natory, or preferential, the PUC is authorized to determine and fix, by order, the just, reasonable, or sufficient rates to be charged; *AB 3986 (Moore)*, which would have permitted DRA to seek rehearings of orders and decisions of the PUC, and to appeal those decisions and orders to the courts; *SB 1723 (Roberti)*, which would have directed the PUC to create an Office of Airline Consumer Information to represent the interests of airline consumers, and would have specified the duties of the office; *SB 2258 (Rosenthal)*, which would have required the PUC to investigate passenger air carriers doing business in this state, and would have permitted the PUC or its staff to require those carriers to provide detailed information concerning specified matters necessary to conduct the investigation; *SB 2413 (Rosenthal)*, which would have provided that whenever the PUC orders a local-exchange telephone carrier to distribute excess profits, it shall require the carrier to rebate its excess profits in accordance with that provision; *ACA 17 (Moore)*, which would have increased the membership of the PUC from five to seven members and abolished the requirement that the Governor's appointees be approved by the Senate; *AB 1974 (Peace)*, which would have required the PUC to consider the environmental impact on air quality in air basins downwind from an electrical generating facility; and *AB 1684 (Costa)*, which would have prohibited the PUC from issuing a specified certificate to a common carrier unless, among other things, the applicant obtains a negative declaration of environmental impact from each affected air quality management district or air pollution control district, or, where applicable, each county board of supervisors with jurisdiction in the areas where the applicant intends to operate.

LITIGATION:

In *People of the State of California; Public Utilities Commission of the State of California v. Federal Communications Commission*, 905 F.2d 1217 (June 6, 1990), the U.S. Court of Appeals for the Ninth Circuit ruled that the FCC's decision to permit the divested Bell Operating Companies (BOCs) to integrate their regulated and unregulated activities violated section 10(e) of the federal Administrative Procedure Act because it was arbitrary and capricious.

After the 1984 court-ordered breakup of American Telephone and Telegraph System (AT&T) into 22 "baby Bells," the FCC initiated a policy of keeping regulated basic telephone service structurally separate from unregulated enhanced services; it required the regional phone companies to maintain separate inventories, personnel, and billing of customer accounts. Fourteen months later, however, the FCC reversed its position, citing "changes in circumstances" including increased competition and new technology to bypass phone lines.

Petitioners argued that it was "irrational" for the FCC to abandon structural safeguards only fourteen months after imposing them on AT&T and the separate BOCs; the Ninth Circuit agreed. In striking down the FCC policy, the court quoted the Supreme Court's statement that "[a]n agency's view of what is in the public interest may change....But an agency changing its course must supply a reasoned analysis." The court could find no support for the FCC's claims that the "substitution of nonstructural safeguards for structural safeguards will benefit the enhanced service industry" or that market changes "reduced the danger of cross-subsidization by the BOCs."

The court also rejected the FCC's argument that section 2(b)(1) of the Communications Act does not bar the FCC from regulating enhanced services to the exclusion of state regulation of intrastate enhanced services. The court found nothing in the language of the statute to support the Commission's "cramped" interpretation of the Act. Rather, the court adopted a broad reading of the statute, stating that the sphere of state authority which the statute "fences off from FCC reach of regulation" includes, at a minimum, services that are delivered by a telephone carrier "in connection with" its intrastate common carrier telephone services. "That these enhanced services are not themselves provided on a common carrier basis is beside the point."

Assessing the impact of the decision, PUC President Mitchell Wilk commented that the court's decision "properly gives the states greater freedom to promote the development of enhanced services and to define the terms and conditions upon which those services are provided."

FUTURE MEETINGS:

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

STATE BAR OF CALIFORNIA

President: Charles S. Vogel
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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 122,000 members, more than one-seventh 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; nine 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 282 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:

State Bar Discipline Monitor Report. On September 1, State Bar Discipline Monitor Robert C. Fellmeth released his Seventh Progress Report on the Bar's discipline system. (See CRLR Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 212; Vol. 9, No. 4 (Fall 1989) pp. 120-21; and Vol. 7, No. 3 (Summer 1987) p. 1 for extensive background information.)

In his report, Professor Fellmeth noted that the following problems continue to plague the Bar's discipline system: (1) the still substantial backlog of fully investigated cases awaiting Notice to Show Cause (NTSC) drafting in the Office of Trials (OT) (formerly called the "Office of Trial Counsel" or "OTC"); (2) OT's need to increase implementation of interim suspension/restriction powers between initial investigation of the complaint and final decision; (3) the inability of the State Bar Court to process the enhanced inflow of discipline cases going to hearing in a timely fashion, given current inadequate resources allocated for Los Angeles hearings; the Monitor recommended that at least two additional judges be appointed as permanent judges in Los Angeles; (4) the long-overdue need for enhanced public outreach regarding the Bar's discipline system to consumers, especially through effective publication of the Bar's toll-free complaint number in accessible locations; (5) the general failure of the system to protect the public from attorney incompetence, due to the system's heavy focus on attorney dishonesty and the Bar's failure to require malpractice insurance for all licensed attorneys; and (6) the need for more effective early intervention to protect the public from alcohol- and drug-abusing attorneys.

The pattern detection capability proposed in the Initial Report of the State Bar Discipline Monitor is being implemented for use by the beginning of 1991, due to the Bar's computerization of all complaint intake information. A separate section within the Bar's Intake Unit will review and enter a variety of source material now available to the Bar, including information from banks regarding NSF checks written on client trust accounts, malpractice insurance claims, criminal arrests and convictions, Bar inquiries (that is, consumer contacts regarding minor misconduct which do not rise to the level of a "complaint") and investigations (including those closed), judicial contempt orders and sanctions, and other information about attorney misconduct. Preliminary results indicate that NSF check notification is an excellent early warning device of either dishonesty or of overall office management breakdown.

The Monitor also noted that the Bar has developed the Attorneys Remedial Training System (ARTS), a competency/education-based remedial discipline program. ARTS is a new tier of the discipline system through which lesser offenses without substantial harm to the public will be handled in a non-disciplinary process. Once the problem is identified, and the attorney has agreed to enter into ARTS rather than face formal discipline proceedings, a program of remedial education is devised based on the problems encountered by the individual attorney. When the remedial education and, if necessary, the mentor oversight phase of ARTS are complete, the case will be returned to the Bar's Office of Intake/Legal Advice. If the results are satisfactory, the complaint against the attorney will pass out of the system without formal disciplinary action.

The report notes that the restructured State Bar Court is now fully functional. Its procedures outline a total twelve- to eighteen-month time guideline for pleading, discovery, hearing, and appeal process. Its judges are well qualified and represent an ethnic and gender cross-section of California. At this writing, the California Supreme Court is still considering implementation of the "finality rule" (see CRLR Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 212 for background information), based in part on its view of the improved quality of the judicial product of the State Bar Court. That rule would state that a decision of the State Bar Court is final unless review to the Supreme Court is sought within a specified time period.

In addition to the pending finality rule, the State Bar is also considering a *State Bar Discipline Reporter* to publish the opinions of the State Bar Court in a systematic and official manner. This proposed publication would be of great import and use to the court, practitioners, scholars, and reform efforts in other states.

Special Task Force on Substance Abuse and Emotional Distress. At its July meeting, the Board of Governors unanimously approved a voluntary statewide program aimed at making lawyers, their colleagues, and families more aware of the ways to spot, prevent, and get help for chemical dependency and emotional distress. It contains an educational plan that includes written and videotaped materials, a speakers' network for bar groups, advertisements in legal publications, and a direct mail project aimed at law firms. The Bar's adoption of the program caps a yearlong effort by former Bar President Alan Rothenberg to focus constructive attention on this serious issue.

The Bar estimated that at least one in ten lawyers practicing in California has a substance abuse problem, and that half its discipline cases involve attorneys abusing drugs or alcohol. It earmarked $450,507 for the "Model Lawyers Personal Assistance Program," including $196,000 for educational tapes and pamphlets on stress and chemical dependency and $47,752 to hire a full-time program administrator. Another $180,000 will go to outside groups such as The Other Bar, Inc., a self-help group for lawyers seeking to break their addictions.

Audits of Client Trust Accounts. The Bar is considering a program that would subject client trust accounts to random audits of account funds. The program would require all California lawyers maintaining trust accounts to register the accounts with the Bar. Although the Bar already has the authority to audit a client trust account under Business and Professions Code section 6091, the statute requires that a client file a complaint alleging that the account has been mishandled before the Bar may conduct its audit. Additionally, under Business and Professions Code section 6091.1, banks are required to notify the Bar if a check drawn on a client trust account bounces. The Bar's internal rules also allow it to conduct an audit after an application based on reasonable cause is presented to the presiding judge of the State Bar Court.

FAX Filings. In July, new Judicial Council rules allowing facsimile transmission for court filings took effect in 13 pilot courts (superior courts in Los Angeles, Orange, Marin, Modoc, San Bernardino, Santa Clara, and Ventura counties; and municipal courts in Monterey, Nevada, Oakland-Piedmont-Emeryville, Los Angeles South Bay and Visalia). The Judicial Council's fax-filing rules apply to all civil filings, except small claims, probate, and family law proceedings. Court-based fax machines should be available on a 24-hour basis, according to the rules. The State Bar was instrumental in getting legislation passed mandating the fax-filing pilot program. One major legal hurdle has been whether an original signature is required on all documents filed under Code of Civil Procedure section 446. Under the new rules, a signature produced by facsimile transmission is considered an original. A demand for production of the original document may be made in out-of-court

proceedings when questions of authenticity arise.

Bar Exam Revisions. Bar officials are considering producing the Bar exam entirely in-state and withdrawing from the national organization that provides standardized multistate tests. One issue of concern is whether California can devise a better test more efficiently and at lower cost than the current Bar exam, one-third of which is purchased from the National Conference of Bar Examiners.

In June, the Bar's Committee of Bar Examiners announced that it intends to place a 100-question California Multiple-Choice (CMC) test on the July 1992 and February 1993 California Bar exam. The CMC will take three hours and replace one-half of the existing performance test. Curiously, the "California" multiple choice exam—which will test torts, contracts, evidence, criminal law, real property, and constitutional law —will not test California law. For example, applicants will be told to assume that the relevant jurisdiction has no comparative negligence or community property laws—both of which are firmly ensconced in California law.

The Board of Governors has also appointed a commission to consider whether California should require Bar applicants to be certified in such skills as client interviewing, negotiation, and trial advocacy.

Mandatory Continuing Legal Education (MCLE). On May 12, the Board of Governors voted unanimously to seek approval from the California Supreme Court for a proposed Rule of Court that would require attorneys to complete at least thirty-six hours of legal education every three years. The Board also voted to circulate for a ninety-day public comment period draft rules and regulations for implementation of the program. At this writing, more than eighty written comments have been received by the Board. (See CRLR Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 212; Vol. 10, No. 1 (Winter 1990) p. 154; and Vol. 9, No. 4 (Fall 1989) p. 138 for extensive background information on the MCLE program.)

Under the proposed rules, the Bar would enroll as inactive those members who fail to meet the minimum requirements. The rules would also establish a 21-member Standing Committee on Minimum Legal Education. The Bar held four regional public forums on the proposed MCLE rules, the last of which was in Sacramento on September 26. The public comment period ended on September 28.

Legal Technician Legislation. Preprint Assembly Bill 14 (Eastin), which is identical to Preprint Senate Bill 9 (Presley), is expected to be introduced in Sacramento as soon as the next legislative session begins. As drafted, the bill would allow non-lawyer "legal technicians" to provide a variety of legal services in any of fourteen areas of law, including immigration, family, housing, public benefits, real estate, estate administration, estate planning, consumer, corporate, and bankruptcy. (See CRLR Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 213; Vol. 9, No. 4 (Fall 1989) p. 137; and Vol. 9, No. 2 (Spring 1989) p. 121 for background information on this issue.)

As drafted, the bill would repeal current statutes barring unauthorized practice of law and instead make it illegal to falsely represent oneself as an attorney. The bill would also establish a new regulatory agency within the Department of Consumer Affairs to license legal technicians in a particular area of law after passing a specialized competency exam, and to set up a consumer protection fund to protect the public against inappropriate actions by legal technicians.

At the beginning of September, the Board of Governors began circulating the *Report of the State Bar Commission on Legal Technicians* for a ninety-day public comment period. The Board has also issued for public comment both Preprint SB 9 and Preprint AB 14. The Commission's report characterizes legal technicians as "independent paralegals" and recommends that they be permitted to engage in the limited practice of law, initially in the areas of bankruptcy, family, and landlord-tenant law. The Commission also suggests that independent paralegals should be licensed and makes several procedural recommendations in that regard. The licensing of independent paralegals would require the adoption by the California Supreme Court of a Rule of Court which would authorize non-lawyers to practice law.

Senator Presley recently indicated that he will introduce a revised version of Preprint SB 9, while Assemblymember Eastin will introduce a bill substantially similar to Preprint AB 14. As an alternative to both bills, the Board of Governors is expected to eventually recommend its own system for regulating legal technicians to both the legislature and the Supreme Court. Some Board members have already voiced concerns regarding the proposed regulation of legal technicians by the Department of Consumer Affairs rather than an agency responsible to the State Bar or the Supreme Court.

Bar Revises Results of "Quake Exam". On February 28, a 5.5 earthquake rumbled through southern California with approximately one hour remaining in the afternoon session of the multistate portion of that exam (MBE). Examinees in Pomona were evacuated; examinees in San Diego and Los Angeles felt the quake, but were not evacuated and were allowed to complete the test. Due to the interruption, the Bar later refused to grade the afternoon session of the multistate exam in its entirety for all examinees; instead, Bar officials graded the morning session and calculated a total multistate score based on that score and a national mean.

In June, however, the Committee of Bar Examiners announced that it would conduct a complete investigation of the February 1990 Bar exam, including the earthquake-disrupted multistate portion. The Committee ultimately agreed to grade the afternoon MBE session for unsuccessful applicants at all test sites, including Pomona. This review resulted in an additional 49 new members of the Bar, and also placed 155 unsuccessful applicants in a borderline category, entitling them to reappraisal by Bar examiners. After rereading the tests of these candidates, the examiners upgraded 29 of the 155 to passing. The 78 new Bar members were informed of the Committee's decision in late June and early July, while many of them were preparing to take the July 1990 exam.

The final passage rate for the February Bar exam was 1,761 out of 3,847 applicants, bringing the percentage of those who passed to 45.8%.

Certified Legal Specialists. In April, then-State Bar President Alan Rothenberg created a special subcommittee, chaired by Board member Robert Oliver, to evaluate the progress of the Bar's Legal Specialization Program and make recommendations to the Board of Governors' Committee on Professional Standards and Admissions (COPSA). The new subcommittee was formed after the Board of Governors rejected a proposal to add a Civil Trial Specialty to the Bar's program for certifying legal specialists. (See CRLR Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 214 for background information.)

On July 17, the Subcommittee to Evaluate Legal Specialization presented a report on the Program, and made several recommendations to COPSA. The Committee approved an amended version of the subcommittee's recommendations, which include: (1) the Bar's Board of Legal Specialization should make every effort to encourage attorneys to participate in the Specialization Program, and should itself participate in the implementation of the MCLE program; (2) COPSA should develop a proposal

regarding the use of the term "specialist" in attorney advertising, for consideration and recommendation to the Board of Governors at the earliest possible date (see CRLR Vol. 9, No. 2 (Spring 1989) p. 121 and Vol. 9, No. 1 (Winter 1989) p. 107 for background information on this issue); (3) the Board of Legal Specialization should develop an outreach program to consumers, attorneys, and the judiciary regarding legal specialization; and (4) the Board of Legal Specialization should make every effort to communicate with applicants regarding their standing in the certification and recertification process.

Loan Forgiveness Task Force Created. In June, the Board of Governors created a Loan Forgiveness Task Force to consider the following: (1) the establishment of a statewide loan repayment assistance program as a high priority for the State Bar Foundation; (2) the expansion of existing law school-based loan repayment assistance programs and the creation of new programs at schools that do not provide such assistance; (3) the development and pursuit of legislation to obtain federal or state funding for loan repayment assistance; and (4) the development and pursuit of legislation to provide favorable tax treatment for loan repayment, assistance loans, or grants.

The Task Force held its first meeting on September 26. Creation of the Task Force is expected to be one step toward making legal services attorney positions more attractive to young lawyers. Many private firms now offer beginning attorneys well over three times what legal services and other public interest employers can offer.

Board Adopts Permanent Fee Scaling Program. The Board of Governors previously established a Pilot Program Fee Scaling Plan, which allowed eligible attorneys to pay reduced license fees based on income or nature of practice. In May 1990, the Board adopted the Fee Scaling Program as permanent.

The Subcommittee on Fee Scaling was charged with reviewing the current fee scaling program to determine what, if any, modifications should be made to the program, and whether the program should be continued past the two-year pilot phase. The Subcommittee recommended, and the Board adopted, a permanent fee scaling program effective with the 1991 fee payments, under which attorneys with an annual adjusted gross income (including spousal income) of $25,000 or less are entitled to a 20% discount in licensing dues. Attorneys with two years or less in practice are also entitled to a 20% dues discount.

LEGISLATION:

The following is a status update on bills reported in detail in CRLR Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) at pages 214-15:

AB 3991 (Brown, W.), as amended August 29, establishes an annual State Bar membership fee for 1991 and 1992, increases the base fees by $23, and increases the fee for the Client Security Fund by $15. For most attorneys on active status, this bill raises annual Bar dues from $440 to $478.

Although the scope of this bill was expected to be limited to raising Bar dues, Assemblymember Brown amended the bill on August 8 to include substantial revisions to the State Bar discipline system. Because these changes appeared regressive to many critics, including State Bar Discipline Monitor Robert C. Fellmeth, Brown was asked to shelve such proposals until a proper analysis could be conducted. Many of these provisions were subsequently amended out of the bill; however, the following changes were included in the final version of the bill: (1) any disciplinary action taken against an individual at a university or an accredited law school for violation of university or law school rules of conduct shall not be used as the sole basis for denying the individual admission to practice law in California, unless the violations involve moral turpitude or result in prosecution under state law; (2) every person who knowingly makes a false or malicious report to the State Bar or causes a complaint to be filed with the State Bar, alleging that an attorney has engaged in professional misconduct, is guilty of a misdemeanor; (3) investigations or proceedings regarding a Bar applicant's moral character are confidential unless confidentiality is waived; (4) regarding the appointment of judges to the State Bar Court by the Supreme Court, preference shall be given to persons with judicial experience; and (5) until the time that formal discipline charges are filed against a Bar member, all disciplinary investigations and records relating to those investigations are confidential unless the confidentiality is waived by the member whose conduct is being investigated, or by the President or Chief Trial Counsel of the State Bar for specified reasons.

Two final amendments to the bill, added August 29, require the Bar to report to the legislature in two years regarding the impact of the U.S. Supreme Court's June 4 decision in *Keller v. State Bar* (*see infra* LITIGATION), and to submit to lawmakers a workload study for all its employees before September 1, 1991. This bill was signed by the Governor on September 30 (Chapter 1639, Statutes of 1990).

AB 4033 (Roybal-Allard), as amended August 21, requires the State Bar to establish a task force to study and develop policy recommendations to provide consumers with an avenue for filing complaints about professional legal practitioners, out-of-state attorneys, and persons fraudulently posing as attorneys. This bill was signed by the Governor on September 22 (Chapter 1236, Statutes of 1990).

SB 2666 (Presley), as amended August 14, would have revised the provisions for the evaluation of candidates for appointment by the Governor to judicial office by (1) stating the intent of the legislature to authorize the evaluation of those candidates by judicial appointment advisory panels selected by county bar associations; (2) revising the confidentiality provisions applicable to the evaluation of those candidates, and making a violation of the confidentiality provisions by a member of the State Bar a disciplinary offense; and (3) specifying various procedures to be used by the State Bar in the evaluation of those candidates. This bill was vetoed by the Governor on September 29.

AB 2682 (Moore). Existing law requires the Board of Governors to establish, maintain, and administer a system and procedure for the arbitration of disputes concerning fees, costs, or both, charged for professional services by members of the State Bar or by members of the bar of other jurisdictions. Existing law requires the Board to allow arbitration of attorney fee and cost disputes to proceed under arbitration systems sponsored by local bar associations in California; and provides that the Board may allow one lay member of any arbitration panel of three members. As amended August 17, this bill provides that if the panel consists of three members, at the option of the client, one of the members shall be required to be an attorney whose area of practice is either civil or criminal law, and one member shall be required to be a lay member. This bill was signed by the Governor on September 18 (Chapter 1020, Statutes of 1990).

AB 3916 (Lempert), which, as amended August 28, raises the monetary jurisdiction of small claims court to $5,000, was signed by the Governor on September 30 (Chapter 1683, Statutes of 1990).

AB 3946 (Harris) provides, among other things, that a person who has received his/her legal education in a foreign state or country where the common law of England is not the basis of jurisprudence shall demonstrate to the

satisfaction of the Committee of Bar Examiners that his/her education, experience, and qualifications qualify him/her to take the examination. This bill was signed by the Governor on September 10 (Chapter 707, Statutes of 1990).

SB 1910 (Killea). Existing law prescribes the membership of the Board of Governors of the State Bar. Provisions that were repealed on January 1, 1990, provided that any attorney who is a full-time employee of any public agency and who serves as a member of the Board shall not suffer the loss of job-related benefits, but existing law contains no such provisions. This bill reenacts similar provisions, but does not limit them to attorney members of the Board. This bill was signed by the Governor on August 7 (Chapter 473, Statutes of 1990).

SB 2066 (Davis). Under existing law, a court is authorized to notify the State Bar if it appears to the court that a contempt holding imposed against an attorney involves grounds warranting discipline. Existing law also requires a court to notify the State Bar whenever a reversal of a judgment in a judicial proceeding is based in whole or in part upon gross misconduct, incompetent representation, or willful misrepresentation by counsel. Among other things, this bill repeals these existing provisions and enacts similar provisions that require a court to notify the State Bar of a final order of contempt imposed against an attorney that may involve grounds warranting discipline, whenever a modification or reversal of a judgment results from misconduct, incompetent representation, or willful misrepresentation of an attorney, or the imposition of any judicial sanctions against an attorney, except for certain sanctions. This bill was signed by the Governor on August 8 (Chapter 483, Statutes of 1990).

SB 2606 (Torres). Existing law requires an attorney who contracts to represent a plaintiff on a contingency fee basis to provide a duplicate copy of the contract to the plaintiff at the time the contract is entered into and specifies the minimum contents of that contract. The law exempts from these requirements any contingency fee contract for the recovery of workers' compensation benefits. As amended August 15, this bill also exempts from those requirements contingency fee contracts for the recovery of claims between merchants arising from the sale or lease of goods or services rendered, or money loaned for use in the conduct of a business or profession, providing each merchant employs ten or more individuals. This bill was signed by the Governor on September 10 (Chapter 713, Statutes of 1990).

The following bills died in committee: *AB 3458 (Friedman)*, which would have prohibited a party to an action or proceeding from making a settlement offer conditioned upon the counsel for an opposing party waiving all or substantially all attorneys' fees in a case in which there may be an entitlement to attorneys' fees pursuant to a private attorney general statute, as defined; *AB 3571 (Quackenbush)*, which would have revised the law protecting a lawyer's work product from discovery to provide that a law enforcement agency may obtain a court order for production of materials or information that are attorney work product, under specified circumstances; and *SB 2102 (Deddeh)*, which would have authorized a plaintiff who requests the court to determine attorneys' fees in default judgment cases to submit supporting evidence in the form of prescribed affidavits if the total of damages, attorneys' fees, and costs does not exceed $25,000.

LITIGATION:

The repercussions of the U.S. Supreme Court's decision in *Keller v. State Bar*, No. 88-1905, 90 D.A.R. 6131, 100 S.Ct. 2228 (1990), continue to be of major concern in the policy decisions of the Board of Governors. (See CRLR Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 215; Vol. 10, No. 1 (Winter 1990) p. 155; and Vol. 9, No. 4 (Fall 1989) p. 138 for background information on this case.) In *Keller*, the U.S. Supreme Court ruled that the State Bar may not use compulsory dues to finance political or ideological activities which are not necessary or reasonably connected to the regulation of the legal profession. The *Keller* decision presents serious problems for "integrated" state bars—that is, state bars which are combination state regulatory agency/trade associations, as is the California Bar.

At the Bar's annual meeting in August, new Bar President Charles S. Vogel announced his support of a restrictive interpretation of the *Keller* decision. Vogel supports identifying and pursuing only those projects permissible under *Keller*, and leaving to voluntary bar associations the more potentially divisive issues. Vogel did not advocate abandoning all legislative and lobbying efforts, but expressed an intent that the Bar remain available to its members to review, propose, and comment on legislation.

Accordingly, Bar General Counsel Diane Yu pulled 41 resolutions from the agenda of the Conference of Delegates at the Bar's Annual Meeting, on grounds that the resolutions were "politically and ideologically colorized." The 500-member Conference of Delegates is made up of representatives of California's 200-plus voluntary local bar associations, and serves—at the expense of all California attorneys—as a forum for debate on a wide variety of topics affecting the legal community, including abortion and other controversial issues arguably unrelated to the regulation of attorneys.

At the August meeting, the Conference of Delegates reacted angrily to Vogel's interpretation, and overwhelmingly supported a proposal to return to business as usual before *Keller*, but to offer dissenting Bar members a refund on Bar dues.

In *Giannini v. Real*, No. 89-55466 (August 16, 1990), Joseph R. Giannini once again took his challenge to the California Bar exam before the U.S. Court of Appeals for the Ninth Circuit. (See CRLR Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 216 and Vol. 8, No. 3 (Summer 1988) p. 131 for background information.) After being denied admission to the Bar and unsuccessfully appealing to the California Supreme Court, Giannini filed a complaint in federal court, challenging the Bar's denial of a license to practice law in California and in the U.S. District Courts for the Central, Southern, and Eastern Districts of California. The named defendants included the California Supreme Court, its justices, the Committee of Bar Examiners, the federal district courts, and the judges of those courts. Giannini moved for summary judgment; defendants moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim. The trial court denied Giannini's motion and dismissed his claims.

The Ninth Circuit affirmed, holding that Giannini's assertion that he was denied due process because he was not given any explanation of why he failed the exam was unpersuasive. An unsuccessful Bar applicant can see his/her exam and determine why he/she failed. Giannini also claimed that the exam violates the equal protection clause under the Fourteenth Amendment. The court reasoned that the exam does not discriminate against a suspect class; therefore, review of state procedures for admission and testing is guided by a rational basis standard. A state need not utilize a uniformly validated exam for measuring professional competence. Rather, California has the right to make its exam more comprehensive and difficult than other states. California has a legitimate interest in ensuring the quality of attorneys within the state and therefore may

set its own examination standards. The court also sustained the local rules requiring an attorney to pass the California bar exam before practicing in its federal courts.

In *Rosenthal v. Justices of the Supreme Court of California*, No. 88-15709 (August 1, 1990), the U.S. Ninth Circuit Court of Appeals ruled that attorney disciplinary hearings are not criminal proceedings; therefore, the protections afforded a criminal defendant do not apply. Jerome Rosenthal was disbarred by the California Supreme Court on the recommendation of the State Bar after over ten years of hearings and proceedings, following a complaint filed against Rosenthal by a former client, Doris Day, and her family. Rosenthal committed numerous breaches of ethical conduct during his representation of Day. Rosenthal filed a federal action alleging constitutional and statutory defects in the disbarment proceeding, and argued that the statute authorizing judicial review of the Bar's recommendation impermissibly shifted the burden to him to show that evidence was insufficient to support disbarment. Rosenthal also maintained that the statute authorizing admission of documents from other disciplinary proceedings violated the confrontation clause. The Ninth Circuit affirmed the trial court's rejection of Rosenthal's claims, holding that a discipline proceeding is not a criminal proceeding and that respondent attorney's are not entitled to the same protections as are criminal defendants. The court held that California provides attorneys subject to discipline with more than constitutionally sufficient procedural due process.

In *California State Automobile Association Inter-Insurance Bureau v. Bales*, No. A044424 (June 14, 1990), the First District Court of Appeal held that the public policy in favor of preserving the undivided loyalty of lawyer to client dictates that an insurer, sued by a third-party claimant for violation of Insurance Code section 790.03, may not obtain comparative equitable indemnity from the claimant's former attorney on the theory that the attorney's negligence at least partially caused the claimant's damage. (*See supra* agency report on DEPARTMENT OF INSURANCE for more information on this case.)

In narrowing its decision in *Silberg v. Anderson*, 50 Cal.3d 205 (1990), the California Supreme Court ruled in *Kimmel v. Goland*, No. S007828 (July 12, 1990), that the immunity lawyers enjoy from liability for acts committed during the course of litigation does not apply to everything they do. The 7-0 opinion allows an attorney to be sued for allegedly helping his tenant-clients to secretly and illegally tape-record conversations with their landlords.

In Opinion No. 90-201 (June 12, 1990), the California Attorney General's office ruled that Registered Foreign Legal Consultants (RFLC) may practice law in California state courts, without regard to State Bar membership, to the extent authorized under Rule 988 of the California Rules of Court. The AG also opined that RFLCs may practice law in the federal courts and tribunals in California if authorized by federal law.

On April 2, 1987, the California Supreme Court adopted Rule 988, concerning the regulation of RFLCs. An RFLC is a person who is admitted to practice and is in good standing as an attorney or counselor at law or the equivalent in a foreign country, and who has been issued a certificate of registration as a RFLC, which certificate is current. An applicant for registration must have been admitted to practice and have actually practiced law as an attorney in a foreign country for at least four of the six years immediately preceding the application, must possess the good moral character requisite for a member of the Bar, and must file an application with the State Bar of California. Upon review, the State Bar may issue a certificate that must be renewed annually. An RFLC is subject to the same disciplinary measures and has the same privilege obligations as any member of the State Bar.

FUTURE MEETINGS:

January 24-26 in Los Angeles.
March 7-9 in San Francisco.
April 18-20 in Los Angeles.
May 30-June 1 in San Francisco.