminate or refuse to continue until NMVB makes its findings.

On January 18, 1991, Mitsubishi notified AMG that it was granting a 10-day extension of the termination in order to see if AMG could work out a deal with a potential buyer; by letter of January 29, AMG notified Mitsubishi that the buyer had backed out of the buy/sell agreement. Mitsubishi terminated AMG's franchise on January 31, 1991.

On March 6, 1991, NMVB received a protest of the termination from AMG; the Board refused to file the protest because it was untimely. AMG admitted that the protest was not timely, but claimed that Mitsubishi's conduct caused its delay in submitting the protest; for this reason, AMG claimed that the protest filing deadline was tolled. Mitsubishi moved to dismiss the protest on the basis that NMVB had no jurisdiction to consider the untimely filing. Following a hearing, an administrative law judge (ALJ) issued an order rejecting the protest on the grounds that it was untimely and that there were insufficient grounds to establish estoppel. AMG then petitioned for a writ of administrative mandamus; the trial court denied AMG's petition and affirmed the decision of the ALJ.

On appeal, AMG first argued that the motion to dismiss procedure utilized before NMVB was improper, and that Vehicle Code section 3060(a)(3)(b) required NMVB to file the protest and conduct a hearing; further, AMG argued that there is no provision in the Administrative Procedure Act for a motion to dismiss, and that it was improper for the ALJ to preside over the hearing. The Sixth District Court of Appeal rejected these arguments, noting that the Board's decision to permit the ALJ to hear the issue as a "motion to dismiss" was fair, a hearing on the timeliness issue was held, AMG was permitted to introduce evidence, and "AMG was afforded an opportunity to be heard consistent with the requirements of due process." Further, the court found that a motion to dismiss was employed in a previous matter before NMVB; although NMVB denied the motion, the court stated that "its propriety was never questioned by the appellate court or the parties." Also, the Sixth District found that it was permissible for the ALJ to hear the issue, since the Board's statutory scheme as a whole indicates that either an ALJ or the Board may preside over a hearing on a matter falling within NMVB's jurisdiction.

AMG also contended that even if the motion to dismiss procedure was permissible, the Board should have reviewed the ALJ's decision. The Sixth District agreed with this argument, finding that although the statutes do not delineate whether an ALJ may determine the issue alone or whether the ALJ's determination must be reviewed by the Board, "the statutory scheme does indicate that the Board should render the ultimate decision with respect to hearings under section 3066"; according to the court, "the same amount of review is warranted in determining whether a protest is timely."

In response to this argument, Mitsubishi contended that AMG never requested that the Board hear the matter, and that AMG failed to exhaust its administrative remedies. However, the Sixth District noted that there are exceptions to the exhaustion doctrine, such as where the administrative remedy is inadequate, unavailable, or where it would be futile to pursue such a remedy. Given the ALJ's statements that "the protest is not accepted for filing with the New Motor Vehicle Board" and "[t]here shall be no further proceedings in this cause before the Board," the court found that it would have been futile for AMG to have pursued the matter before the Board. Accordingly, the Sixth District remanded the matter to NMVB so that it may properly rule on the matter.

RECENT MEETINGS

At its December 7 meeting, NMVB discussed an ALJ's proposed decision in a matter between Jim Lynch Cadillac and General Motors Corporation's Cadillac Motor Car Division. Because NMVB refuses to release the ALJ decision to the public, the facts are not clear. However, this dispute apparently arises out of a July 1992 NMVB decision in a matter between the same parties; at that time, the Board adopted an ALJ decision permitting GMC to terminate the franchise of Jim Lynch Cadillac. *[12:4 CRLR 223]* Jim Lynch Cadillac now wishes to litigate an issue related to the 1992 matter, but GMC contends that, under the doctrine of res judicata, the issue may not be relitigated because Lynch had the opportunity to have it heard in the original proceeding. Following discussion, the Board asked each party's attorney to file a two-page brief stating their arguments as to why the issue should or should not be excluded under the doctrine of issue preclusion.

FUTURE MEETINGS

To be announced.

OSTEOPATHIC MEDICAL BOARD OF CALIFORNIA

Executive Director:
Linda Bergmann
(916) 322-4306

In 1922, California voters approved a constitutional initiative which created the Board of Osteopathic Examiners; 1991 legislation changed the Board's name to the Osteopathic Medical Board of California (OMBC). Today, pursuant to Business and Professions Code section 3600 *et seq.*, OMBC regulates entry into the osteopathic profession, examines and approves schools and colleges of osteopathic medicine, and enforces professional standards. The Board is empowered to adopt regulations to implement its enabling legislation; OMBC's regulations are codified in Division 16, Title 16 of the California Code of Regulations (CCR). The 1922 initiative, which provided for a five-member Board consisting of practicing doctors of osteopathy (DOs), was amended in 1982 to include two public members. The Board now consists of seven members, appointed by the Governor, serving staggered three-year terms.

At its October meeting, OMBC welcomed new member Laurie Woll, DO, to the Board; Woll was appointed to OMBC in June by Governor Wilson.

MAJOR PROJECTS

OMBC Budget Update. Like many other regulatory agencies, OMBC has

faced tight budgetary constraints over recent years; according to Board officials, the current fiscal crisis may have a detrimental effect on OMBC's enforcement and disciplinary capabilities. *[13:2&3 CRLR 208]* At its October 30 meeting, OMBC estimated that its 1993–94 enforcement budget will be depleted in January, five months prior to the end of the fiscal year. In addition to seeking a fee increase (*see below*), OMBC is considering the feasibility of recouping some of the administrative costs associated with its enforcement activities through a "cost recovery" mechanism; at its October 30 meeting, the Board instructed staff to determine whether cost recovery revenue would be devoted to OMBC's operating budget or deposited in the state's general fund.

OMBC Reviews Its Public Disclosure Policy. Like the Medical Board of California and the Board of Dental Examiners, OMBC recently began considering what information regarding a licensee's history can and should be disclosed to the public, and at what point such disclosures should be made. At its October 30 meeting, the Board acknowledged that numerous consumer groups are concerned that health care regulatory boards are not providing consumers with accurate and timely information with which they can make informed decisions about health care providers.

Currently, OMBC discloses information on licensee malpractice judgments over $30,000, disciplinary action taken in another state, and felony convictions. At its October meeting, OMBC considered the possibility of also disclosing fully investigated disciplinary cases which have been referred to the Attorney General's Office for the filing of an accusation, and a DO's loss of hospital privileges.

OMBC members voiced several concerns about implementing this enhanced scope of disclosure. For example, the Board stated it may subject itself to litigation based on misrepresentation, since it does not always receive information that is correct and complete. The Board agreed that a disclaimer would solve this potential problem. In addition, members were concerned about the added time burdens which would be placed on staff members and the possibility of having to hire additional personnel to answer consumer inquiries about DOs. Under one proposal discussed by the Board, OMBC would initially disclose only a minimum amount of information, and give the consumer the option of writing a letter to OMBC requesting more specific information; the agency would then comply with the request, to the best of its ability, and include a bill for the time and resources expended by Board staff in gathering the information. As a result, members of the public would have to pay OMBC in order to receive a complete response to their inquiries.

Following discussion, the Board directed staff to further analyze the cost aspects of an enhanced disclosure policy, and report its findings at a future OMBC meeting.

Rulemaking Update. At this writing, OMBC's proposed amendments to section 1600, 1602, 1668, 1620, 1621, 1656, 1690, and Article 18, Title 16 of the CCR, still await review and approval by the Office of Administrative Law. *[13:4 CRLR 202]* Among other things, the proposal would make the following changes:

–change references to the Board of Osteopathic Examiners to the Osteopathic Medical Board of California, in accordance with the Board's recent name change mandated by various sections of the Business and Professions Code;

–delete a reference to a 75% pass rate for the Board's written examination;

–provide that a petition for reinstatement shall not be heard by the Board unless the time elapsed from the effective date of the original disciplinary decision or from the date of the denial meets the requirements of Business and Professions Code section 2307; and

–increase the Board's examination fee from $125 to $350, its duplicate certificate fee from $10 to $25, its annual tax and registration fee from $175 to $200, and its delinquent annual tax and registration fee from $87.50 to $100.

LEGISLATION

AB 2156 (Polanco). Under existing law, insurers that provide professional liability insurance, or the parties to certain settlements where there is no professional liability insurance as to the claim, are required to report a settlement or award in a malpractice claim that is over specified dollar amounts to the applicable licensing board. As amended May 25, this bill would require reports filed with OMBC by professional liability insurers to state whether the settlement or arbitration award has been reported to the federal National Practitioner Data Bank. *[S. Inactive File]*

RECENT MEETINGS

At its October 30 meeting, OMBC discussed the infection control guidelines recently issued by the California Department of Health Services (DHS). Under state law, OMBC is required to adopt these guidelines as Board policy and ensure that all licensees are familiar with them; knowing failure to follow them is grounds for discipline. *[13:4 CRLR 63; 13:2&3 CRLR 82–83]* Although the Board initially agreed that the most efficient means of giving notice of these revised regulations to the osteopathic community would be through a newsletter, this idea was rejected because of the Board's tight budget situation. OMBC deferred the issue of notice until its next meeting; however, the Board approved a motion to adopt the guidelines prepared by DHS.

FUTURE MEETINGS

To be announced.

PUBLIC UTILITIES COMMISSION

Executive Director:
Neal J. Shulman
President: Daniel Wm. Fessler
(415) 703-1487

The California Public Utilities Commission (PUC) was created in 1911 to regulate privately-owned utilities and ensure reasonable rates and service for the public. Today, under the Public Utilities Act of 1951, Public Utilities Code section 201 *et seq.*, the PUC regulates the service and rates of more than 43,000 privately-owned utilities and transportation companies. These include gas, electric, local and long distance telephone, radio-telephone, water, steam heat utilities and sewer companies; railroads, buses, trucks, and vessels transporting freight or passengers; and wharfingers, carloaders, and pipeline operators. The Commission does not regulate city- or district-owned utilities or mutual water companies.

It is the duty of the Commission to see that the public receives adequate service at rates which are fair and reasonable, both to customers and the utilities. Overseeing this effort are five commissioners appointed by the Governor with Senate approval. The commissioners serve staggered six-year terms. The PUC's regulations are codified in Chapter 1, Title 20 of the California Code of Regulations (CCR).

The PUC consists of several organizational units with specialized roles and responsibilities. A few of the central divisions are: the Advisory and Compliance Division, which implements the Commission's decisions, monitors compliance with the Commission's orders, and advises the PUC on utility matters; the Division of Ratepayer Advocates (DRA), charged with representing the long-term