new electrical energy generation resources, including bidding and other competitive acquisition programs, and requests for proposal type solicitations; ***AB 1431 (Moore)***, which would have required the PUC to examine wholesale cellular telephone rates in the major metropolitan markets to determine the costs, including a fair profit, to provide wholesale cellular telephone service in each of those markets, and to base wholesales rates on those costs; ***AB 558 (Polanco)*** and ***AB 314 (Moore)***, both of which related to the conditions under which Caller ID may be offered in California; ***SB 815 (Rosenthal)***, which would have prohibited an owner or operator of a coin-activated telephone available for public use or any telephone corporation from making any charge for the use of a calling card or collect call for any telephone call made from a coin or coinless customer-owned pay telephone above and beyond the surcharge applicable to users of credit cards for those calls; ***AB 847 (Polanco)***, which would have authorized the PUC, as an alternative to the suspension, revocation, or amendment of a certificate for a highway common carrier or the permit of a household goods carrier, to impose a fine of up to $20,000, instead of $5,000, for a first offense; ***SB 636 (Calderon)***, which would have authorized the use of money in the PUC's Transportation Rate Fund for conducting studies and research into how to increase the public benefits attained from highway carriers in the areas of safety, environment, productivity, and traffic congestion management; ***SB 692 (Rosenthal)***, which would have directed the PUC to require every electrical, gas, and telephone corporation subject to its jurisdiction to transmit to its customers or subscribers, together with its bill for services, a legal notice which describes intervenor groups by name, address, and telephone number; ***SB 743 (Rosenthal)***, which would have required the PUC to require that any telephone corporation which requests approval of the modernization of its telephone network with fiber optics also establish and provide an independent source of power for the telephone network in the case of a public emergency that could curtail electric power; ***AB 844 (Polanco)***, which would have authorized the PUC to cancel, suspend, or revoke a certificate or operating permit upon the conviction of a charter-party carrier of any felony; ***AB 846 (Polanco)***, which would have required the PUC, if, after a hearing, it finds that a highway permit carrier or a household goods carrier has continued to operate as such after its certificate or permit has been suspended pursuant to existing law, to either revoke the certificate or permit of the carrier or to impose upon the holder of the permit(s) a civil penalty of not less than $1,000 nor more than $5,000 for each day of unlawful operations; ***AB 90 (Moore)***, which would have required the PUC, in establishing rates for an electrical, gas, telephone, or water corporation, to develop procedures for these utilities to recover, through their rates and charges, the actual amount of local taxes, fees, and assessments, and to adjust rates to correct for any differences between actual expenditures and amounts recovered in this regard; ***AB 230 (Hauser)***, which would have required those public utilities which furnish residential service to provide with their bills a statement indicating the customer's consumption of electricity, gas, or water during the corresponding billing period one year previously and the number of days in, and charges for, that billing period; ***AB 379 (Moore)***, which would have created a Department of Telecommunications and Information Resource Management to recommend to the Governor and the legislature elements of a state telecommunications and information resource policy; ***AB 1792 (Harvey)***, which would have required the PUC to develop and implement cost estimates for the marginal costs of generation, bulk transmission, and energy costs for different classes of consumers of electrical energy, including but not limited to agricultural use and residential use, for the purpose of determining reasonable and just rates for electrical energy; ***ACA 30 (Bates)***, which would have required the legislature to provide for five public utility districts and provided for the election of the PUC commissioners; and ***AB 1260 (Chacon)***, which would have established procedures applicable to dump truck carriers and household goods carriers that provide for appeal of any interim, interlocutory, or other order of the PUC to a state court of appeal.

FUTURE MEETINGS:

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

STATE BAR OF CALIFORNIA

President: John M. Seitman
Executive Officer: Herbert Rosenthal
(415) 561-8200 and (213) 580-5000
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The State Bar of California was created by legislative act in 1927 and codified in the California Constitution at Article VI, section 9. The State Bar was established as a public corporation within the judicial branch of government, and membership is a requirement for all attorneys practicing law in California. Today, the State Bar has over 128,000 members, which equals approximately 17% of the nation's population of lawyers.

The State Bar Act, Business and Professions Code section 6000 *et seq.*, designates a Board of Governors to run the State Bar. The Board President is elected by the Board of Governors at its June meeting and serves a one-year term beginning in September. Only governors who have served on the Board for three years are eligible to run for President.

The Board consists of 23 members—seventeen licensed attorneys and six non-lawyer public members. Of the attorneys, sixteen of them—including the President—are elected to the Board by lawyers in nine geographic districts. A representative of the California Young Lawyers Association (CYLA), appointed by that organization's Board of Directors, also sits on the Board. The six public members are variously selected by the Governor, Assembly Speaker, and Senate Rules Committee, and confirmed by the state Senate. Each Board member serves a three-year term, except for the CYLA representative (who serves for one year) and the Board President (who serves a fourth year when elected to the presidency). The terms are staggered to provide for the selection of five attorneys and two public members each year.

The State Bar includes twenty standing committees; fourteen special committees, addressing specific issues; sixteen sections covering fourteen substantive areas of law; Bar service programs; and the Conference of Delegates, which gives a representative voice to 291 local, ethnic, and specialty bar associations statewide.

The State Bar and its subdivisions perform a myriad of functions which fall into six major categories: (1) testing State Bar applicants and accrediting law schools; (2) enforcing the State Bar Act and the Bar's Rules of Professional Conduct, which are codified at section 6076 of the Business and Professions Code, and promoting competence-based education; (3) ensuring the delivery of and access to legal services; (4) educating the public; (5) improving the administration of justice; and (6) providing member services.

MAJOR PROJECTS:

Bar's ADR Bill Rejected in Legislature. Fulfilling a top priority of Board of Governors President John Seitman, the Bar recently sponsored an ambitious bill to expand the use of alternative dispute

resolution (ADR) in both civil and criminal matters. AB 3011 (Isenberg) was intended to codify a proposal formulated by the Bar's Joint Taskforce on Access to Justice in its 1991 *Alternative Dispute Resolution Action Plan*, which identified 16 proposals for expanding the use and availability of ADR to resolve disputes. *[11:2 CRLR 181–82]*

AB 3011 would have specifically authorized the use of ADR in both civil and criminal matters, and contained numerous measures—some mandatory, others optional—to encourage its use wherever possible. With regard to civil matters, it provided that courts must require plaintiffs, upon filing a complaint, to serve a specific form on defendants regarding ADR, informing defendants of the state's policy to resolve disputes without litigation if possible and of the need to meet and confer about the possibility of various types of ADR, including mediation, arbitration, neutral case evaluation, minitrials, summary jury trials, and neutral factfinding. If the parties do not agree on an ADR process, the court would be authorized to hold an ADR assessment conference to consider an appropriate ADR process. Under the bill, parties must meet and confer to discuss the possibility of ADR prior to the ADR assessment conference, which shall take place no sooner than 120 days after the filing of the complaint. If the court chooses to hold an assessment conference, the court shall review available ADR processes with the parties; may refer the case to ADR (in consultation with the local bar association and ADR providers to ensure availability); and may determine the amount of discovery for the ADR process.

With regard to criminal matters, the bill contained legislative findings and declarations relative to the success of other states' ADR programs for the resolution of disputes between victims and criminal defendants. The bill would have permitted pre-plea and pre-sentencing probation reports to include a recommendation that, as a condition of probation, the defendant participate in a victim-offender mediation program (if one is available and the victim consents). AB 3011 would also have modified misdemeanor diversion statutes to allow participation in victim-offender mediation programs as a condition of diversion—again, if both the victim and the defendant consent to participation and if an appropriate program is available.

The Bar stated that the purpose of the bill was to reduce the cost, time, and stress of civil litigation by promoting appropriate resolution of civil disputes before substantial trial preparation costs have been incurred and before polarization of the parties has resulted. The bill attempted to require parties, attorneys, and courts to consider ADR without requiring ADR itself. In the criminal arena, the bill sought to give a victim the right to confront the person who committed the offense with the consequences of the offense, and also to negotiate a restitution agreement. This process is intended to reduce the crime victim's sense of powerlessness and to force the defendant to take personal responsibility for his or her action.

Not many of the Bar's recent forays into the legislature have been successful, and this one was no exception. The powerful California Trial Lawyers Association (CTLA) initially announced opposition to the bill unless it was amended to exclude personal injury and wrongful death cases from the ADR system created by the bill. Many of these cases are already subject to court referral to arbitration and fast-track processes. Later, CTLA stated that if personal injury and wrongful death cases were not excluded from the bill, it might support the bill subject to a number of conditions, including coverage of all cases (including all criminal cases and all domestic violence matters), a ban on judicial referral of personal injury and wrongful death cases to ADR processes, and reinstatement of the so-called *"Royal Globe"* cause of action for bad faith against insurers for unfair claims settlement practices. In some circles, this last condition was referred to as a "poison pill" term, as it surely would have aroused the insurance industry to oppose the bill.

The California Association of District Attorneys (CDAA) opposed AB 3011's provisions for ADR in criminal cases. CDAA stated that it disagreed with proposals that encourage victims to meet with their perpetrators as a method of negotiating restitution agreements. CDAA does not oppose counseling of defendants regarding their offense, their duty to take responsibility for their action, and their need to make restitution; however, it objected to involving victims in the process of establishing the proper level of restitution through a victim/offender mediation process.

The political battle over the bill in the legislature was short-lived, vicious, and typical of the Bar's record in the legislature despite a well-funded lobbying corps. On May 6, the Bar enjoyed a temporary victory when the Assembly Judiciary Committee—chaired by bill author Phil Isenberg—passed AB 3011 by a 6–2 vote, but only after the Bar struck an eleventh-hour deal with CDAA. Just before the hearing on the bill, Bar officials agreed to rewrite the bill's criminal provisions to make criminal ADR completely optional at the county level, with district attorneys having sole authority to approve establishment of pre- and post-filing ADR programs. CDAA withheld its opposition, and the bill passed. However, Bar lobbyist Mark Harris went too far, publicly boasting about the Bar's rare defeat of CTLA and accusing CTLA of attempting to kill the Bar's dues bill in retaliation (*see infra*). Even with one of the best authors in the Assembly, the bill got no further; the Assembly Ways and Means Committee rejected it on May 20, granted it reconsideration, and rejected it again on May 26. CTLA opposition was crucial; however, other players—including the California Judges Association—expressed concerns about the potential fiscal impact of the bill and its possible disruption of existing fast-track processes.

Dues Bill Stalled. The State Bar's only other legislative priority in 1992 appears to be its dues bill. The Bar's statutory authority to demand dues from its members expires every two years, and the legislature must redelegate that authority and approve the annual dues level. As compared with prior Bar dues bills, AB 2296 (Isenberg) seeks a modest $20 increase in mandatory licensing fees, from $478 annually to $498. *[12:2 CRLR 193]* The bill sailed through the Assembly by April 6, but—at this writing—has been stalled in the Senate Judiciary Committee ever since.

A combination of factors appears to be working against the Bar in the legislature: (1) a union unhappy with Bar management's handling of an ongoing labor dispute between the Bar and its unionized employees (many of whom periodically walk out) has sought refuge in the legislature, and has apparently convinced the Senate Judiciary Committee to stall the dues bill until Bar management softens its stance; (2) the recession and the statewide budget crisis have taken firm hold over the legislature, resulting in its consistent refusal to approve bills which will result in increased expenditures and/or increase licensing fees; (3) a growing movement to disintegrate the integrated State Bar, caused in part by attorney dissatisfaction over the Bar's high licensing fees and its tendency to spend at least some of its members' compelled dues on causes with which not all its members agree, as exposed in the *Keller* case (*see infra* LITIGATION); and (4) the traditional hostility of Senate Judiciary Committee Chair Bill Lockyer toward the Bar. At this writing, no hearing is set on AB 2296.

Bar Discipline System to Record Decisions. The State Bar recently announced its publication of the *California State Bar Court Reporter*, the official record of State Bar Court disciplinary decisions. In addition to the full text of published opinions of the State Bar Court Review Department, the *Reporter* includes comprehensive headnotes, case summaries, and a detailed index and digest.

Long advocated by former State Bar Discipline Monitor Robert C. Fellmeth as one means of enhancing the consistency of State Bar Court decisions and increasing the possibility of settlements *[11:4 CRLR 10]*, the Bar's publication of the *Reporter* became especially important last year when the California Supreme Court adopted "finality rules" which have significantly reduced the number of Bar discipline cases going to the Supreme Court for review and decision. *[11:1 CRLR 148]* In his final report ending a five-year term as Discipline Monitor, Fellmeth noted that "[t]he proposed *Reporter* has symbolic as well as practical significance. In a sense, it becomes the flagship for the state's discipline efforts. Its existence says that these cases—this area of law and the ethical obligations of attorneys—are of great importance and worth of official report."

State Bar Rulemaking. The following is a status update on proposed regulatory amendments considered by the State Bar in recent months:

–Use of the Term "Certified Specialist." At its March meeting, the Board of Governors repealed Rule of Professional Conduct 1-400(D)(6), which prohibited attorneys from advertising as a "certified specialist" unless actually certified by the Bar's Board of Legal Specialization. A similar Illinois rule was invalidated by the U.S. Supreme Court in *Peel v. Attorney Registration and Disciplinary Commission of Illinois. [12:1 CRLR 193]* This rule change must be approved by the California Supreme Court.

Also in March, the Board of Governors' Committee on Education and Competence decided to release for public comment proposed new Rule 1-400(E)(11), which would create a rebuttable presumption that a "communication" which states or implies that a member is a certified specialist violates the Bar's advertising rule unless the communication also states the complete name of the entity which granted the certification. The public comment period on this proposal was scheduled to close on June 18.

–Trust Account Recordkeeping. The Committee on Education and Competence was scheduled to review the public comments received on its revised version of amendments to Rule 4-100(C), regarding client trust account recordkeeping standards, at its May 1 meeting. Backing away from an expansive original version of the rule in December 1991 *[12:1 CRLR 192–93]*, the Committee released a narrower version for comment until March 12. The modified version focuses only on retention of trust account financial records. A previous requirement that the trust account be maintained in accordance with generally accepted accounting principles was eliminated in the second version as being unduly burdensome to members. A requirement that members maintain records to identify all their client trust accounts was added to the second version to ensure that all such accounts can be located should a question arise.

Due to civil unrest in Los Angeles following the acquittals of four Los Angeles Police Department officers charged with using excessive force on Los Angeles resident Rodney King, the Bar cancelled its May 1 meeting; the Committee was scheduled to take up Rule 4-100(C) at its June 5 meeting.

–"Gender Bias" Rule. On May 11, a special Bar committee approved a revamped version of a rule to prohibit discrimination in legal advocacy. The so-called "gender bias" rule has been expanded and modified several times *[12:1 CRLR 193]*; the May 11 version would actually create two new Rules of Professional Conduct—one banning discrimination in legal employment and another banning discrimination on the part of a lawyer while he/she is engaged in the representation of a client.

The proposed employment discrimination rule would provide that "in the management or operation of a law practice a [State Bar] member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in: (1) hiring, promoting, discharging or otherwise determining the conditions of employment of any person; or (2) accepting or terminating representation of any client."

The proposed general bias rule would provide that "while engaged in the practice of law, a member shall not discriminate against, or threaten, harass, intimidate or denigrate any other person on the basis of race, national origin, sex, sexual orientation, religion, age or disability." Another section of the rule, intended to address widespread concerns about the rule's impact on the first amendment rights of attorneys and on their obligation to vigorously represent all clients, reads as follows: "This rule does not prohibit activities constituting legitimate advocacy when race, national origin, sex, sexual orientation, religion, age or disability are relevant to issues in the engagement."

The Bar's Committee on Education and Competence was expected to address the modified version of this rule at its July meeting; at that time, it may decide to release the proposal for a 90-day comment period.

–Attorney-Client Sex. On January 13, the Bar resubmitted to the California Supreme Court its proposed Rule of Professional Conduct 3-120, which (with some exceptions) prohibits attorneys from requiring or demanding sexual relations with a client incident to or as a condition of any professional representation; employing coercion, intimidation, or undue influence in entering into sexual relations with a client; or accepting or continuing representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently. *[12:1 CRLR 193]* At this writing, the Court has not acted on the proposed rule. Assemblymember Lucille Roybal-Allard, whose 1989 legislation compelled the Bar to adopt an attorney-client sex rule, is still pursuing AB 1400 (*see infra* LEGISLATION) in case the Court rejects the rule.

–Attorney Confidentiality. On January 24, the Committee on Education and Competence voted to release a third version of proposed new Rule of Professional Conduct 3-100, regarding State Bar members' "duty to maintain client confidence and secrets inviolate," for a 90-day public comment period. As published on January 24, the rule specifies an attorney's duty "to maintain inviolate the confidence, and, at every peril to himself or herself, to preserve the secrets of a client." The rule provides permissive exceptions to a member's duty of confidentiality (1) where the client consents to disclosure, and (2) to the extent the member reasonably believes necessary to prevent the commission of a criminal act that the member believes is imminently likely to result in death or substantial bodily harm. The Committee was scheduled to review the public comments received on the new version at its June 5 meeting.

–Reinstatement to Practice Law. At its February meeting, the Board of Governors approved the proposal of the Committee on Admissions and Discipline to amend Rule 662 of the Bar's Transitional Rules of Procedure. Prior to its amendment, Rule 662 provided that an attorney who has

been disbarred or has resigned with charges pending must wait for a period of at least five years following such disbarment, resignation, or other legal qualification from practice before filing a first petition for reinstatement to the practice of law. However, the rule provided that the Discipline Committee could shorten the time for filing a first petition for reinstatement to a time not less than three years from disqualification upon a showing of good cause. The amendment transfers the adjudication of these applications to shorten time for the filing of reinstatement petitions from the Discipline Committee to the State Bar Court, and clarifies that a member who resigns from membership without disciplinary charges pending may file a first petition for reinstatement at any time. *[12:1 CRLR 193]*

Bar Terminates Certification of Lawyer Referral Service. Following a heated public hearing on January 17, the Bar's Legal Services Committee revoked its conditional certification of Primex Talking Yellow Pages, a statewide lawyer referral service (LRS) which failed to satisfy the Bar's LRS standards in Business and Professions Code section 6155. The Committee found Primex in violation of at least eight of the Bar's minimum standards. Although Primex had applied for certification, it does not consider itself a lawyer referral service but rather an "advertising medium" whose services are not restricted to information about lawyers.

This action is the latest in the Bar's promised crackdown on uncertified LRSs and those which are operating in violation of the Bar's standards. *[12:1 CRLR 193–94; 11:1 CRLR 149–50]* The Los Angeles County District Attorney's Office had already filed an action against Primex, charging it with misleading advertising and unfair competition; that suit is pending in superior court.

LEGISLATION:

AB 1400 (Roybal-Allard), as amended January 27, would provide that it shall constitute cause for the imposition of discipline of an attorney for an attorney to require or demand sexual relations with a client incident to or as a condition of any professional representation, to employ coercion, intimidation, or undue influence in entering into sexual relations with a client, or to continue to represent a client with whom the attorney has sexual relations if they cause the attorney to perform legal services incompetently in violation of a specified rule. These restrictions would not apply to relations with spouses or ongoing relations that predate the initiation of the attorney-client relationship. This bill is similar to a proposed Rule of Professional Conduct currently pending in the California Supreme Court (*see supra* MAJOR PROJECTS). *[S. Jud]*

AB 2296 (Isenberg). Existing law establishes an annual membership fee for members of the State Bar for 1992, but does not establish a membership fee for later years. As amended March 23, this bill would establish the annual membership fee for 1993 and 1994, generally increasing the base fee by $20.

Existing law, until January 1, 1993, authorizes the State Bar's Board of Governors to increase the annual membership fee by an additional fee for discipline augmentation of not more than $110. This bill would instead require the Board, for 1993 and 1994, to increase the annual membership fee by an additional fee of $110 to be used exclusively for discipline augmentation; the bill would also extend the repealer in the provision to January 1, 1995.

Existing law provides that all membership fees for members of the State Bar be paid into the treasury of the State Bar, and when so paid, shall become part of its funds. This bill would, in addition, provide that the Board of Governors may make transfers from one fund of the State Bar to another fund to pay all chargeable expenses, as defined, for effectuating the purposes of the State Bar Act. Funds collected from the additional membership fee exclusively for discipline augmentation would be excepted from this provision.

Finally, this bill would authorize the Board to increase the membership fee for inactive members from not more than $40 to not more than $50. *[S. Jud]*

AB 2970 (Horcher). Existing law, which is operative until January 1, 1993, and then repealed on January 1, 1994, sets forth requirements and restrictions relating to ownership and operation of lawyer referral services. As amended April 8, this bill would extend from July 1, 1993, to July 1, 1995, the date on which those existing provisions become inoperative and extend the January 1, 1994 repeal date to January 1, 1996. *[A. Floor]*

AB 3150 (Horcher). Existing law prohibits the making or dissemination of untrue or misleading advertising to the public concerning the performance of professional services. Existing law also prohibits a person from advertising or holding himself/herself out as practicing or entitled to practice law who is not an active member of the State Bar. As introduced February 20, this bill would prohibit false, misleading, deceptive, or unfair communications, as specified, by an attorney concerning the attorney or the attorney's services; regulate attorney advertising; prohibit agreements for, or the collection of, fees by attorneys which are generated through improper advertising or solicitation; and establish the Standing Committee on Advertising within the State Bar to enforce these provisions governing attorney advertising. *[A. Jud]*

AB 2300 (Umberg). Under existing law, an order imposing public reproval or other disciplinary against a member of the State Bar is required to contain a direction that the member pay costs, other than attorneys' and expert witness fees; in the event an attorney is exonerated of all charges following a formal hearing, he/she is entitled to reimbursement from the State Bar in an amount determined by the State Bar to be the reasonable expenses, other than fees for attorneys' or experts, of preparation for the hearing. As amended April 1, this bill would provide that attorneys' and expert witness fees are included in the costs of reimbursement. This bill would also provide that any order imposing a private or public reproval on a member of the State Bar, imposing discipline, or accepting a resignation with a disciplinary matter pending, may include an order that the member pay a fine not to exceed $10,000 per violation subject to a maximum of $100,000; these fines would be deposited into the Bar's Client Security Fund. This bill would require the State Bar, with the approval of the Supreme Court, to adopt rules setting forth guidelines for the imposition of fines under this provision. *[S. Jud]*

SB 1405 (Presley). Existing law provides that hearings and records of State Bar Court disciplinary proceedings shall be public, unless specifically provided, except that all disciplinary investigations are confidential until the time formal charges are filed. As amended April 30, this bill would provide that certain types of specified investigations are not confidential.

This bill would require the State Bar to issue an Annual Discipline Report by April 30 of each year, containing specified information describing the performance and condition of the State Bar discipline system.

Existing law provides that in certain cases, a written fee agreement or contract containing specified information is required between an attorney and his/her client. This bill would provide that the agreement or contract disclose whether the attorney maintains legal malpractice insurance.

Existing law provides for the arbitration of fee or cost disputes between attorneys and clients; the arbitrator may award

the client a refund of unearned prepaid fees. This bill would provide that the arbitrator may award the client a refund of unearned fees, costs, or both previously paid to the attorney.

Existing law sets forth the limitations period for the commencement of causes of actions against attorneys, except that the limitations period is tolled if the plaintiff has not sustained actual injury; cases have held that the limitations period is tolled even when the plaintiff has sustained actual injury until the injury is irremediable or appreciable. This bill would state the intent of the legislature that the limitations period is tolled only during the period that the plaintiff has not sustained any actual injury, and that any court rulings to the contrary are abrogated. *[A. Jud]*

AB 683 (Moore), as amended April 1, would establish a Legal Access Pilot Program and Advisory Commission within the Department of Consumer Affairs' Tax Preparer Program to, among other things, register and regulate nonlawyer "legal technicians" providing legal assistance; provide that the pilot program be implemented using existing Tax Preparer administration and support staff; and provide for an Advisory Commission to advise the Program Administrator, and specify the duties and functions of the Program Administrator and Commission. *[S. Jud]*

AB 3818 (Chandler). Existing law provides that a court which has assumed jurisdiction over an attorney's law practice may order one or more active members of the Bar to, among other things, notify persons and entities who appear to be clients of the attorney, of the cessation of the attorney's law practice. As introduced February 21, this bill would authorize a court to direct the active members of the State Bar appointed to the court to mail the notice of cessation of law practice. *[S. Jud]*

AB 3011 (Isenberg), as amended April 23, would have provided for the use of alternative dispute resolution processes, including mediation, neutral case evaluation, arbitration, minitrial, and neutral fact finding, as a precursor to other proceedings in the determination of civil and some criminal proceedings (*see supra* MAJOR PROJECTS). This bill was rejected twice by the Assembly Ways and Means Committee in May.

The following is a status update on bills reported in detail in CRLR Vol. 12, No. 1 (Winter 1992) at page 194:

AB 687 (Brown), as amended in May 1991, would provide that an attorney may not be disciplined by the Bar for accepting compensation for professional services in excess of specified fee limitations if the client consents to the fee arrangement, a court approves the fee arrangement, and the fee arrangement is not the product of fraud. The current version of AB 687 does not require the attorney to disclose to his/her client or the court the application of a statutory fee limit. Hence, former State Bar Discipline Monitor Robert Fellmeth and the Bar's Discipline Committee oppose the bill, arguing that it would preclude the discipline of attorneys who knowingly charge unlawful fees. *[S. Jud]*

SB 711 (Lockyer), as amended April 9, would provide, as a matter of public policy, that in certain actions based on fraud, personal injury, or wrongful death caused by a defective product or defined environmental hazard, no part of any confidentiality agreement, settlement agreement, stipulated agreement, or protective order, other than an initial protective or discovery order pending conclusion of litigation, shall be entered or enforceable, other than as to provisions requiring nondisclosure of the amount of money paid to settle the claim, unless a protective order is entered by the court after a noticed motion. This bill would also prohibit the sale or offer for sale by an attorney of information obtained through discovery. *[A. Floor]*

AB 1689 (Filante), as amended March 9, is no longer relevant to the State Bar.

SB 140 (Robbins), which would have provided that the definition of an "athlete agent" shall not include a member of the Bar acting solely as legal counsel for any person, and ***AB 168 (Eastin)***, which would have provided for a new class of legal practitioners called "legal technicians," died in committee.

LITIGATION:

On April 7, the challenge to the State Bar's 1991 implementation of the U.S. Supreme Court's ruling in ***Keller v. State Bar*** was resolved in favor of the Bar. Arbitrator David Concepcion endorsed the State Bar's calculation of its expenses which were non-chargeable to Bar members as dues allocated to support political activities during 1991. During the lengthy arbitration proceeding, which wound to a close in February, almost 200 State Bar members challenged the sufficiency of the Bar's $3 "*Hudson* deduction" refund of compelled dues, the pro rata amount of the Bar's $44 million budget which the Bar claimed was spent on non-chargeable activities during 1991. The challengers argued that State Bar members were instead entitled to a refund of $86.87 for 1991.

Concepcion ruled that less than 2% of the Bar's budget is spent on political activities banned by the *Keller* decision. The total additional non-chargeable amount in four budget categories—ethnic minority relations, Bar sections, governmental affairs, and general and administrative expenses—equaled $780.44, according to Concepcion. Thus, each of the 179 challengers was allotted an additional $4.36 plus interest.

The most momentous case currently in litigation relevant to the jurisdiction of the State Bar is ***Rubin v. Green***, 3 Cal. App. 4th 1418 (Feb. 16, 1992); the California Supreme Court granted review in this case on May 14, and oral argument is expected this fall. This case arose after Norma Green and other tenants of a mobilehome park filed a class action lawsuit against Gerald Rubin, the park owner, over a variety of alleged mobilehome park rule violations and lease breaches. Defendant Rubin filed a countering civil complaint against Norma Green and against the attorneys who filed the action on her behalf. The complaint alleged that the attorneys had "solicited" the mobilehome park tenants as clients by "addressing meetings of the tenants" and by "distributing questionnaires." The complaint alleged that the attorneys made misstatements of fact about Rubin, failed to use administrative remedies, and filed a case before negotiating in good faith. The causes of action included primarily the "interference in business relations or prospective advantage" tort. The trial court sustained the demurrers of Green and her attorneys, citing the "litigation privilege" of counsel as to communications.

The Fourth District Court of Appeal reversed, with Justice McKinster dissenting. The decision holds that the specific prohibitions on running and capping in the State Bar Act, Business and Professions Code sections 6152 and 6153, include improper solicitation and are more specific than is the general litigation privilege of Civil Code section 47(b). The court of appeal held that they may be reconciled by removing the privilege to the extent the more specific violations may apply. Although sections 6152 and 6153 provide only for criminal remedy, or for sanction through the State Bar discipline system, the majority derides the efficacy of these remedies. It found instead that Rubin had stated viable torts and that violations of sections 6152 and 6153 are "unfair or unlawful" acts in business within the broad scope of California's "Little FTC Act," Business and Professions Code section 17200, and therefore give rise to its remedies of injunction and restitution. Finally, the decision argued that the

"litigation privilege" is limited to "communication" by attorneys, as with mailed correspondence, and that where an attorney appears personally and talks, he or she has engaged in conduct beyond communication.

The Center for Public Interest Law has filed an *amicus curiae* brief in support of defendant Green, arguing the following:

(1) The decision of the court of appeal would allow counterclaims against attorneys based on any alleged violation of the State Bar Act, encompassing over 226 sections, as well as any violation of the Rules of Professional Conduct, since each may be violated by personal communications and since any of them may be "unfair" or "unlawful." Such counterclaims are likely to become commonplace as "SLAPP" suits against poverty law, environmental, and public interest attorneys. Such retaliatory suits will require costly defense by counsel often engaged in sacrificial *pro bono* practice.

(2) The standards of professional behavior are enforced by a variety of means, including criminal sanction, tort remedy, discipline by the State Bar, and sanction by the trial court. Some prohibitions are enforced by one remedy and some by others, but the decision of the court of appeal would write onto all of them a tort mechanism of enforcement although specifically excluded from the prohibition itself. That mechanism will create fragmented and inconsistent enforcement of attorney standards and undermine the recent reforms in the State Bar discipline system designed to create consistent sanctions for wrongful acts.

(3) The decision under review would engraft onto cases the ancillary adjudication of the behavior of counsel *vis-a-vis* his/her own client, as well as possibly many other issues, proliferating litigation through a mechanism not ideally suited for that function.

(4) The enforcement of standards of behavior of counsel is not simply a "business practice" under section 17200, but intersects with the administration of justice by the courts. The application of remedies designed to address unfair business practices may not be suited to accomplish regulation of the profession before the courts.

The public interest law community is alarmed at the implications of the court of appeal's decision in this case; however, the opinion conflicts with several recent decisions of the Supreme Court upholding strongly the integrity of the litigation privilege, including *Silberg v. Anderson*, 50 Cal. 3d 205 (1990).

In ***Howard v. Babcock***, No. G009931 (May 5, 1992), the Fourth District Court of Appeal held that a non-competition clause in a law firm partnership agreement violates the Rules of Professional Conduct. Four partners in Howard, Moss, Babcock, Combs, Kinnett, Waddell & Bergsten of Orange County left the firm in 1986 but continued to practice law in the area, and took a number of clients with them. The firm invoked the non-competition clause of the partnership agreement and refused to pay withdrawal benefits or the share of ongoing work and accounts receivable to which the leaving partners were entitled. The firm also sued to obtain the net proceeds of work completed for former clients of the firm. The Orange County Superior Court upheld the non-competition provision.

The court of appeal reversed. Although Business and Professions Code section 16602 allows for limited agreements to not compete with a previous employer, the court held that Rule of Professional Conduct 1-500, precluding any private agreement that restricts the right of a member of the State Bar from practicing law, applies. While limited agreements not to compete may be permitted as to business in general, they are not applicable to legal practice. This decision conflicts with that of the Second District Court of Appeal in *Haight v. Superior Court*, 234 Cal. App. 3d 963 (1991), which upheld covenants not to compete under Business and Professions Code section 16602. The issues raised in *Howard* are likely to be addressed by the Supreme Court given the clear conflict between the districts.

In Re Johnson, 1 Cal. 4th 689 (Jan. 30, 1992), presented the Supreme Court with a dilemma. In 1987, attorney Raymond Hane was charged with four felony counts of violating Penal Code section 288(a) (committing lewd and lascivious acts on a child under the age of 14). On March 4, 1988, Hane pled guilty. On April 6, 1988, the Supreme Court received a copy of the conviction record and under existing policy immediately suspended his license to practice for conviction of a crime of "moral turpitude." While under this suspension in March 1989, Hane agreed to represent Johnson, who had been charged with cocaine possession. Johnson was convicted after trial, and sought reversal for violation of his right to counsel. The Supreme Court held that conviction of the applicable sex crimes and suspension from practice did not necessarily establish for Johnson denial of his constitutional right to counsel. The court discussed at length the different kinds of moral turpitude—those which may preclude effective assistance of counsel, and those which may warrant immediate suspension for character unreliability in carrying out the duties of an officer of the court. The court opined, with a measure of understandable discomfort, that the sexual deviance and crimes of the attorney certainly offend the latter standards, but do not necessarily deny the person availing himself of attorney Hane's legal services the right to effective assistance to counsel.

The First District Court of Appeal has backed strict application of conflict of interest standards for attorneys in ***Truck Insurance Exchange v. Fireman's Fund Insurance Company***, 6 Cal. App. 4th 1050 (May 21, 1992). In this case, defendant Fireman's Fund moved successfully to disqualify the law firm of Crosby, Heafey, Roach & May from acting as counsel for plaintiff Truck Insurance Exchange because the firm was representing Fireman's Fund in several wrongful termination cases and had not been given written consent by Fireman's Fund to represent another party suing it. However, after the firm began representing Truck Insurance Exchange, it withdrew as counsel for Fireman's Fund, removing the conflict. Conflicts where a law firm represents someone suing a former client turn on whether the previous representation of the party being sued would compromise confidential information previously shared between the former client and attorney now representing an adverse interest. In this case, there was no compromise of confidences from Fireman's to the firm (involving entirely separate personnel and matters). However, the court barred the representation nevertheless, finding that a *per se* disqualification occurred when the firm began representation of Truck Insurance against Fireman's Fund at the time Fireman's Fund was a client on other matters. Withdrawal did not cure a perfected violation of the Rules of Professional Conduct. The firm's duty of loyalty was breached and was not restored through mere withdrawal.

Another decision applying strict standards to attorney practice was handed down by the Fourth District Court of Appeal on January 31. In ***Lewis v. Stern, Cook & Naiditch***, No. G009639, the court revived a malpractice case against a firm which deliberately dropped a case in the middle of an appeal because "the bill had not been paid." Although the case is unpublished, its message was no less heard within the Bar.

Three attorneys have filed suit to stop the State Bar's program requiring minimum continuing legal education (MCLE) to practice law. The case, ***Greenberg v. State Bar of California***, No. 682931-9, is

pending in Alameda County Superior Court. Plaintiffs allege that compelled classes on substance abuse and bias violate their first amendment rights. Plaintiffs have punctuated their lawsuit with rhetoric about the "re-education camps" of the former Soviet Union. The case also challenges the exemptions to MCLE for judges, elected officials, law professors, and administrative law judges.

FUTURE MEETINGS:

August 13–15 in San Francisco.
September 17–19 in San Francisco.
October 2–5 in San Francisco.