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# Business Associations and Professions

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# Business Associations and Professions

## Business Associations and Professions; advance fees for real estate brokers

Business and Professions Code § 10085.5 (new).  
SB 1917 (Thompson); 1992 STAT. Ch. 515

Under existing law, advance fees<sup>1</sup> include fees paid by a borrower to a person<sup>2</sup> for locating real estate loan<sup>3</sup> lenders.<sup>4</sup> Chapter 515 prohibits any person except a licensed real estate broker<sup>5</sup> from receiving advance fees from borrowers in connection with loans secured by real property.<sup>6</sup> Chapter 515 does not prohibit the receipt of advance fees by a bank,<sup>7</sup> savings association,<sup>8</sup> credit union,<sup>9</sup> industrial loan company,<sup>10</sup> licensed personal property broker,<sup>11</sup> licensed consumer finance lender<sup>12</sup> or licensed

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1. See CAL. BUS. & PROF. CODE § 10026 (West 1987) (defining advance fees as fees claimed, demanded, charged, received, collected or contracted for a listing, advertisement or offer to sell or lease property, other than in a general circulation newspaper).

2. See *id.* § 10006 (West 1987) (defining person).

3. See CAL. FIN. CODE § 5115 (West 1989) (defining real estate loan).

4. CAL. BUS. & PROF. CODE § 10026 (West 1987); see *Nelson v. Dept. of Real Estate*, 161 Cal. App. 3d 939, 944, 209 Cal. Rptr. 368, 371 (1984) (holding that required advance preparation fees charged by a broker hired to obtain loans fall within the definition of advanced fees); BUS. & PROF. CODE § 10146 (West 1987) (requiring advance fee funds to be deposited in a trust account and an accounting be made before the broker may use the money for expenses); CAL. CIV. CODE § 1921 (West Supp. 1992) (defining lender with respect to adjustable rate residential mortgage loans).

5. See CAL. BUS. & PROF. CODE § 10131 (West 1987) (defining real estate broker); *id.* § 10131.2 (West 1987) (defining further a broker as one engaging in the business of, among other things, collecting an advance fee in connection with obtaining a loan on real property); *id.* § 10150.6 (West 1987) (describing experience and training qualifications for real estate broker licensing); *cf.* N.Y. REAL PROP. LAW § 440-a (McKinney 1989) (requiring any person engaging in the occupation of a real estate broker to obtain a real estate broker's license).

6. CAL. BUS. & PROF. CODE § 10085.5(a) (enacted by Chapter 515); *cf.* NEV. REV. STAT. § 645.323 (1991) (prohibiting any person from accepting an advance fee listing unless the person is a licensed real estate broker).

7. See CAL. FIN. CODE § 102 (West 1989) (defining bank).

8. See *id.* § 5102(a) (West 1989) (defining savings association).

9. See *id.* § 14002 (West 1989) (defining credit union).

10. See *id.* § 18003 (West 1989) (defining industrial loan company).

11. See *id.* § 22009 (West Supp. 1981) (defining personal property broker); see also *id.* § 22206 (West Supp. 1992) (establishing requirements for personal property broker licensing).

12. See *id.* § 24009 (West Supp. 1992) (defining consumer finance lender); see also *id.* § 24200 (West Supp. 1992) (requiring a license for consumer finance lenders).

commercial finance lender,<sup>13</sup> or charges made by title insurers<sup>14</sup> or controlled escrow companies.<sup>15</sup> A violation of Chapter 515 is punishable by fine<sup>16</sup> or imprisonment<sup>17</sup> or both.<sup>18</sup>

*LGC*

## **Business Associations and Professions; advertising--unsolicited fax transmissions**

Business and Professions Code § 17538.4 (new).  
AB 2438 (Katz); 1992 STAT. Ch. 564

Existing law regulates the advertisement of goods and services.<sup>1</sup> Chapter 564 prohibits any person or business from faxing or causing to be faxed<sup>2</sup> unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit, unless that person or business establishes a toll-free phone number that a recipient may call to notify the sender

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13. *See id.* § 26009 (West Supp. 1992) (defining commercial finance lender); *see also id.* § 26200 (West Supp. 1992) (requiring a license for commercial finance lenders).

14. *See* CAL. INS. CODE § 12340.4 (West 1988) (defining title insurance company).

15. CAL. BUS. & PROF. CODE § 10085.5(b) (enacted by Chapter 515). Chapter 515 does not apply to charges made by title insurers or controlled escrow companies pursuant to § 12340 of the Insurance Code. *Id.*; *see* CAL. INS. CODE § 12340.6 (West 1988) (defining controlled escrow company).

16. *See* CAL. BUS. & PROF. CODE § 10085.5(c) (enacted by Chapter 515) (providing for a fine not to exceed \$10,000, or if violated by a corporation, a fine not to exceed \$50,000).

17. *See id.* (enacted by Chapter 515) (providing for imprisonment in the county jail for a term not to exceed six months).

18. *Id.* (enacted by Chapter 515); *cf.* *Burch v. Argus Properties, Inc.*, 92 Cal. App. 3d 128, 132, 154 Cal. Rptr. 485, 487 (1979) (allowing treble damages for failure of a licensed real estate broker to account for advance fees, in violation of Business and Professions Code § 10146, in order to protect against the possibility of fraud).

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1. CAL. BUS. & PROF. CODE §§ 17500-17577 (West 1991 & Supp. 1992). These provisions regulate charitable solicitations, telephone sellers, labeling of products made by the blind, travel promoters, motel rate signs, American Indian made articles, vending machines and water treatment devices. *Id.*

2. *See id.* § 17538.4(e) (enacted by Chapter 564) (providing that "fax" or "causing to be faxed" does not include or refer to the transmission of any document by a telecommunications utility to the extent that it merely carries that transmission over its network).

not to fax them any further unsolicited documents.<sup>3</sup> Under Chapter 564, once the recipient has notified the sender not to fax any further unsolicited documents, a person or entity which sends additional fax transmissions shall be subject to a \$500 fine.<sup>4</sup>

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3. *Id.* § 17538.4(a) (enacted by Chapter 564). All unsolicited fax documents subject to this section shall provide the recipient, in at least 9-point type, the toll-free telephone number and an address the recipient may write to, notifying the sender not to fax any further unsolicited documents to the fax number or numbers specified by the recipient. *Id.* § 17538.4(b) (enacted by Chapter 564); *cf.* ILL. REV. STAT. ch. 38, para. 26-3(b) (1991) (prohibiting the faxing of a document containing unsolicited advertising or fund-raising material, except to a person which the sender knows or reasonably believes has given the sender permission to send such material); NEV. REV. STAT. ANN. § 207.325(1) (Michie 1991) (prohibiting unsolicited faxes soliciting a person to purchase real property, goods or services, unless sent to a person who has a preexisting business relationship with the sender); OKLA. STAT. § 1862 (1991) (defining commercial solicitation as an unsolicited electronic or telephonic fax transmission to encourage the purchase of goods, realty, services, or to advertise the availability of such, and excluding from the definition faxes sent when the commercial solicitation is made in course of prior negotiations, sent to a party with whom there was a prior or existing business relationship, made in course of a follow up to a sales call, or sent after normal business hours and two pages or less length). *See generally* CALIFORNIA PUBLIC UTILITIES COMMISSION, REPORT TO THE LEGISLATURE OF 1990, at 3-5 (1990) (reporting the findings of a research project conducted on the problem junk faxes pose to California businesses, with half who receive unsolicited faxes strongly objecting to them, and most who received them agreeing that they tie up the fax machine and interfere with important business communications). However, most businesses do not find junk fax transmissions to be a problem, but believe that they will be a problem in the near future, and favor legislative action to restrict the sending of junk faxes. *Id.*

4. *Id.* § 17538.4(c)-(d) (enacted by Chapter 564). The \$500 fine pertains to each transmission. *Id.* *See generally* CALIFORNIA STATE SENATE COMMITTEE ON BUSINESS AND PROFESSIONS, ANALYSIS OF SB 2438, June 29, 1992, at 2 (stating that unsolicited faxes cost the receiver four to thirteen cents per page); Jerry Gillam, *Bill Banning Fax Transmission Of Ads Introduced In Assembly*, L. A. TIMES, Feb. 5, 1992, at B8 (describing the problems junk fax transmissions create, including costing the recipient both time and money by raising electricity bills, wasting paper, and delaying important incoming and outgoing messages); Sandra Evans, *Bill's Message: Don't Mess With the Fax: Virginia Plan Would Crack Down on Those Who Send Unwanted Notices*, WASH. POST, Feb. 16, 1990, at D7 (reporting on a Virginia bill with similar provisions to Chapter 564, and stating that similar bills are pending in 25 states, with Maryland and Connecticut already banning unsolicited faxes, and New York restricting the practice).

## **Business Associations and Professions; alcoholic beverage instructional event restrictions**

Business and Professions Code § 25503.4 (new).  
AB 2868 (Floyd); 1992 STAT. Ch. 471

Existing law prohibits any manufacturer, winegrower,<sup>1</sup> California winegrower's agent,<sup>2</sup> rectifier,<sup>3</sup> distiller,<sup>4</sup> bottler, importer<sup>5</sup> or wholesaler<sup>6</sup> from giving alcoholic beverages<sup>7</sup> to any alcoholic beverage licensee<sup>8</sup> without charge as a part of any sale or transaction.<sup>9</sup> Chapter 471 permits a winegrower, California winegrower's agent or importer to conduct or participate in an instructional event for consumers held on a retailer's premises.<sup>10</sup>

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1. See CAL. BUS. & PROF. CODE § 23013 (West 1985) (defining winegrower as any person who has facilities for the conversion of fruit into wine, and is engaged in the production of not less than 200 gallons of wine per year).

2. See *id.* § 23373 (West 1985) (authorizing the licensing of winegrower's agents).

3. See *id.* § 23016 (West 1985) (defining rectifier); see also *id.* § 23372 (West 1985) (authorizing the licensing of rectifiers).

4. See *id.* § 23015 (West 1985) (defining distilled spirits manufacturer).

5. See *id.* § 23017 (West 1985) (defining importer as: (1) Any consignee of alcoholic beverages brought into the state when the beverages are for delivery or use in the state; (2) any person, except a public warehouse, to whom delivery is first made in this state of alcoholic beverages brought into the state; (3) any licensed importer selling beverages to non-licensees in an area over which the United States government exercises jurisdiction when the delivery is made by common carrier from a point outside the state; or (4) any person bringing non-consigned alcoholic beverages into the state for delivery or use in the state); see also *id.* § 23374 (West 1985) (authorizing the licensing of wine importers).

6. See *id.* § 23021 (West 1985) (defining wholesaler); see also *id.* § 23379 (West 1985) (authorizing the licensing of wine wholesalers).

7. See *id.* § 23004 (West 1985) (defining alcoholic beverage as a liquid containing alcohol, spirits, wine or beer which contains at least one half of one percent of alcohol by volume).

8. See *id.* § 23009 (West 1985) (defining licensee as a person holding a license issued by the department of Alcoholic Beverage Control).

9. *Id.* § 25503(b) (West 1985); see *Schenley Affiliated Brands Corp. v. Kirby*, 21 Cal. App. 3d 177, 188, 98 Cal. Rptr. 609, 619 (1971) (holding that the purpose of this section is to foster equal competitive opportunity among retailers). See generally *Gonzales & Co., Inc. v. Department of Alcoholic Beverage Control*, 151 Cal. App. 3d 172, 175, 198 Cal. Rptr. 479, 480 (1984) (holding that a cash rebate to consumers offered by a wine manufacturer through retailers is not a "premium, gift or free goods" as prohibited by statute).

10. CAL. BUS. & PROF. CODE § 25503.4 (enacted by Chapter 471). No gifts, free goods or other things of value may be given away in connection with the event. *Id.* § 25503.4(a)(1) (enacted by Chapter 471). The consumption of alcoholic beverages on premises with a retail package off-sale license is not authorized. *Id.* § 25503.4(e) (enacted by Chapter 471); see *id.* § 23393 (West 1985) (defining a retail package off-sale license as a license which authorizes the sale to consumers only

Existing law prohibits the compensation of a retailer for advertising the sale of distilled spirits.<sup>11</sup> Chapter 471 permits a winegrower, California winegrower's agent or importer to list a retailer's name and address in advertisements pertaining to an instructional event.<sup>12</sup>

*LGC*

## **Business Associations and Professions; attorneys and monetary sanctions**

Business and Professions Code § 6086.13 (new).  
AB 2300 (Umberg); 1992 STAT. Ch. 1270

Existing law provides that members of the State Bar<sup>1</sup> are subject to public reproof.<sup>2</sup> Chapter 1270 provides that any order of the State

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of beer and wine in packages, in quantities of less than 52 gallons per sale, and for consumption off the premises). Minimal amounts of wine for sampling do not constitute a thing of value, and may be provided for tasting at the event. *Id.* § 25503(a)(2) (enacted by Chapter 471). However, a retail license does not authorize the furnishing or giving away of any free samples of alcoholic beverages to be consumed away from the event. *Id.* § 23386 (West 1985); *cf.* CONN. GEN. STAT. § 30-20 (West Supp. 1992) (permitting the holder of a package store permit to offer free samples of wine on the premises). *But cf.* IDAHO CODE § 23-1332 (1992) (permitting the furnishing of single-serving samples only on the premises of retail wine outlets which exclusively retail the product of that winery).

11. CAL. BUS. & PROF. CODE § 25503(f) (West 1985).

12. *Id.* § 25503.4(b) (enacted by Chapter 471). The advertisement may list the name and address of the retailer if the listing is relatively inconspicuous in relation to the advertisement as a whole. *Id.* § 25503.4(b)(2) (enacted by Chapter 471). The advertisement may not include beverage prices. *Id.* § 25503.4(b)(1) (enacted By Chapter 471). *But see id.* § 23366.1 (West 1985) (prohibiting any manufacturer from soliciting consumers to purchase distilled spirits at a particular retailer). The winegrower or winegrower's agent are not authorized to share any advertising costs with the retailer. *Id.* § 25503.4(d) (enacted by Chapter 471).

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1. See CAL. BUS. & PROF. CODE § 6002 (West 1990) (defining member of the State Bar); *id.* § 6068(a)-(o) (West Supp. 1992) (providing the duties of an attorney).

2. *Id.* § 6086.10 (West 1990). The order imposing public reproof shall include a direction that the member pay costs. *Id.* See also *id.* § 6086.11 (West 1990) (establishing the complainants grievance panel); CAL. R. CT. 615 (West 1983) (defining public reproof); *Trousil v. State Bar*, 38 Cal. 3d 337, 341, 695 P.2d 1067, 1068, 211 Cal. Rptr. 525, 527 (1982) (holding in part that it is the member of the State Bar who bears the burden of showing that the findings of the State Bar are not supported by the evidence).

Bar Court<sup>3</sup> imposing suspension or disbarment<sup>4</sup> of a member of the State Bar may include an order that the member pay monetary sanctions.<sup>5</sup>

*JME*

**Business Associations and Professions; automobile dealers--  
advertising restrictions**

Civil Code § 2982 (amended); Vehicle Code § 11713.1  
(amended).

AB 3482 (Bentley); 1992 STAT. Ch. 1092

Under existing law, it is a misdemeanor<sup>1</sup> for any holder of a

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3. See CAL. BUS. & PROF. CODE § 6086.5 (West 1990) (providing the authority of the State Bar Court).

4. See *id.* § 6103 (West 1990) (stating that violation of the oath and duties of an attorney may result in suspension or disbarment); see also *Attorney's Right to Practice in Federal Court as Affected by his Disbarment or Suspension in State Court or other Federal Court*, 20 A.L.R. 1436 (1991) (stating that disbarment by state court does not result in automatic disbarment by federal court).

5. CAL. BUS. & PROF. CODE § 6086.13 (enacted by Chapter 1270). The sanction may not exceed five thousand dollars (\$5,000) per violation, and is subject to a total limit of fifty thousand dollars (\$50,000). *Id.* § 6086.13(a) (enacted by Chapter 1270); see *id.* § 6086.13(e) (enacted by Chapter 1270) (providing that sanctions under this section shall not be collected to the extent that collection would impair the collection of criminal penalties or civil judgements arising from the transaction connected with the discipline of the attorney); *id.* § 6086.13(d) (enacted by Chapter 1270) (stating that any sanction collected under this section is in addition to any other authority to impose costs or monetary sanctions). For other states' laws explaining attorney sanctions, see, e.g., MISS. CODE ANN. § 73-3-35 (1991); R.I. GEN. LAWS § 30-13-6 (1991); WYO. STAT. § 33-5-117 (1992).

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1. See CAL. VEH. CODE § 40000.11(a) (West Supp. 1992) (making the violation of occupational licensing and business regulations a misdemeanor); see also *id.* § 11705(a)(10) (West Supp. 1992) (providing for revocation or suspension of a dealer's license upon violation of certain sections of the Vehicle Code, including § 11713.1); *id.* § 11705.4(a) (West 1987) (authorizing the Department of Motor Vehicles to revoke or suspend a license after notice and hearing); CAL. GOV'T CODE §§ 11503-11517 (West 1992) (governing the administrative procedure to be followed for a hearing to revoke or suspend a license); *id.* § 11523 (West 1992) (governing the procedure for applying for judicial review of an administrative decision); *Merrill v. Department of Motor Vehicles*, 71 Cal. 2d 907, 915, 458 P.2d 33, 38, 80 Cal. Rptr. 89, 94 (1969) (holding that the standard of judicial review for suspension or revocation of a vehicle dealer's license is different than the standard of review for failure to issue a license). The denial of a license to a previously unlicensed person

dealer's<sup>2</sup> license<sup>3</sup> to advertise<sup>4</sup> vehicles and related goods or services intending not to supply reasonably expectable demand, unless the advertisement discloses a limitation on the available quantity.<sup>5</sup> Under Chapter 1092, whenever a dealer advertises vehicles and related goods or services at a specified price and does not intend to meet reasonably expectable demand, the dealer must disclose the number of vehicles in stock at the advertised price.<sup>6</sup> When the advertisement uses language such as "starting at" or "as low as," the number of vehicles available at that price must be disclosed.<sup>7</sup> Chapter 1092 also regulates the type-size,<sup>8</sup> color<sup>9</sup> and location<sup>10</sup> of the required disclosures.<sup>11</sup>

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does not implicate a vested right, while revocation or suspension of an existing license does. *Id.*

2. See CAL. VEH. CODE § 285 (West 1985) (defining dealer).

3. See *id.* § 11700 (West Supp. 1992) (prohibiting persons from acting as a dealer without a license); *id.* § 11700.1 (West 1987) (governing the procedure for application for a license).

4. See CAL. CODE REGS. tit. 13, § 402.00 (1992) (defining advertising); see also *Ford Dealers Ass'n v. Department of Motor Vehicles*, 32 Cal. 3d 347, 357, 650 P.2d 328, 333, 185 Cal. Rptr. 453, 458 (1982) (holding that advertisements can be made orally in face-to-face negotiations between salespeople and customers).

5. CAL. VEH. CODE § 11713.1(i) (amended by Chapter 1092); see *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980) (giving criteria by which a governmental restriction on commercial speech is to be judged to determine if the restriction is constitutionally valid); *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 771 (1976) (noting that states may regulate commercial speech which may be deceptive or misleading); see also *Merrill v. Department of Motor Vehicles*, 71 Cal. 2d 907, 918, 458 P.2d 33, 40, 80 Cal. Rptr. 89, 96 (1969) (holding that the purpose of the statutory scheme which includes § 11713.1 is to protect the public from unscrupulous and irresponsible persons involved in the sale of vehicles). Advertisements involving the rental and leasing of motor vehicles are subject to similar regulations. See CAL. VEH. CODE § 11614(o) (West Supp. 1992).

6. CAL. VEH. CODE § 11713.1(i) (amended by Chapter 1092); see Beckett, *New Bill Seeks Changes in Auto Ads*, S.F. CHRON., June 19, 1992, at C1 (reporting on a recent study which found that dealers often advertised vehicles when they were unable to satisfy demand; what California Assemblyman Byron Sher calls bait-and-switch and economic fraud).

7. CAL. VEH. CODE § 11713.1(i) (amended by Chapter 1092).

8. See *id.* (requiring that the type-size of the required disclosure be at least equal to one quarter of the type-size used in the advertised price and in no case less than 8-point type).

9. See *id.* (requiring that the disclosure be the same color as that used in the advertised price).

10. See *id.* (requiring that the disclosure be located immediately above, below or to the side of the advertised price, without any intervening words, pictures or symbols).

11. *Id.*



Chapter 1092 further requires a new motor vehicle dealer<sup>12</sup> to notify the franchisor<sup>13</sup> of specified information,<sup>14</sup> and prohibits the new motor vehicle dealer from providing the franchisor with false information.<sup>15</sup>

Under existing law, every conditional sale contract<sup>16</sup> for the sale<sup>17</sup> of a vehicle<sup>18</sup> must contain, within the contract, certain disclosures.<sup>19</sup> Chapter 1092 expands existing law by requiring that the seller of a vehicle disclose, in the conditional sale contract, whether the vehicle is new<sup>20</sup> or used.<sup>21</sup>

*JSP/TRF*

## **Business Associations and Professions; cable television systems**

Business and Professions Code § 22770 (new).  
SB 1595 (Rosenthal); 1992 STAT Ch. 361

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12. See *id.* § 426 (West 1987) (defining motor vehicle dealer).

13. See *id.* § 331.2 (West 1987) (defining franchisor).

14. See *id.* § 11713.1(2)(u) (amended by Chapter 1092) (requiring the new motor vehicle dealer to disclose to a franchisor the name of the purchaser, date of sale, and the vehicle identification number of every new vehicle sold made by that franchisor); CAL. COM. CODE § 1201(32) (West 1964) (defining purchase); *id.* § 1201(33) (West 1964) (defining purchaser).

15. CAL. VEH. CODE § 11713.1(2)(u) (amended by Chapter 1092); see *Ford Dealers Ass'n v. Department of Motor Vehicles*, 32 Cal. 3d 347, 365, 650 P.2d 328, 338-39, 185 Cal. Rptr. 453, 463-64 (1982) (holding that failure to disclose the rental history of a motor vehicle would violate statutes barring dissemination of false or misleading statements to public by automobile dealers).

16. See CAL. CIV. CODE § 2981(a) (West Supp. 1992) (defining conditional sale contract).

17. See CAL. COM. CODE § 2106(1) (West 1964) (defining sale); see also CAL. VEH. CODE § 5901(d) (West 1987) (stating that a sale of a vehicle is completed when the purchaser has paid the purchase price, or has signed a purchase contract or security agreement and taken physical possession or delivery of that vehicle).

18. See CAL. VEH. CODE § 670 (West 1987) (defining vehicle).

19. CAL. CIV. CODE § 2982(a) (West Supp. 1992); see *id.* § 1798.3(e) (West 1985) (defining disclose); see also 12 C.F.R. § 226.5 (1992) (providing the general disclosure requirements under federal law for open-end credit); 12 C.F.R. § 226.17 (1992) (providing the general disclosure requirements under federal law for close-end credit).

20. See CAL. VEH. CODE § 430 (West Supp. 1992) (defining new vehicle).

21. CAL. CIV. CODE § 2982(q) (amended by Chapter 1092); see CAL. VEH. CODE § 665 (West Supp. 1992) (defining used vehicle).

Existing law permits any city and/or county within California to authorize, by franchise<sup>1</sup> or license,<sup>2</sup> the construction of a cable television system.<sup>3</sup> Existing law provides for the implementation<sup>4</sup> of rules protecting the individual cable television subscriber.<sup>5</sup> Chapter 361 prohibits cable television operators<sup>6</sup> or video providers<sup>7</sup> from charging for a service initially provided to the consumer<sup>8</sup> for

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1. See CAL. BUS. & PROF. CODE § 20001 (West Supp. 1992) (defining franchise as a contract or agreement between two or more persons by which a franchisee is given the right to engage in a business with a substantial association to a franchisor's trademark, prescribed by that franchisor, and a franchise fee is required); see also 47 U.S.C. § 522(8) (1988) (defining franchise as an initial authorization, or renewal thereof issued by a franchising authority).

2. See CAL. GOV'T CODE § 53066 (West Supp. 1992) (discussing the rules and regulations governing the franchise and licensing of cable television).

3. *Id.* § 53066(a) (West Supp. 1992); see 47 U.S.C. § 522(6) (1988) (defining cable system as a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service); DEL. CODE ANN. tit. 26, § 601(a) (1991) (requiring the granting of a franchise in order for a cable television system to be constructed or operated); N.C. GEN. STAT. § 153A-137 (1992) (defining cable television system as a facility that receives direct or indirect signals transmitting programs broadcast by one or more television stations and distributes these signals by wire or cable to subscribing members of the public who pay for the service); *id.* (permitting a county to grant upon reasonable terms, franchises for the operation of cable television systems for a maximum of 10 years); TENN. CODE ANN. § 7-59-201(2) (1991) (defining cable system as a facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service); VA. CODE ANN. § 15.1-23.1 (Michie 1992) (defining cable television system as any facility consisting of a set of closed transmission paths and associated signal generation, reception and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community).

4. See CAL. GOV'T CODE § 53066(a) (West Supp. 1992) (stating that the rules are to be implemented by the governing body of the city and/or county).

5. *Id.*; see 17 U.S.C. § 119(d)(8) (1988) (defining subscriber). The governing body of the city and/or county may implement rules and regulations that it deems advisable to protect individual subscribers. CAL. GOV'T CODE § 53066(a) (West Supp. 1992).

6. See CAL. BUS. & PROF. CODE § 22770(a) (enacted by Chapter 361) (defining cable television operator as the person or entity providing cable television services); cf. 47 U.S.C. § 522(4) (1988) (defining cable operator as any person or group of persons who provides cable service over a cable system and owns a significant interest in such cable system, or who controls or is responsible for the management and operation of such cable system).

7. See CAL. BUS. & PROF. CODE § 22770(b) (enacted by Chapter 361) (defining video provider as any person, company, or service which provides one or more channels of video programming to a residence and where some fee is paid).

8. See *id.* § 302(e) (West 1990) (defining consumer as any person who seeks or acquires goods, services, money, or credit for personal, family, or household purposes); see also 15 U.S.C. § 1681a(c) (1988) (defining consumer as an individual).

a limited time at no charge, unless the consumer affirmatively elects to continue the service prior to the imposition of a charge.<sup>9</sup>

*DLR*

## **Business Associations and Professions; continuing education--psychology**

Business and Professions Code § 2915 (new); § 2988 (amended).

SB 774 (Boatwright); 1992 STAT. Ch. 260

Under existing law, a psychology<sup>1</sup> license<sup>2</sup> may be renewed upon submission of an application and payment of the renewal fee.<sup>3</sup> Beginning on January 1, 1996, Chapter 260 mandates that to renew a psychology license, the licensee must complete eighteen hours of

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9. CAL. BUS. & PROF. CODE § 22770(c) (enacted by Chapter 361); *see* SENATE COMMITTEE ON ENERGY AND PUBLIC UTILITIES, COMMITTEE ANALYSIS OF SB 1595, at 1 (Apr. 7, 1992) (stating that the author introduced Chapter 361 to prohibit negative option marketing by cable companies in California). In the past, cable companies have offered free services for a limited time, and then, at the end of that time automatically began to charge for the service unless the customer affirmatively notified the company that he or she did not want the service. *Id.* The author of Chapter 361 believes that a cable company should not be permitted to initiate services for a charge without the customer's agreement in advance. *Id.* Chapter 361 does not apply to the addition, restructuring, or retiering of any package, tier, or service offering, provided the consumer is already receiving the service. CAL. BUS. & PROF. CODE § 22770(c) (enacted by Chapter 361); *see* 47 U.S.C. § 522(14) (1988) (defining service tier).

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1. *See* CAL. BUS. & PROF. CODE § 2903 (West 1990) (defining psychology and psychotherapy).

2. *See id.* § 2903 (West 1990) (requiring a license for the practice of psychology); *see also id.* § 2902 (West 1990) (defining psychologist); *id.* §§ 2940-2948 (West 1990 & Supp. 1992) (setting forth the requirements psychologists must meet in order to be granted a license.) These requirements include an examination and the payment of an examination fee. *Id.* All states mandate similar licensing requirements for psychologists. Linda Jorgenson, *The Furor Over Psychotherapist-Patient Sexual Contact: New Solutions to an Old Problem*, 32 WM. & MARY L. REV. 645, 715 (1991). *See generally* Michael R. Lanzarone, *Professional Discipline: Unfairness and Inefficiency in the Administrative Process*, 51 FORDHAM L. REV. 818 (1983) (discussing state regulation of professions).

3. CAL. BUS. & PROF. CODE § 2984 (West 1990).

continuing education courses.<sup>4</sup> For licenses renewed on or after January 1, 1997 the required continuing education shall be thirty-six hours completed in the preceding two years.<sup>5</sup> Chapter 260 additionally prohibits psychologists from practicing outside their particular field of competence.<sup>6</sup>

Under existing law, a licensed psychologist who is not engaged in the practice of psychology may request that the psychologist's license be placed on inactive status.<sup>7</sup> Chapter 260 exempts an inactive licensee from continuing education requirements, but requires that the licensee complete the continuing education requirements before being returned to active status.<sup>8</sup>

SRM

### **Business Associations and Professions; contractors**

Business and Professions Code §§ 7028.15, 7071.8, 7099.10, 7099.11 (amended).  
AB 2347 (Frazee); 1992 STAT. Ch. 294

Existing law requires the posting of a bond for all licensed contractors.<sup>1</sup> Prior law required the posting of an additional bond by

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4. *Id.* § 2915(a) (enacted by Chapter 260); *cf. id.* § 6070 (West 1990) (requiring continuing education for attorneys to retain their license to practice law); *see also id.* § 2915(d) (enacted by Chapter 260) (specifying required and recommended courses); *id.* § 2915(h) (enacted by Chapter 260) (stating that licensees shall choose courses related to their field of practice that may include new theoretical approaches, research, and applied techniques); *cf. ALA. CODE* § 34-26-22 (1975); *ARIZ. REV. STAT. ANN.* § 32-2074 (1991); *FLA. STAT. ANN.* § 490.0085 (West 1991); *GA. CODE ANN.* § 43-30-15 (1991); *KAN. STAT. ANN.* § 74-5364 (1990) (requiring continuing education requirements for psychologists).

5. *CAL. BUS. & PROF. CODE* § 2915(a) (enacted by 260).

6. *Id.* § 2915(i) (enacted by Chapter 260). A psychologist's field of expertise is determined by the psychologist's education, training, and experience. *Id.*

7. *Id.* § 2988 (amended by Chapter 260).

8. *Id.*

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1. *CAL. BUS. & PROF. CODE* § 7071.6 (West Supp. 1992). All contractors must post a \$5,000 to \$10,000 bond in order to obtain a license. *Id.*; *see id.* §§ 7065.01-7077 (West 1975 & Supp. 1992) (providing requirements for the licensing of contractors); *cf. NEV. REV. STAT.* § 624.270 (1991)

an applicant for a new or restored contractor's<sup>2</sup> license,<sup>3</sup> or for continued use of a license after the applicant had been disciplined for violation of the Contractors License Law.<sup>4</sup> Chapter 294 instead requires the posting of an additional bond by any person<sup>5</sup> whose contractor's license has been suspended or revoked as a result of any disciplinary action<sup>6</sup> by the state contractor's board.<sup>7</sup> Under prior law, a qualifying individual<sup>8</sup> was required to post the additional bond only if that person had knowledge of or participated in the disciplinary action.<sup>9</sup> Chapter 294 requires the posting of an

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(requiring a bond of \$1,000 to \$50,000, depending on the magnitude of the contractor's operations).

2. See CAL. BUS. & PROF. CODE § 7026 (West Supp. 1992) (defining contractor generally); *id.* § 7026.1 (West Supp. 1992) (defining contractors as persons who service air conditioners, heating or refrigeration equipment, builders, home improvement construction persons, tree removers and water well drillers); *id.* § 7026.2 (West Supp. 1992) (defining contractors as persons involved in the construction, installation, alteration, repair or preparation of mobile homes); *id.* § 7026.3 (West Supp. 1992) (defining contractors as carpet installers).

3. See *id.* § 7065 (West Supp. 1992) (authorizing the investigation and qualifications of applicants for a contractor's license); see also CAL. CODE REGS. tit. 16, § 816 (1990) (providing the application form for original licenses); CAL. CODE REGS. tit. 16, § 827 (1990) (providing for review of the application by the registrar of licenses).

4. 1986 Cal. Stat. ch. 79, sec. 1 at 203 (amending Cal. Bus. & Prof. Code § 7071.8) (amended by Chapter 294); see CAL. BUS. & PROF. CODE §§ 7000-7189.7 (West 1975 & Supp. 1992) (establishing the Contractors License Law).

5. See CAL. BUS. & PROF. CODE § 7025 (West 1975) (defining person).

6. See *id.* § 7071.11(c) (West Supp. 1992) (providing that any judgment or admitted claim against a required bond constitutes grounds for disciplinary action); CAL. LAB. CODE § 1021.5 (West 1989) (providing that a contractor who knowingly hires an unlicensed subcontractor is subject to a civil penalty). See generally *Viking Pools, Inc. v. Maloney*, 48 Cal. 3d 602, 604, 770 P.2d 732, 733, 257 Cal. Rptr. 320, 321 (1989) (holding that a breach of an express written warranty by a contractor is grounds for disciplinary action); *Pinney v. Phillips*, 230 Cal. App. 3d 1570, 1589, 281 Cal. Rptr. 904, 916 (1991) (holding that refusal to submit to a warrantless search cannot be grounds for disciplinary action).

7. CAL. BUS. & PROF. CODE § 7071.8(b) (amended by Chapter 294). The bond may not be less than \$15,000 nor more than 10 times the amount required for a mandatory bond pursuant to § 7071.6 of the Business and Professions Code. *Id.* The bond must remain on file with the registrar for a period of at least two years. *Id.* § 7071.8(c) (amended by Chapter 294); cf. ARIZ. REV. STAT. ANN. § 32-1154 (West Supp. 1991) (permitting the registrar of contractors to increase the required surety bond of contractors guilty of committing specific acts).

8. See CAL. BUS. & PROF. CODE § 7068 (West Supp. 1992) (providing ways in which an individual may qualify); *id.* § 7068.1 (West Supp. 1992) (establishing the responsibilities of qualifying individuals including direct supervision and control of construction projects); see also CAL. CODE REGS. tit. 16, § 823 (1990) (defining direct supervision and control by a qualifying individual).

9. 1986 Cal. Stat. ch. 79, sec. 1, at 203 (amending CAL. BUS. & PROF. CODE § 7071.8) (amended by Chapter 294).

additional bond by a qualifying individual regardless of whether the person participated in or had knowledge of the prohibited act.<sup>10</sup>

*LGC*

## **Business Associations and Professions; contractor licensees--complaints**

Business and Professions Code § 7011.8 (new).  
AB 2966 (Horchler); 1992 STAT. Ch. 437

Under existing law the Registrar,<sup>1</sup> who is appointed by the Contractors' State Licensing Board,<sup>2</sup> may investigate the actions of any contractor<sup>3</sup> within the state and may deny,<sup>4</sup> cite,<sup>5</sup> suspend,<sup>6</sup> or revoke<sup>7</sup> any license<sup>8</sup> if the licensee is guilty of an act constituting a

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10. CAL. BUS. & PROF. CODE § 7071.8(a)(1) (amended by Chapter 294).

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1. See CAL. BUS. & PROF. CODE § 7011 (West 1975) (providing for the appointment, compensation, and duties of the Registrar).

2. See *id.* § 7010 (West 1975) (providing the functions and duties of the Contractors' State Licensing Board); *id.* § 7000.5 (West Supp. 1992) (governing the existence and membership of the Contractors' State Licensing Board within the Department of Consumer Affairs).

3. See *id.* §§ 7026, 7026.2(b) (West Supp. 1992) (defining contractor as any person, who constructs, alters, repairs, adds to, subtracts from, improves, moves, or demolish any building, structure, road, project, development, or improvement).

4. See *id.* § 475 (West 1990) (defining the following as grounds on which a license may be denied: (1) Knowingly making a false statement of fact in an application for a license; (2) conviction of a crime; (3) commission of any act involving dishonesty, fraud, or deceit with the intent to substantially benefit or injure another; and (4) commission of an act which would be grounds for suspension or revocation of a license); see also *id.* § 7073 (West Supp. 1992) (permitting the Registrar to deny licensure).

5. See *id.* § 7099 (West Supp. 1992) (authorizing the Registrar to cite the licensee in lieu of denial, revocation, or suspension of the licensee's license).

6. See *id.* §§ 490-493 (West 1990) (governing suspension of licenses); *id.* § 7090 (West Supp. 1992) (authorizing the Registrar to suspend the licensee's license).

7. See *id.* §§ 490-493 (West 1990) (governing revocation of licenses); see also *id.* § 7090 (West Supp. 1992) (authorizing the Registrar to revoke the licensee's license).

8. See *id.* § 477(b) (West Supp. 1992) (defining license as a certificate, registration, or other means to engage in a business or profession regulated by the Business and Professions Code); see also *id.* §§ 7065-7077 (West 1975 & Supp. 1992) (governing the licensing of contractors).

cause for disciplinary action.<sup>9</sup> Chapter 437 mandates that any person<sup>10</sup> who falsely reports or causes a false complaint to be filed with the Contractors' State Licensing Board against a licensee for professional misconduct<sup>11</sup> is guilty of an infraction punishable by a fine.<sup>12</sup> Further, Chapter 437 permits the Board to inform the district or city attorney that the Board believes a person filed a false report or complaint against a licensee.<sup>13</sup>

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9. *Id.* § 7090 (West Supp. 1992); *see id.* §§ 7107, 7108, 7109, 7110, 7111, 7111.1, 7112, 7113, 7113.5, 7114, 7114.1, 7115, 7116, 7117, 7117.5, 7117.6, 7118, 7120, 7121, 7121.5, 7122, 7122.5, 7123 (West 1975 & Supp. 1992) (setting forth acts that constitute a cause for disciplinary action); *see also* Linda Jones Gen. Builder v. Contractor's State License Bd., 194 Cal. App. 3d 1320, 1326, 240 Cal. Rptr. 180, 184 (1987) (holding that before disciplinary action can take place charges must be made); *cf.* ARIZ. REV. STAT. ANN. § 32-1139(B) (1991) (providing that a contractor's license is suspended when any amount is paid out of the Residential Contractor's Fund for claim disputes, unless it has been repaid); NEV. REV. STAT. §§ 624.300-624.301, 624.3011-624.3017 (1991) (providing grounds for disciplinary action). *See generally* Renee A. Mangini, *The Contractor's State License Law: From Strict Adherence To Substantial Compliance*, 9 WHITTIER L. REV. 613, 614-16 (1987) (discussing the rationale for Contractor's State License Laws); Jon Engellenner, *These Houses Are No Place Like Home Residents Blame County Inspectors*, SACRAMENTO BEE, June 24, 1992, at B1 (stating that the Contractor's State License Board oversees complaints against builders, not the county).

10. *See* CAL. BUS. & PROF. CODE § 7025 (West 1975) (defining person).

11. *See id.* §§ 7122, 7122.5 (West 1975) (governing participation in misconduct).

12. *Id.* § 7011.8(a) (enacted by Chapter 437). The infraction is punishable by a fine not to exceed one thousand dollars (\$1,000). *Id.*

13. *Id.* § 7011.8(b) (enacted by Chapter 437). The Board must provide the appropriate policy committees of each house of the Legislature a report that states the number of false complaints received and the number of false complaints referred to the district or city attorney, no later than July 1 of each year. *Id.* § 7011.8(c) (enacted by Chapter 437).

## Business Associations and Professions; corporations--dissolution

Corporations Code §§ 2010, 2011 (amended); Revenue and Taxation Code § 23335 (new).

SB 1331 (Russell); 1992 STAT. Ch. 189

Under existing law, the dissolution of a corporation<sup>1</sup> is effective on the date which on the certificate of winding up and dissolution<sup>2</sup> is filed.<sup>3</sup> Existing law additionally provides that the withdrawal of a foreign corporation<sup>4</sup> is effective on the date which the certificate of withdrawal is filed.<sup>5</sup> Under existing law, no certificate of dissolution<sup>6</sup> will become effective unless the taxpaying entity obtains a tax clearance certificate.<sup>7</sup> Chapter 189 requires the Franchise Tax

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1. See CAL. CORP. CODE § 167 (West 1990) (defining domestic corporation). A dissolved corporation includes a corporation that has filed a certificate of dissolution, and for which the Franchise Tax Board has not yet made the determination that all taxes have been paid or secured pursuant to California Corporations Code § 1905. *Id.* §§ 2010(d), 2011(e) (amended by Chapter 189). See generally Herbert Kraus, *Changes in California Laws on Corporate Dissolution*, PRENTICE HALL L. & BUS., Nov. 1991, at 28 (discussing the streamlining of corporate dissolution procedures).

2. See CAL. REV. & TAX. CODE § 23331(a) (West 1992) (specifying that a certified copy of the court decree, judgment, or order declaring the corporation duly wound up and dissolved may be filed with the Secretary of State, as an alternative to the certificate of winding up and dissolution). Chapter 189 states that with regard to winding up and causes of action against a dissolved corporation, a corporation that has filed a certificate of dissolution and for which the Franchise Tax Board has not yet, or never has, determined that all taxes have been paid or secured, is included in the definition of a dissolved corporation. CAL. CORP. CODE §§ 2010(d), 2011(e) (amended by Chapter 189); see also *id.* § 1901 (West Supp. 1992) (providing the content and required procedures for a certificate of election to wind up and dissolve).

3. CAL. REV. & TAX. CODE § 23331(a) (West 1992). A certified copy of the court decree, or order declaring the corporation duly wound up and dissolved is to be filed in the office of the Secretary of State. *Id.*; see IND. CODE ANN. § 23-17-23-2(a) (West 1992) (providing that the Secretary of State determines the grounds for dissolving a corporation and will serve the corporation with written notice of that determination). See generally 15 PA. CONS. STAT. § 2536 (1992) (providing that a director is not entitled to file an application for involuntary winding up and dissolution of the corporation).

4. See CAL. CORP. CODE § 171 (West 1990) (defining foreign corporation as any corporation other than a domestic corporation).

5. CAL. REV. & TAX. CODE § 23331(a) (West 1992). The certificate of withdrawal is to be filed in the office of the Secretary of State. *Id.*

6. See CAL. CORP. CODE § 1905(a)-(d) (West Supp. 1992) (describing the content and filing procedure for a certificate of dissolution).

7. CAL. REV. & TAX. CODE § 23334 (West 1992). The tax clearance certificate shall indicate that the Franchise Tax Board is satisfied from the available evidence that all taxes imposed by Bank and Corporation Tax Law have been paid or secured by bond, deposit, or otherwise. *Id.*



Board<sup>8</sup> to consider the taxpayer's final return<sup>9</sup> as a request for a tax clearance.<sup>10</sup> Chapter 189 further mandates that the Franchise Tax Board provide the entity taxpayer with information<sup>11</sup> regarding documents to be filed.<sup>12</sup>

*DLR*

## **Business Associations and Professions; dental auxiliaries**

Business and Professions Code §§ 1680, 1751, 1754  
(amended).  
AB 2120 (Cortese); 1992 STAT. Ch. 196

Under existing law, specified conduct committed by persons licensed under the Dental Practice Act<sup>1</sup> is deemed unprofessional.<sup>2</sup>

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8. See *id.* § 23031 (West 1992) (defining Franchise Tax Board); see also CAL. GOV'T CODE §§ 15700-15702 (West 1992) (governing Franchise Tax Board membership, duties of the executive officer, and delegation of powers and duties).

9. See CAL. REV. & TAX. CODE § 23335(a) (enacted by Chapter 189) (providing that a taxpayer, by designating in the appropriate place on the form provided by the Franchise Tax Board, may indicate that a return is a final return).

10. *Id.*

11. See *id.* § 23335(b) (enacted by Chapter 189) (providing that the information include forms and instructions).

12. *Id.* The documents shall be filed with the Franchise Tax Board and the Secretary of State.  
*Id.*

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1. See CAL. BUS. & PROF. CODE §§ 1600-1808 (West 1990 & Supp. 1991) (establishing the Dental Practice Act).

2. *Id.* § 1680 (amended by Chapter 196). Unprofessional conduct includes, among other things: (1) Obtaining any fee by fraud or misrepresentation; (2) the aiding or abetting of any unlicensed person to practice dentistry; (3) the use of any false or fictitious name; (4) the advertising to guarantee any dental service; (5) the violation of any of the provisions of law regulating the procurement, dispensing, or administration of dangerous drugs. *Id.* § 1680 (a),(c),(f),(l),(m) (amended by Chapter 196). See also *James v. Board of Dental Examiners*, 172 Cal. App. 3d 1096, 1099, 218 Cal. Rptr. 710, 715 (1985) (holding that a dentist's negligent or incompetent conduct is not deemed unprofessional within the meaning of Business and Professions Code § 1680); *Campbell v. State Bd. of Dental Examiners*, 53 Cal. App. 3d 283, 284, 125 Cal. Rptr. 694, 697 (1975) (holding that a dentist's use of his own face in his advertising in a visual medium does not constitute unprofessional conduct within the meaning of business and Professions Code § 1680). Many states have defined unprofessional conduct in the context of a dentist's conduct; see, e.g., ARIZ. REV. STAT. ANN. § 32-1201 (1991) (stating that unprofessional conduct includes use of controlled substances, betrayal of

Under Chapter 196, the use of an unlicensed person by a licensed dentist to perform specified functions relating to dental assistance is deemed unprofessional.<sup>3</sup>

Under existing law, a dental assistant is an unlicensed person who may perform certain dental procedures.<sup>4</sup> A registered dental assistant is a person who must be licensed prior to performing certain dental procedures.<sup>5</sup> Chapter 196 requires the Board of Dental Examiners<sup>6</sup>

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a professional confidence, or intentional violation of a privileged communication except as otherwise required by law); IOWA CODE § 153.34 (1991) (providing that unprofessional conduct includes fraud or deceit in procuring the license or the renewal thereof to practice dentistry or dental hygiene); ME. REV. STAT. ANN. tit. 32, § 1100-Q (West 1991) (listing the penalties for a dentist's unprofessional conduct); NEV. REV. STAT. § 631.346 (1991) (listing the acts which constitute unprofessional conduct); N.D. CENT. CODE § 43-20-05 (1991) (listing the grounds for suspension or revocation of a dentist's license); OKLA. STAT. tit. 59, § 328.33 (1991) (providing the types of unprofessional conduct which are grounds for revocation or suspension of dental license).

3. CAL. BUS. & PROF. CODE § 1680(ee) (amended by Chapter 196). It is unprofessional for a licensed dentist to have a person perform the duties of a registered dental assistant, registered dental assistant in extended functions, registered dental hygienist, or registered dental hygienist in extended functions, if that person does not have a valid license to perform those functions at the time of initial employment. *Id.*; see CAL. CODE REGS. tit. 16, § 1067(c)-(f) (1992) (defining registered dental assistant, registered dental hygienist, registered dental assistant in extended functions, and registered dental hygienist in extended functions); *id.* § 1087 (1992) (listing the duties of a registered dental assistant in extended functions); *id.* § 1089 (1992) (listing the duties of a registered dental hygienist in extended functions); see also CAL. BUS. & PROF. CODE § 1680(p) (amended by Chapter 196) (stating that any person who violates Business and Professions Code § 1680 is guilty of a misdemeanor and shall be punished either by fine, imprisonment or both); 3 Op. Cal. Att'y Gen. 465, 468 (1980) (prohibiting a registered dental hygienist from owning and managing that portion of a dentist's practice which is limited to providing those services which a registered dental hygienist is authorized to perform).

4. CAL. CODE REGS. tit. 16, § 1067(b) (1992) (stating the procedures which may be performed by a dental assistant); *cf. id.* § 2089 (West 1990) (listing the medical services which may be rendered by medical graduates who are fulfilling postgraduate training); *id.* § 2725 (West 1990) (setting forth the services which may be rendered by nurses).

5. CAL. BUS. & PROF. CODE § 1753 (West 1991); see *id.* § 1753 (West 1987) (setting forth the licensing requirements for a dental assistant); *cf.* 16 Op. Cal. Att'y Gen. 188, 190 (1950) (stating that although a dental hygienist is considered a healing art licensee, a dental hygienist may not order laboratory tests of patients).

6. See CAL. BUS. & PROF. CODE § 1601 (West 1991) (setting forth the powers and the structure of the Board of Dental Examiners).

to adopt, and thereafter to review and update, regulations pertaining to the procedures which may be performed by both dental assistants and registered dental assistants.<sup>7</sup>

*JME*

### **Business Associations and Professions; dental risks**

Business and Professions Code §§ 1648.10, 1648.20 (new).  
SB 934 (Watson); 1992 STAT. Ch. 801

Existing law provides for the regulation of dental practice,<sup>1</sup> including requirements for examination,<sup>2</sup> admission<sup>3</sup> and licensing<sup>4</sup> of dentists.<sup>5</sup> Chapter 801 requires the Board of Dental Examiners<sup>6</sup> to develop and make available to dentists a fact sheet describing the

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7. *Id.* §§ 1751, 1754 (amended by Chapter 196). The Board of Examiners must adopt such regulations by September 15, 1993. *Id.*

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1. *See* CAL. BUS. & PROF. CODE § 1625 (West 1990) (defining dentistry).

2. *See id.* § 1621.4 (West 1990) (specifying the responsibilities and duties of the dental examining board).

3. *See id.* § 1628.5 (West 1990) (establishing the grounds or refusal for admission to dental practice).

4. *See id.* § 1628 (West 1990) (providing eligibility requirements for applicants for licensure).

5. *Id.* §§ 1600-1999 (West 1990 & Supp. 1992).

6. *See id.* §§ 1601-1620 (West 1990 & Supp. 1992) (providing for the administration of and outlining the responsibilities and duties of the Board of Dental Examiners).

advantages and risks<sup>7</sup> associated with materials<sup>8</sup> available for restoration of oral defects.<sup>9</sup>

*LGC*

**Business Associations and Professions; disciplinary investigations of attorneys and attorney-client contract disputes**

Business and Professions Code § 6086.13 (new); §§ 6086.1, 6147, 6148, 6203, 6204 (amended); Code of Civil Procedure § 1021.1 (amended).  
SB 1405 (Presley); 1992 STAT. Ch. 1265

Existing law provides that investigative reports prepared for state bar disciplinary hearings are confidential.<sup>1</sup> Chapter 1265 creates exceptions to the confidentiality rule based on the nature of the

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7. See Mark Lowey, *Mercury Leak*, CALGARY HERALD, May 23, 1992, at G9 (stating that mercury vapor escapes from restorative material in dental fillings, called amalgams, when people chew, grind or brush their teeth); THE DAILY TELEGRAPH, Apr. 14, 1992, at 15 (stating that several studies, including one in which mercury fillings were placed in sheep teeth, suggest that mercury from the fillings impairs kidney functions and accumulates in organ tissue). *But see* Board of Dental Examiners v. Hufford, 461 N.W.2d 194, 197 (Iowa 1990) (holding that except in individuals sensitive to mercury, there is no justification for the removal of mercury amalgams); *The Mercury in Your Mouth*, CONSUMER REPORTS, May 1991, at 316 (indicating that experts in biochemistry, toxicology and veterinary medicine have been highly critical of the study placing mercury amalgams in sheep teeth). See generally *Dental Options: Resin Fillings*, USA TODAY, Mar. 16, 1992, at 1D (suggesting that tooth-colored resin fillings appear to be a durable alternative to mercury amalgams).

8. See CAL. BUS. & PROF. CODE § 1648.20 (enacted by Chapter 801) (providing that materials include only structures or devices placed in the patient's mouth with the intention that they remain there beyond completion of the dental procedure).

9. *Id.* § 1648.10 (enacted by Chapter 801); cf. LA. REV. STAT. ANN. § 40:1299.131(B)(1) (West 1992) (requiring dentists to inform patients in general terms of those risks of death, brain damage, paraplegia, loss of function of an organ or limb, or disfiguring scars associated with proposed dental treatment).

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1. CAL. BUS. & PROF. CODE § 6086.1(b) (amended by Chapter 1265); see *Chronicle Publishing Co. v. Superior Court*, 54 Cal. 2d 548, 573, 354 P.2d 637, 651, 7 Cal. Rptr. 109, 123 (1960) (holding that in the interest of the public, the State Bar's need to keep preliminary disciplinary investigations of its members confidential outweighs a litigant's need for the information); CAL. ST. B. R. 8 (providing that all preliminary investigations and formal proceedings are the property of the State Bar and are confidential).

charges,<sup>2</sup> waiver by the member, or waiver by the president of the State Bar or the Chief Trial Counsel.<sup>3</sup> Chapter 1265 further provides that the State Bar must provide an annual report on the performance of the State Bar's disciplinary system.<sup>4</sup>

Existing law requires that a contingency fee<sup>5</sup> contract between an attorney and client must be in writing and contain specified information.<sup>6</sup> Further, existing law requires that if a service contract exceeds \$1,000 in cost to the client it must be in writing and contain specified information.<sup>7</sup> Chapter 1265 adds that the contingency fee

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2. See CAL. BUS. & PROF. CODE § 6086.1(a)(2)(A)-(E) (amended by Chapter 1265) (providing that hearings and records are public if: (1) They are related to involuntary inactive enrollment; (2) they are petitions for reinstatement; (3) they are related to suspension or disbarment; (4) they involve payment information for the Client Security Fund; or (5) they include an action to cease law practice).

3. *Id.* § 6086.1(a)(2), (b)(1)-(3) (amended by Chapter 1265). The Chief Trial Counsel or President of the State Bar may only waive where warranted for protection of the public. *Id.* § 6086.1(b)(2) (amended by Chapter 1265).

4. *Id.* § 6086.13(a) (enacted by Chapter 1265); *id.* § 6086.13(a)(1)-(12) (enacted by Chapter 1265) (requiring the report to contain complete and accurate descriptions of: (1) The existing backlog of disciplinary cases; (2) the number of inquiries and complaints and their disposition; (3) the number and type of matters self reported by members; (4) the number and type of matters reported by other sources; (5) the speed of handling complaints; (6) the number and type of filed notices to show outcomes; (7) the number and types of informal discipline outcomes; (8) a description of State Bar programs directed at assuring honesty and competence among attorneys; (9) a description of State Bar programs directed at preventing acts warranting discipline; (10) a description of the Client Security Fund; (11) a report on the audits and decisions of the Complainants' Grievance Panel; and (12) an accounting of the cost of the discipline system).

5. See *Severson & Werson v. Bolinger*, 1 Cal. App. 4th 417A, 1572, 1 Cal. Rptr. 2d 531, 533 (1991) (stating that in order to protect clients, attorney fee agreements are evaluated at the time of their making and must be fair, reasonable, and explained in full to the client).

6. CAL. BUS. & PROF. CODE § 6147(a)(1)-(5) (amended by Chapter 1265). The contract must include the following: (1) The contingency fee rate; (2) an explanation how costs and disbursements will affect the contingency fee and the client's recovery; (3) explanation as to any compensation to the attorney for related matter not covered by the contingency fee; and (4) a statement that the fee is negotiable and not set by law or that the fee is the maximum contingency fee and the attorney and client may negotiate a lower rate. *Id.* See TEX. GOV'T CODE ANN. § 82.065(a) (West 1992) (requiring a contingent fee contract for legal services to be in writing and signed by the attorney and client); MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 1.5(c) (1992); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 8-101(c) (1981) (requiring a contingency fee contract to be in writing and that it must show the method by which the fee will be determined).

7. CAL. BUS. & PROF. CODE § 6148(a)(1)-(3) (amended by Chapter 1265). A contract for services must contain the following: (1) The hourly rate and other standard rates, fees, and charges; (2) the general nature of the legal services being provided; and (3) the attorney and client's responsibility with respect to the contract. *Id.* See generally David M. Lester, *No Man is an Island: A Compendium of Legal Issues Confronting Attorneys When Individual Defendants are Named in an Employment Litigation Complaint*, 20 PAC. L. J. 293, 295-97, Appendix A (1989) (setting forth fee

or service contract must disclose whether the attorney maintains errors and omissions insurance and in certain circumstances,<sup>8</sup> the policy limits on that coverage.<sup>9</sup>

Existing law provides that disputes<sup>10</sup> between attorneys and their clients shall be submitted to arbitration.<sup>11</sup> Chapter 1265 provides that the willful failure of either party to participate in arbitration prohibits that party from bringing the case to trial.<sup>12</sup>

*DLR/MM*

### **Business Associations and Professions; health care providers--communicable diseases**

Business and Professions Code §§ 1680, 2221.1, 2660, 2761, 2878, 3527, 3750, 4955 (amended).  
SB 1813 (Russell); 1992 STAT. Ch. 1350

Under existing law, it is unprofessional conduct for a dentist<sup>1</sup> or dental auxiliary<sup>2</sup> to knowingly fail to follow specified infection control guidelines.<sup>3</sup> Chapter 1350 provides that a licensee must

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agreement requirements and sample fee agreement letters).

8. See CAL. BUS. & PROF. CODE § 6147(a)(6) (amended by Chapter 1265); *id.* § 6148(a)(4) (amended by Chapter 1265) (specifying that policy limits only need to be disclosed if they are less than \$100,000 per occurrence up to a maximum of \$300,000 per policy term).

9. *Id.* § 6147(a)(6) (amended by Chapter 1265); *id.* § 6148(a)(4) (amended by Chapter 1265).

10. See *id.* § 6201 (West 1987) (defining fee or cost disputes).

11. *Id.*; see *Madden v. Kaiser Found. Hosp.*, 17 Cal. 3d 699, 706, 552 P.2d 1178, 1182, 131 Cal. Rptr. 882, 886 (1976) (stating that arbitration is an accepted and favored method of resolving disputes). See generally Barry S. Martin, *Suing the Client*, 6 CAL. LAW., at 23 (Feb. 1986) (noting that arbitration under the auspices of the State Bar and local bar association is the most common way to collect disputed fees in California).

12. CAL. BUS. & PROF. CODE § 6204(a) (amended by Chapter 1265).

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1. See CAL. BUS. & PROF. CODE § 1601.5 (West 1990) (defining practicing dentist); see also *id.* § 1625 (West 1990) (defining the practice of dentistry).

2. See *id.* § 1741 (West 1990) (defining dental auxiliary).

3. *Id.* § 1680 (amended by Chapter 1350). It is unprofessional to knowingly fail to protect patients by failing to follow infection control guidelines of the Board of Dental Examiners. *Id.* Many states regulate communicable diseases in order to prevent or control their spread. See, e.g., KAN. STAT. ANN. § 75-5604 (1991) (establishing various departments which have the purpose of

follow the infection control guidelines of the Board of Dental Examiners<sup>4</sup> in order to avoid unprofessional conduct.<sup>5</sup>

Under existing law, the Board of Registered Nursing<sup>6</sup> and the Board of Vocational Nurses and Psychiatric Technician Examiners<sup>7</sup> are authorized to discipline licensees who knowingly fail to follow certain infection control guidelines.<sup>8</sup>

Under Chapter 1350, the Board of Podiatric Medicine<sup>9</sup> is entitled to take disciplinary action against persons licensed under that board who knowingly fail to follow specified infection control guidelines.<sup>10</sup> Additionally, Chapter 1350 authorizes the Physical Therapy Examining Committee<sup>11</sup> to discipline licensees who knowingly fail to follow the infection control guidelines.<sup>12</sup>

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controlling communicable diseases); OHIO REV. CODE ANN. § 3709.22 (Anderson 1989) (providing that each board of health of a city or health district must study and record the prevalence of disease within its district with the purpose of controlling communicable diseases); S.C. CODE ANN. § 57-32-30 (Law. Co-op. 1990) (requiring local school boards to implement comprehensive education programs to prevent and control the spread of communicable diseases); S.D. CODIFIED LAWS ANN. § 34-22-8 (1990) (requiring the state department of health to create a division for communicable disease control).

4. See CAL. BUS. & PROF. CODE § 1601 (West 1990) (establishing the Board of Dental Examiners and providing for its duties and functions).

5. *Id.* § 1680 (dd) (amended by Chapter 1350); cf. CAL. CODE REGS. tit. 17, § 2500 (1992) (stating that all health care providers must notify the local health department of all persons suspected to be suffering from a communicable disease); *id.* (listing all communicable diseases); *id.* tit. 3, § 603 (1992) (providing that all persons who handle milk and milk products are required to exercise scrupulous cleanliness in order to avoid the spread of communicable diseases).

6. See CAL. BUS. & PROF. CODE §§ 2710-2716 (West 1990 & Supp. 1992) (establishing the Board of Registered Nursing, and providing the Board's functions and duties).

7. See *id.* §§ 2890-2895 (West 1990 & Supp. 1992) (establishing the Board of Vocational Nurses and Psychiatric Technician Examiners and providing the functions and duties of the Board).

8. *Id.* § 4540 (West 1990).

9. See *id.* § 2461 (West 1990) (defining podiatry).

10. *Id.* § 2221.1(a) (amended by Chapter 1350).

11. See *id.* §§ 2602-2615 (West 1990 & Supp. 1992) (establishing the Physical Therapy Examining Committee and providing the Committee's duties and functions).

12. *Id.* § 2660 (amended by Chapter 1350). Numerous law review articles have been written on the subject of the implementation of infection control guidelines both in the work place and in the public sector. See, e.g., Symposium, *AIDS and the Right and Obligations of Health Care Workers: The AIDS Project: Creating a Public Health Policy -- Rights and Obligations of Health Care Workers*, 48 MD. L. REV. 93 (1989); Deborah Jones Merritt, *Communicable Disease and Constitutional Law: Controlling AIDS*, 61 N.Y.U. L. REV. 739 (1986); Jefferey W. Cavender, Note, *AIDS in the Health Care Setting: the Congressional Response to the Kimberly Bergalis Case*, 26 GA. L. REV. 539 (1992); Joseph Reiner, Comment, *AIDS Discrimination by Medical Care Providers: Is Washington Law an Adequate Remedy?*, 63 WASH. L. REV. 701 (1988).

Under existing law, the Physician Assistant Examining Committee,<sup>13</sup> the Respiratory Care Examining Committee,<sup>14</sup> and the Acupuncture Committee<sup>15</sup> are authorized to discipline licensees for unprofessional conduct.<sup>16</sup> Chapter 1350 expands the definition of unprofessional conduct to include the knowing failure of a licensee to protect patients by failing to follow certain infection control guidelines.<sup>17</sup>

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### **Business Associations and Professions; home design damage--release of architectural plans**

Business and Professions Code § 5536.3 (new).  
AB 2456 (Klehs); 1992 STAT. Ch. 859.

Under existing law, architects are not liable for damage caused by the subsequent unauthorized changes to or use of their plans, provided that the architectural service rendered was not a proximate cause of the damage.<sup>1</sup> Chapter 859 provides for the release of architectural building plans to verify the fact and amount of damage

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13. See CAL. BUS. & PROF. CODE §§ 3504-3512 (West 1990) (establishing the Physician Assistant Examining Committee and providing its functions and duties).

14. See *id.* §§ 3710-3722 (West 1990 & Supp. 1992) (establishing the Respiratory Care Examining Committee and explaining its duties and functions).

15. See *id.* §§ 4928-4934 (West 1990 & Supp. 1992) (establishing the Acupuncture Committee and providing the Committee's duties and functions).

16. *Id.* § 4955 (amended by Chapter 1350).

17. *Id.* § 4955(j) (amended by Chapter 1350); see CAL. HEALTH & SAFETY CODE § 1250.11 (West 1991); CAL. LAB. CODE § 6300 (West 1991) (providing the infection control guidelines which must be adhered to by licensees licensed under California Business and Professions Code § 4955).

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1. CAL. BUS. & PROF. CODE § 5536.25(a) (West Supp. 1992). The exemption from liability applies only to a licensed architect who signs and stamps plans, specifications, or documents. *Id.* The signing and stamping of plans does not impose a legal duty or responsibility upon the person signing the plans to observe the construction of the subject of the plans. *Id.* § 5536.25(b) (West Supp. 1992). However, an architect and a client may enter into a contractual agreement which includes an arrangement for the provision of construction observation exercises. *Id.*



to residential real property<sup>2</sup> from a natural disaster<sup>3</sup> for insurance purposes.<sup>4</sup> Under Chapter 859, if the damage may be covered by one or more insurance policies, any architect or other person who has prepared plans for the construction or remodeling of the real property, must, upon request, release a copy of the plans to the homeowner's insurer or the homeowner.<sup>5</sup> Chapter 859 prohibits a homeowner from using the plans to rebuild without the prior written consent of the architect or other person who prepared the plans.<sup>6</sup> If the homeowner uses the plans to rebuild without the architect's prior written consent, the architect is not liable to any person.<sup>7</sup>

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**Business Associations and Professions; interim alcoholic beverage permits**

Business and Professions Code §§ 23322, 23960, 24048.1, 24048.2, 24048.3, 24048.4 (repealed); § 24044.5 (new); §§ 23056, 24045, 24048, 24049.5 (amended).  
AB 2858 (Floyd); 1992 STAT. Ch. 838

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2. See CAL. BUS. & PROF. CODE § 5536.3(e) (enacted by Chapter 859) (defining residential real property as a single family structure, whether or not owner-occupied).

3. See *id.* § 5536.3(a) (enacted by Chapter 859) (requiring the state Governor to have declared a natural disaster).

4. *Id.* See generally *Garamendi Announces Actions In Response To Oakland Fire Insurance Controversy*, 1992 BUSINESS WIRE INC., Apr. 9, 1992 available in LEXIS, Nexis Library, Wires file (describing insurance claim settlement problems caused by the discrepancy in property values assigned by fire victims and insurance companies, with fire victims reporting an average home loss of \$384,000, while insurers reported an average loss of \$215,000, and only 30% of claimants having reported being paid in full for their losses).

5. CAL. BUS. & PROF. CODE § 5536.3(a) (enacted by Chapter 859). An authorized agent of either the homeowner or the insurer may receive the plans. *Id.* (enacted by Chapter 859). The homeowner, insurer, or authorized agent receiving the plans must verify that the plans will be used solely for the purposes of verifying the fact and amount of damage for insurance purposes. *Id.*

6. *Id.* § 5536.3(b) (enacted by Chapter 859).

7. *Id.* § 5536.3(c) (enacted by Chapter 859).

Existing law authorizes the Department of Alcoholic Beverage Control (Department)<sup>1</sup> to issue licenses<sup>2</sup> for the retail sale<sup>3</sup> of alcoholic beverages.<sup>4</sup> Under existing law, the Department may issue a temporary retail permit to a transferee of any license for the continued sale of alcoholic beverages under certain conditions.<sup>5</sup>

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1. See CAL. BUS. & PROF. CODE §§ 23049-23055 (West 1985) (describing the duties and authority of the Department of Alcoholic Beverage Control).

2. See *id.* § 23044 (West 1985) (defining license as a license issued by the Department of Alcoholic Beverage Control).

3. See *id.* § 23026 (West 1985) (defining retail sale as the sale by an on or off-sale licensee for consumption and not for re-sale).

4. *Id.* § 23051 (West 1985); see *id.* § 23004 (West 1985) (defining alcoholic beverage as a beverage consisting of or containing alcohol, spirits, beer, or wine in such quantity as to exceed one-half of one percent alcohol by volume, which is fit for consumption alone or when diluted); *id.* § 23300 (West 1985) (stating that no person may exercise rights or privileges conferred by an alcoholic beverage license unless that person has been issued a license); *id.* § 23301 (West 1992) (providing that failure to obtain a license is a misdemeanor); 14 Cal. Op. Att'y Gen. 93, 96 (1949) (stating that the determination of whether premises shall be used for the sale of intoxicating beverages is within the power of the Board of Equalization [now the Department of Alcoholic Beverage Control]); see also CAL. CONST. art. XX, § 22 (providing that the Department has the power to deny or suspend any alcoholic beverage license upon a determination of good cause for such action); CAL. BUS. & PROF. CODE §§ 23355-23405.2 (West 1985 & Supp. 1992) (listing the various types of licenses available under state law); *id.* § 24200 (West 1985) (listing the grounds on which revocation of licenses are proper); *Boreta Enter., Inc. v. Alcoholic Beverage Control Bd.*, 2 Cal. 3d 85, 90, 465 P.2d 1, 3, 84 Cal. Rptr. 113, 116 (1970) (providing that the good cause requirement mandates that the decision to revoke a license cannot be an abuse of the Department's discretion); *Yu v. Alcoholic Beverage Control Appeals Bd.*, 3 Cal. App. 4th 286, 296, 4 Cal. Rptr. 2d 280, 286 (1992) (providing that no determination of fault on the part of licensees is necessary for the Department to revoke the privileges of an alcoholic beverage license); *Reimel v. Alcoholic Beverage Control Bd.*, 263 Cal. App. 2d 706, 709, 69 Cal. Rptr. 744, 746 (1968) (stating that courts will permit the Department to administer the alcoholic beverage law with minimal judicial interference, and that an abuse of discretion must clearly appear before a court will intervene in the process); *Jacques, Inc. v. State Bd. of Equalization*, 155 Cal. App. 2d 448, 458, 318 P.2d 6, 13 (1957) (providing that the Department has broad discretion to determine what constitutes good cause, and has the power to determine when a license would be contrary to public welfare and morals). See generally Janet Kiholm Smith, *An Analysis of State Regulations Governing Liquor Store Licenses*, 25 J. L. & ECON. 301, 302-19 (1982) (reviewing liquor regulations and setting forth an economical analysis of liquor license laws). An applicant for a retail alcoholic beverage license must complete a written application and submit it to the Department to begin the licensing process. CAL. BUS. & PROF. CODE § 23950 (West 1985); see *id.* §§ 23951-23955.5 (West 1985) (setting forth the content of the application). The applicant must also post notice of the pending license in a conspicuous place on the premises. *Id.* § 23985 (West 1985). Furthermore, the applicant must mail notice of the application to every resident within five-hundred feet radius of the premises. *Id.* § 23985.5 (West 1985). Finally, the prospective licensee must publish notice of the application in a general circulation newspaper. *Id.* § 23986(a) (West 1985).

5. CAL. BUS. & PROF. CODE § 24045.5 (West Supp. 1992); see *id.* §§ 24045.2-24045.3 (West 1985) (authorizing the issuance of special temporary retail package off-site beer and wine licenses); cf. FLA. STAT. ANN. § 561.331(1) (West Supp. 1992) (providing for the issuance of temporary licenses to transferees). In order to qualify for a temporary retail sales license, the premises

Chapter 838 authorizes the Department to issue interim retail permits<sup>6</sup> to persons applying for any retail licenses: (1) If protests<sup>7</sup> were filed following application for the license; (2) the department has found no ground warranting rejection<sup>8</sup> of the application during its investigation; and (3) the applicant has applied for an alcoholic beverage license for the premises and paid a \$100 fee.<sup>9</sup>

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must have been operated under an alcoholic beverage license within thirty days of the filing for the temporary permit. CAL. BUS. & PROF. CODE § 24045.5(a) (West Supp. 1992). Additionally, the license must have been surrendered pursuant to department policies, and the applicant must file a transfer application and pay a fee. *Id.* § 24045.5(b)-(d) (West Supp. 1992).

6. See CAL. BUS. & PROF. CODE § 24044.5(b) (enacted by Chapter 838) (describing interim retail permits).

7. See *id.* § 24013 (West Supp. 1992) (describing the protest process); see also *id.* § 24014 (West 1985) (requiring that all protests be verified).

8. See *id.* § 24200 (West 1985) (providing the grounds for the revocation or suspension of a license); see also *id.* § 24013 (West Supp. 1992) (stating that the Department may, upon receipt of a protest, choose whether to hold hearings on the validity of the protest or reject the protest outright); *id.* § 24015 (West 1985) (providing for scheduling of protest hearings).

9. *Id.* § 24044.5(a) (enacted by Chapter 838); cf. FLA. STAT. ANN. § 561.181(1)(a) (West 1987) (authorizing the issuance of temporary initial licenses upon application for some type of permanent alcoholic beverage license). The interim permit is valid for a maximum of 120 days, and can be extended for the same period upon compliance with departmental regulations and repayment of the application fee. CAL. BUS. & PROF. CODE § 24044.5(b) (enacted by Chapter 838). The issuance of a license to the holder of a temporary permit is not to be approved until the applicant has filed a statement executed under penalty of perjury that all current obligations have been discharged and that the applicant's outstanding checks in payment of alcohol will be honored. *Id.* § 24044.5(c) (enacted by Chapter 838). The Department's refusal to issue an interim permit may not be appealed. *Id.* § 24044.5(g) (enacted by Chapter 838). Under Chapter 838, the Department is empowered to revoke any interim permit for good cause. *Id.* § 24044.5(h) (enacted by Chapter 838).

## Business Associations and Professions; intoxication of physician--misdemeanor

Business and Professions Code § 2240 (amended).  
SB 1876 (Deddeh); 1992 STAT. Ch. 979

Under existing law, physicians,<sup>1</sup> surgeons,<sup>2</sup> and podiatrists<sup>3</sup> who are in actual attendance<sup>4</sup> of a patient while intoxicated<sup>5</sup> are guilty of unprofessional conduct<sup>6</sup> and subject to discipline by the

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1. See CAL. HEALTH & SAFETY CODE § 7186(g) (West Supp. 1992) (defining physician as a physician and surgeon licensed by the Medical Board of California or the Osteopathic Medical Board of California); *Ex parte Rust*, 181 Cal. 73, 75, 183 P. 548, 549 (1919) (defining "physician and surgeon" as a person qualified in the art of healing or alleviating the disorders of the human body); *cf. Millsap v. Alderson*, 63 Cal. App. 518, 525, 219 P. 469, 472 (1923) (defining "physician and surgeon" as a person holding an unrevoked, unlimited certificate from the board of medical examiner to treat the sick and afflicted); 36 CAL. JUR. 3d *Healing Arts and Institutions* § 2, at 114 (1977) (defining a "physician and surgeon" as a person qualified in the art of healing or alleviating the disorders of the human body).

2. See CAL. BUS. & PROF. CODE § 2051 (West 1990) (authorizing persons holding physician's and surgeon's certificates to practice medicine); BLACK'S LAW DICTIONARY 1442 (6th ed. 1990) (defining surgeon as one whose profession or occupation is to cure diseases, defects, or injuries of the body by manual operation).

3. See 36 CAL. JUR. 3d *Healing Arts and Institutions* § 4, at 116 (1977) (defining podiatry as the diagnosis and medical, surgical, mechanical, manipulative, and electrical treatment of the human foot, including nonsurgical treatment of the muscles and tendons of the leg governing the functions of the foot, but excluding amputations and the use of any anesthetic except local anesthetics).

4. See CAL. HEALTH & SAFETY CODE § 7186(a) (West Supp. 1992) (defining attending physician).

5. See CAL. BUS. & PROF. CODE § 2240 (amended by Chapter 979) (defining intoxicated as intoxication to an extent that impairs a physician's or surgeon's ability to practice medicine).

6. See *id.* § 2234(a)-(f) (West 1990) (defining unprofessional conduct); CAL. CIV. CODE § 3333.2(c)(2) (West Supp. 1992) (defining professional negligence); *Grannis v. Board of Medical Examiners*, 19 Cal. App. 3d 551, 563, 96 Cal. Rptr. 863, 872 (1971) (holding that the Board of Medical Examiners could discipline a medical doctor for unprofessional conduct where the doctor's alcoholism could impair her judgment in treating patients); see also 36 CAL. JUR. 3d *Healing Arts and Institutions* § 80, at 227 (1977) (providing a general description of what constitutes unprofessional conduct for physicians and surgeons); *id.* § 81, at 231 (specifying what acts constitute criminal acts for physicians and surgeons); *id.* § 97, at 260 (specifying what constitutes unprofessional conduct for a podiatrist); *Colorado State Bd. of Medical Examiners v. Hoffner*, 832 P.2d 1062, 1069 (Colo. App. 1992) (holding that the State Board of Medical Examiners could revoke a physician's license for habitual intemperance which constituted unprofessional conduct). Compare COLO. REV. STAT. 12-36-117(1)(i) (1991) (providing that habitual intemperance constitutes unprofessional conduct) with MD. ANN. CODE §§ 14-404(7), 14-404(9)(i) (Supp. 1992) (providing that the State Board of Physician Quality Assurance may revoke a physician's license for unprofessional conduct resulting from habitual intoxication or for rendering professional services

Division of Medical Quality.<sup>7</sup> Chapter 979 provides that a physician or surgeon who is intoxicated while in actual attendance of a patient is additionally guilty of a misdemeanor.<sup>8</sup>

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## **Business Associations and Professions; licensing**

Business and Professions Code §§ 125.95, 7591.14, 7591.15, 7591.16 (repealed); §§ 2816, 2817, 2818, 2819 (repealed and new); §§ 145, 146, 147, 148, 149, 166, 6980.29, 6980.33, 6980.35 (new); §§ 2733, 5000, 6980.2, 7517, 7517.1, 7523, 7550.31, 7591.17, 7591.18, 7593.6, 7594.5, 7598.17, 7599.54, 9801, 9803, 9805, 9807, 9808, 9891.27, 9891.35, 9891.42, 19170.5, 19213.1 (amended); Government Code §§ 19230, 19231, 19232, 19233, 19234, 19235, 19236, 19237, 19238, 19239, 19240, 19241 (repealed); §§ 15372.10, 15372.11, 15372.12, 15372.13, 15372.14, 15372.15,

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while under the influence of alcohol).

7. CAL. BUS. & PROF. CODE § 2240 (amended by Chapter 979); *see id.* § 2227(a)(1)-(5) (West Supp. 1992) (stating that disciplinary action may include revocation of license, suspension of license, probation, or public reprimand). The Division of Medical Quality was formed as one of the three divisions of the Medical Board of California. *Id.* § 2003 (West 1990); *see id.* §§ 2320-2336 (West 1990 & Supp. 1992) (creating the Division and specifying its authorities and duties). The Division is responsible for administering and enforcing the disciplinary and criminal provisions of the Medical Practice Act. *Id.* § 2004 (West 1990); *see id.* § 2340 (West 1990) (providing that intent of the Legislature is that the Medical Board of California should try to identify and rehabilitate any physician or surgeon suffering from impairment due to alcohol); *see also* Grannis v. Board of Medical Examiners, 19 Cal. App. 3d 551, 568, 96 Cal. Rptr. 863, 871 (1971) (holding that a physician convicted of misdemeanor drunk driving was not subject to a second misdemeanor for unprofessional conduct involving the use of alcoholic beverages).

8. CAL. BUS. & PROF. CODE § 2240 (amended by Chapter 979). The violation is punishable by a fine between \$200 and \$1200, or by imprisonment of 60 and 180 days. *Id.* § 2315 (West 1990). *See generally* SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1876, at 2 (Apr. 28, 1992) (stating that one possible purpose of Chapter 979 is to make the penalty more severe for the unauthorized practice of medicine). According to the Medical Board of California, under current laws District Attorneys are unable to prosecute persons practicing without a license unless the District Attorneys can show that the person charged actually caused "great bodily harm, serious physical or mental illness, or death." *Id.* at 3; *see* People v. Superior Court, 24 Cal. 3d 428, 435, 595 P.2d 139, 142, 155 Cal. Rptr. 704, 708 (1979) (holding that dispensing, prescribing, or furnishing drugs without a good faith examination did not constitute unprofessional conduct, and was not a misdemeanor under Business and Professions Code § 2426).

15372.16, 15372.17, 15372.18, 15372.19, 15372.20, 15372.21 (new); Health and Safety Code §§ 604, 605, 607 (repealed); Penal Code §§ 466.6, 466.8 (amended).  
SB 2044 (Boatwright); 1992 STAT. Ch. 1135.

Prior law authorized the Department of Consumer Affairs (DCA)<sup>1</sup> to establish an administrative citation system for illegal and unlicensed activity.<sup>2</sup> Under existing law, unlicensed activity in certain enumerated professions is punishable as a misdemeanor.<sup>3</sup>

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1. See CAL. BUS. & PROF. CODE §§ 100, 101 (West 1991 & Supp. 1992) (creating the DCA and outlining its composition).

2. 1986 Cal. Stat. ch. 1379, sec. 2, at 4924 (enacting CAL. BUS. & PROF. CODE § 125.95); see CAL. BUS. & PROF. CODE § 125.9 (West Supp. 1992) (outlining a system for the issuance of citations to licensees).

3. See CAL. BUS. & PROF. CODE § 2670 (West 1990) (providing that practicing physical therapy without a license is punishable as a misdemeanor); *id.* § 2970 (West 1990) (providing that practicing psychology or psychotherapy without a license is punishable as a misdemeanor); *id.* § 3763 (West 1990) (providing that practicing respiratory care without a license is punishable as a misdemeanor); *id.* § 4831 (West 1990) (providing that practicing veterinary medicine without a license is punishable as a misdemeanor); *id.* § 4983 (West 1990) (providing that practicing family counseling without a license is punishable as a misdemeanor); *id.* § 5120 (West 1990) (providing that practicing accounting without a license is punishable as a misdemeanor); *id.* § 5536 (West 1990) (providing that practicing architecture without a license is punishable as a misdemeanor); *id.* § 6787 (West Supp. 1992) (providing that practicing civil, electrical, or mechanical engineering without a license is punishable as a misdemeanor); *id.* § 6980.34 (West Supp. 1992) (providing that practicing as locksmith without a license is punishable a misdemeanor); *id.* § 7320 (West Supp. 1992) (providing that practicing cosmetology without a license is punishable as a misdemeanor); *id.* § 7502.1 (West Supp. 1992) (providing that practicing as a reposessor without a license is punishable as a misdemeanor); *id.* § 7592.2 (West Supp. 1992) (providing that practicing as an alarm company operator without a license is punishable as a misdemeanor); *id.* § 7719 (West Supp. 1992) (providing that practicing as an embalmer or a funeral director without a license is punishable as a misdemeanor); *id.* § 7872 (West Supp. 1992) (providing that practicing geology or geophysics without a license is punishable as a misdemeanor); *id.* § 8019 (West Supp. 1992) (providing that practicing shorthand reporting without a license is punishable as a misdemeanor); *id.* § 8553 (West Supp. 1992) (providing that practicing structural pest control without a license is punishable as a misdemeanor); *id.* § 9681 (West 1975) (providing that practicing as a cemetery broker without a license is punishable as a misdemeanor); *id.* § 9850 (West 1975) (providing that practicing as an electronic repair dealer without a license is punishable as a misdemeanor); *id.* § 9889.20 (West Supp. 1992) (providing that practicing automotive repair without a license is punishable as a misdemeanor); *id.* § 9891.24 (West 1975) (providing that practicing as a tax preparer without a license is punishable as a misdemeanor); *id.* § 19220 (West 1975) (providing that practicing as a home furnishing professional without a license is punishable as a misdemeanor). Chapter 1135 does not repeal or amend any of the previously listed sections. *Id.* § 146(c) (enacted by Chapter 1135).

Chapter 1135 specifies that unlicensed activity violations<sup>4</sup> in those professions are punishable as infractions.<sup>5</sup>

Chapter 1135 further empowers specific agencies<sup>6</sup> to issue citations if the agency has probable cause<sup>7</sup> to believe a person is advertising services in a telephone directory without being properly licensed or registered.<sup>8</sup> Chapter 1135 additionally mandates that the Director of the Department of Consumer Affairs (Director)<sup>9</sup> develop guidelines to ensure that mandatory continuing education is used to create a more competent licensed population.<sup>10</sup> Chapter 1135 makes

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4. See *id.* § 146(2)(c) (enacted by Chapter 1135) (listing the sections in the Business and Professions Code which require registration, licensure, certification, or other authorization in order to engage in specified businesses or professions).

5. *Id.* § 146(d) (enacted by Chapter 1135); see CAL. PENAL CODE § 17 (West Supp. 1992) (defining a misdemeanor as a crime which is punishable by imprisonment in state prison or county jail or by fine and which meets certain other qualifications); *id.* § 19.2 (West Supp. 1992) (providing that the punishment for a single misdemeanor may not exceed a prison or jail term of more than one year); B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW § 76, at 92-3 (2nd ed. 1988) (summarizing the statutory test for misdemeanors in California, and providing the differences between misdemeanors and felonies); see CAL. PENAL CODE § 17(a) (West Supp. 1992) (defining an infraction as a crime or public offense which is not a felony or misdemeanor). Whether a crime is defined as an infraction instead of a misdemeanor is significant for the following reasons: (1) A person charged with an infraction is not entitled to a jury trial; (2) a person charged with an infraction is not entitled to the appointment of a public defender; and (3) statutes may provide that commissioners and hearing officers may hear and determine certain infraction cases. *Id.* § 19.6 (West Supp. 1992). Infractions for a violation of Chapter 1135 carry a fine of \$250 to \$1,000. CAL. BUS. & PROF. CODE § 146(d) (enacted by Chapter 1135). Chapter 1135 also specifies that surveying land without a license is punishable as an infraction. *Id.* § 146(c)(16) (enacted by Chapter 1135). Existing law has no provision specifying that practicing as a land surveyor without a license is punishable as a misdemeanor. *Id.* §§ 8700-8805 (West 1975 & Supp. 1992).

6. See CAL. BUS. & PROF. CODE § 149(e)(1)-(12) (enacted by Chapter 1135) (listing the agencies which may issue citations).

7. See WAYNE K. L. LAFAYE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 3.1, at 138-54 (2nd ed. 1992) (discussing the meaning of probable cause).

8. CAL. BUS. & PROF. CODE § 149(a) (enacted by Chapter 1135).

9. See *id.* § 23.5 (West 1990) (establishing the duties of the director of the Department of Consumer Affairs).

10. *Id.* § 166 (enacted by Chapter 1135); see *id.* § 166(a) (enacted by Chapter 1135) (specifying the areas that the Director's guidelines for mandatory education programs must address in order to ensure the creation of a more competent licensing population).

various other changes in licensing for locksmiths,<sup>11</sup> tax preparers,<sup>12</sup> and alarm company operators<sup>13</sup> in order to enhance and strengthen enforcement action against illegal and unlicensed activity.<sup>14</sup> Chapter 1135 was enacted to prevent unlicensed activity,<sup>15</sup> which the Legislature finds to be a threat to the health and safety of this state, by providing sufficient, effective, and responsible means to enforce the licensing laws of California.<sup>16</sup>

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## **Business Associations and Professions; licensing and regulation of marriage, family and child counselors**

Business and Professions Code §§ 728, 4980.43, 4980.45,  
4982 (amended); Civil Code § 43.93 (amended).  
SB 1394 (Torres); 1992 STAT. Ch. 890

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11. See *id.* § 6980.2 (amended by Chapter 1135) (defining locksmith). Existing criminal law mandates that anyone who makes a key for another capable of operating the ignition of a motor vehicle by any other method than by duplication, must obtain specific information about the person requesting the key and the motor vehicle. CAL. PENAL CODE § 466.6(a) (West 1988). Existing criminal law additionally mandates that anyone who knowingly and willfully makes a key capable of opening any door to any residence for another shall obtain specific information about the person and the residence. *Id.* § 466.8(a) (West 1988).

12. See CAL. BUS. & PROF. CODE § 9891.1 (West Supp. 1992) (defining tax preparer). Prior law stated that the maximum disciplinary cost recovery for a violation of tax preparer licensing provisions was \$500. 1973 Cal. Stat. ch. 870, sec 1, at 1586 (enacting CAL. PENAL CODE § 9891.27(b)(1)). See generally Kathy Kristof, *Finding a Tax Preparer to Fit Your Needs*, S.F. CHRON., March 2, 1992, at B5 (discussing licensing requirements for tax preparers).

13. See CAL. BUS. & PROF. CODE § 7590.2 (West Supp. 1992) (defining alarm company operator).

14. *Id.* §§ 145, 6980.29, 7523 (enacted by Chapter 1135); *id.* §§ 7591.18, 9891.42 (amended by Chapter 1135). Chapter 1135 requires that under the Business and Professions Code, a locksmith must obtain the same information when making keys for others as required under Penal Code §§ 466.6 and 466.8. *Id.* § 6980.29(a)-(b) (enacted by Chapter 1135). Chapter 1135 strengthens existing law pertaining to alarm company operators by allowing the Director of Consumer Affairs to refuse to issue a license if the applicant is the subject of any criminal investigations or disciplinary action. *Id.* § 7593.6 (enacted by Chapter 1135).

15. See *id.* § 145(a) (enacted by Chapter 1135) (limiting the scope of Chapter 1135 to licenses for professions and vocations regulated by the Department of Consumer Affairs).

16. *Id.* § 145 (a)-(c) (enacted by Chapter 1135); see SENATE COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF SB 2044, at 3 (April 6, 1992) (noting that the intent behind Chapter 1135 is to increase the effectiveness of the enforcement efforts of various licensing agencies within the Department of Consumer Affairs).



Existing law requires trainees<sup>1</sup> and interns<sup>2</sup> to obtain 3,000 hours of supervised experience before applying for licensure as marriage, family, and child counselors.<sup>3</sup> Existing law requires interns or trainees to perform services at the place where their employer regularly conducts business.<sup>4</sup> Under Chapter 890, an intern or trainee who receives no more than \$500 per month from all work settings as reimbursement for expenses actually incurred, is considered an employee and not an independent contractor.<sup>5</sup> Existing law provides that a private, licensed therapist cannot supervise more than two registered interns at one time.<sup>6</sup> Under Chapter 890, marriage, family, and child counseling corporations are also prohibited from employing more than two interns for each qualified supervisor.<sup>7</sup>

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1. See CAL. BUS. & PROF. CODE § 4980.03(c) (West 1990) (defining trainee as an individual enrolled in a master's or doctor's degree program and that are prohibited from working in a private practice). The Board of Behavioral Science Examiners currently registers and regulates trainees and interns. *Id.* § 4980.35(a)-(b) (West 1990).

2. See *id.* § 4980.03(b) (West 1990) (defining intern as a person who has completed 1500 trainee hours and who has earned a master's or doctor's degree which qualifies him or her for licensure). An intern may gain experience when employed in a private practice owned by a licensed marriage, family and child counselor, psychologist, clinical social worker, physician and surgeon, or a professional corporation. *Id.* § 4980.43(c) (amended by Chapter 890). Interns are required to register with the Board in order to be credited for post-degree hours of experience gained toward licensure. *Id.* § 4980.43(d) (amended by Chapter 890); cf. MINN. STAT. § 148B.38 (1991) (allowing students, interns, or individuals preparing for marriage and family therapy to practice under the qualified supervision of a licensed professional as long as they are designated by titles such as "student," "trainee," "intern," or other title clearly indicating training status); MASS. LAWS ANN. ch. 112, § 164 (Law. Co-op. 1992) (exempting from marriage and family therapist licensing requirements a student, intern, or trainee receiving board qualified supervision whose training status is designated by the title "intern," or a person who is issued a temporary permit by the board to engage in the activities for which a license is required).

3. CAL. BUS. & PROF. CODE § 4980.43(a).

4. *Id.* § 4980.43(g) (amended by Chapter 890). An intern employed in a private practice is required to be under the direct supervision of a licensee who is employed by and practices at the same site as the intern's employer. *Id.* § 4980.43(e) (amended by Chapter 890); see *id.* (defining licensee). Employers of interns and trainees have interpreted this requirement in a way that prevents an intern employed in private practice from seeing his or her patient in the hospital, and from making home visits as an employee of a school, governmental or nonprofit corporation. CALIFORNIA SENATE FLOOR ANALYSIS, at 2 (Mar. 23, 1992).

5. *Id.* § 4980.43(h) (amended by Chapter 890). The board may audit applicants who were reimbursed for expenses, and the applicant has the burden of demonstrating that the payments received were for reimbursement of expenses actually incurred. *Id.*

6. *Id.* § 4980.45(a) (amended by Chapter 890).

7. *Id.* § 4980.45(b) (amended by Chapter 890). A corporation may not employ more than 10 registered interns, and those who supervise interns must be employed full-time by the corporation. *Id.* Under Chapter 890, an intern or trainee who receives no more than \$500 per month for expenses

Under existing law, unprofessional conduct includes engaging or soliciting sexual relations, or committing an act of sexual abuse or misconduct with a client if that act or solicitation is related to the qualifications, duties, or functions of a marriage, family, or child counselor.<sup>8</sup> Chapter 890 expands the definition of unprofessional conduct to include engaging in sexual relations with a client or former client up to two years after therapy has concluded.<sup>9</sup>

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## **Business Associations and Professions; outdoor advertising--landscaped freeways**

Business and Professions Code § 5208.6 (new); § 5443 (amended).

AB 2795 (Floyd); 1992 STAT. Ch. 649

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actually incurred for their volunteered services is considered an employee and not an independent contractor. *Id.* § 4980.43(h) (amended by Chapter 890). The applicant has the burden of demonstrating to the Board that payments received were for expenses actually incurred. *Id.*

8. *Id.* § 4982(k) (amended by Chapter 890).

9. *Id.*; see *Waters v. Bourhis*, 40 Cal. 3d 424, 434, 709 P.2d 469, 475, 220 Cal. Rptr. 666, 673 (1985) (holding that instances of sexual conduct between a psychiatrist and a patient may give rise to a medical malpractice action, as the psychiatrist has breached a special duty owed to the patient to use due care for the patient's health in the context of the therapist-patient relationship); see also *Atienza v. Taub*, 194 Cal. App. 3d 388, 393, 239 Cal. Rptr. 454, 457 (1987) (finding that allegations of a physician's sexual misconduct provide a basis for a malpractice action only where the physician induced sexual conduct on the pretext that it was a necessary part of the therapy). See generally *Roy v. Hartogs*, 381 N.Y.S. 2d 587, 588 (1976) (holding that New York's "anti-heartbalm" statute didn't preclude a medical malpractice action based on allegations of a physician's sexual misconduct where the plaintiff was induced to have sexual intercourse with the defendant as part of her prescribed psychiatric therapy); *Block v. Ambach*, 537 N.E.2d 181, 185 (N.Y. 1989) (holding that due process requirements were satisfied by notice of professional misconduct charges against male nurse even though time periods during which he had sexual relations with certain patients and engaged in other inappropriate conduct ranged from 26 to 78 months); *Zipkin v. Freeman*, 436 S.W.2d 753, 755 (Mo. 1968) (finding that psychiatric patients have a propensity to develop strong emotional dependence upon their physicians, leading to a greater possibility of emotional exploitation).

Under existing law, an advertising display<sup>1</sup> which is primarily designed to be viewed from the main-traveled way<sup>2</sup> of a landscaped freeway<sup>3</sup> may not be placed or maintained on property adjacent to<sup>4</sup> that section of the landscaped freeway.<sup>5</sup> Further, existing law permits any county to govern where advertising displays may or may not be placed through county land use<sup>6</sup> or zoning ordinances.<sup>7</sup> Under existing law, any governmental entity<sup>8</sup> may enter into a relocation agreement with the owner or owners of advertising displays.<sup>9</sup>

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1. See CAL. BUS. & PROF. CODE § 5202 (West 1990) (defining advertising display as advertising structures and signs).

2. See *id.* § 5216.2 (West 1990) (defining a main-traveled way as the traveled section of a highway where through traffic is carried).

3. See *id.* § 5216 (West 1990) (defining landscaped freeway as a section or sections of a freeway which is or may be improved by planting ornamental vegetation which requires reasonable maintenance on at least one side of the freeway); CAL. CODE REGS. tit. 4, § 2513 (1990) (providing for the classification of landscaped freeways); *id.* § 2517 (governing the classification of displays as being viewed primarily from landscaped freeways).

4. See CAL. CODE REGS. tit. 4, § 2502(b) (1990) (defining adjacent to as meaning located within an area formed by measuring 660 feet laterally from the edge of the right-of-way of a landscaped freeway section along a line perpendicular to the centerline of the freeway).

5. CAL. BUS. & PROF. CODE § 5440 (West 1990); see *id.* § 5442 (West 1990) (providing that if the advertising sign or structure is used exclusively in the following ways, § 5440 does not apply: (a) To advertise the sale or lease of the property upon which it is placed; (b) to identify the owner of the property or the property itself; and (c) to advertise goods produced or services rendered on the property upon which it is placed); *id.* §§ 5200-5486 (West 1990 & Supp. 1992) (governing outdoor advertising displays); see also CAL. CODE REGS. tit. 4, §§ 2500-2519 (1990) (regulating outdoor advertising displays adjacent to landscaped freeways); cf. 23 U.S.C.A. § 131 (1990 & Supp. 1992) (governing the federal control of outdoor advertising); KAN. STAT. ANN. § 41-714(2) (1991); NEV. REV. STAT. § 405.020 (1991); *id.* § 405.030 (1991); S.C. CODE ANN. § 61-13-390 (1991) (prohibiting specified advertising, billboards, and signs). See generally Dean W. Knight & Sons, Inc. v. California, 155 Cal. App. 3d 300, 303, 202 Cal. Rptr. 44, 45 (1984) (holding that the California Outdoor Advertising Act regulates and establishes, on a state-wide basis, comprehensive minimum standards for outdoor advertising displays adjacent to or visible from interstate highways in conjunction with the federal Highway Beautification Act of 1965); Wayne D. Wilson, Note, *State and Local Billboard Control in California*, 11 CAL. W. L. REV. 193 (1974) (analyzing the recurrent problems with billboard legislation in California).

6. See CAL. HEALTH & SAFETY CODE § 25199.1 (West 1992) (defining land use decision).

7. See CAL. PUB. RES. CODE § 30122 (West 1986) (defining a zoning ordinance as an ordinance authorized by Government Code § 65850 or a similar ordinance enacted by a city charter). See generally 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 53 (1987) (stating that each city and county has a planning agency to prepare a comprehensive long-term general plan for physical development, and local zoning ordinances must conform to the plan).

8. See CAL. CIV. CODE § 1798.3(i) (West 1985) (defining governmental entity).

9. CAL. BUS. & PROF. CODE § 5443(b) (amended by Chapter 649). The relocation agreement must not cause a reduction in federal aid highway funds or an increase in the number of non-conforming displays. *Id.*; see *id.* § 5412 (West 1990) (authorizing local entities to enter into relocation agreements). Existing law prohibits relocation of any sign which was lawfully erected

Chapter 649 provides that the Department of Transportation<sup>10</sup> is not prohibited from allowing any advertising display to be increased in height if a noise attenuation barrier<sup>11</sup> has been placed in front of the display, as long as this action does not cause a reduction in federal aid highway<sup>12</sup> funds or an increase in the number of displays which do not conform with existing law.<sup>13</sup>

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## **Business Associations and Professions; perfusionist certification**

Business and Professions Code §§ 2590, 2591, 2592, 2593  
(new).

AB 566 (Hunter); 1992 STAT. Ch. 343

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without adequate compensation. *Id.*

10. See CAL. GOV'T CODE § 14001 (West 1992) (providing that the Department of Transportation is a division of the Business, Transportation, and Housing Agency); *id.* § 14030 (West 1992) (setting forth the powers and duties of the Department); see also CAL. STS. & HIGH. CODE § 90 (West 1990) (stating that the Department of Transportation has full possession and control of all state highways and all property and property rights acquired for state highway purposes).

11. See CAL. STS. & HIGH. CODE § 215.5(a) (West Supp. 1992) (providing for the development and implementation of noise attenuation barriers).

12. See 23 U.S.C. § 103 (1988) (providing the federal-aid system); *id.* § 104 (Supp. 1990) (governing the apportionment of federal-aid highway funds); see also 23 U.S.C.A. § 101 (West Supp. 1992) (defining federal-aid highways). In order to avoid a reduction in Federal-Aid Highway Funds, a state must provide for effective billboard control. *United Outdoor Advertising Co., Inc. v. Business, Transp., and Hous. Agency*, 44 Cal. 3d 242, 245, 746 P.2d 877, 879, 242 Cal. Rptr. 738, 741 (1988). See generally *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (holding that Congress may withhold federal highway funds as an encouragement to the states to enact higher minimum drinking ages than they would otherwise have chosen).

13. CAL. BUS. & PROF. CODE § 5443(b) (amended by Chapter 649). Any increase must only be to that height necessary to restore visibility of the display from the main-traveled way. *Id.* Under Chapter 649, the landscape requirement does not prohibit the California Department of Transportation from permitting the erection of a legally permitted sign, unless the action would cause a reduction in federal aid highway funds. ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 2795, at 1 (Mar. 30, 1992). In the past, after a noise abatement wall has been built that partially or completely covers a billboard, the California Department of Transportation has denied permission to increase the billboard's height on the basis that the freeway is landscaped and does not permit billboards. *Id.*; cf. CAL. BUS. & PROF. CODE § 5216 (West 1990) (providing that traffic noise abatement does not change the character of a freeway to a landscaped freeway).

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Under existing law, the Division of Allied Health Professions of the Medical Board of California adopts and administers regulations related to the scope of practice of medical assistants.<sup>1</sup> Chapter 343 establishes similar certification provisions with regard to the practice of perfusion.<sup>2</sup> For example, Chapter 343 provides that no person shall hold himself or herself out as a perfusionist without meeting certain education and examination requirements.<sup>3</sup>

In addition, any person enrolled in an approved perfusionist training program may practice perfusion as a student perfusionist<sup>4</sup> or perfusion intern<sup>5</sup> if under the direct supervision of a perfusionist.<sup>6</sup> Any person who completes an approved program but has not received notification of passage of the examination must identify himself or herself only as a graduate perfusionist.<sup>7</sup> Chapter 343 further declares

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1. CAL. BUS. & PROF. CODE § 2071 (West 1990); *see id.* § 2069 (West 1990) (defining medical assistant). The Board of Registered Nurses administers provisions related to the licensing and scope of practice of registered nurses and certified nurse specialists. *Id.* §§ 2725-2742 (West 1990).

2. *Id.* §§ 2590-2593 (enacted by Chapter 343); *see id.* § 2590(a) (enacted by Chapter 343) (defining perfusion). Perfusion means those functions necessary for the support, treatment, measurement, or supplementation of the cardiovascular or circulatory systems, and those functions necessary to ensure safe management of the physiological functions by monitoring the necessary parameters of those functions. *Id.* Perfusion services include extracorporeal circulation which is the diversion of a patient's blood through a heart-lung machine or similar device. *Id.* § 2590(b)(1)-(3) (enacted by Chapter 343); *see id.* § 2590(c)(1)-(5) (enacted by Chapter 343) (defining additional functions as perfusion services if performed in conjunction with the above mentioned activities).

3. *Id.* § 2590(d) (enacted by Chapter 343); *see id.* § 2590(e) (enacted by Chapter 343) (requiring graduation from an approved perfusionist training program and successful completion of the entire examination of the American Board of Cardiovascular Perfusion (Board) or its equivalent, if determined necessary by the State Department of Health Services (Department)); *id.* § 2592(b) (enacted by Chapter 343) (defining approved perfusionist training program); *see also id.* § 2590(g) (enacted by Chapter 343) (requiring continued education or certification by the Board, or the equivalent of such certification to remain a perfusionist if determined necessary by the Department). Persons may practice perfusion without completing the requirements of Chapter 343 if they are otherwise licensed, and perfusion services are consistent with their respective scopes of practice. *Id.* § 2595 (enacted by Chapter 343). Persons may practice perfusion without completing the requirements of Chapter 343 if they have practiced as a perfusionist, as of January 1, 1993, and have preperformed at least 40 cardiopulmonary bypasses since January 1, 1987. *Id.* § 2590(f) (enacted by Chapter 343).

4. *See id.* § 2593(b) (enacted by Chapter 343) (defining student perfusionist).

5. *See id.* (enacted by Chapter 343) (defining perfusion intern).

6. *Id.* § 2593(a),(c) (enacted by Chapter 343); *see id.* § 2593(c) (enacted by Chapter 343) (defining direct supervision).

7. *Id.* § 2591 (enacted by Chapter 343).

that any person who practices perfusion in violation of section 2590 of the Business and Professions Code is guilty of a misdemeanor.<sup>8</sup>

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**Business Associations and Professions; physicians and surgeons--informed consent**

Business and Professions Code §§ 2259, 2259.5 (new).  
AB 190 (Bronzan); 1992 STAT. Ch. 1140

Under existing case law, a physician must inform a patient of any material risk<sup>1</sup> of treatment of which the physician has knowledge or should have knowledge.<sup>2</sup> A physician failing to do so may be liable for those injuries which befall the patient as a result of the risk of which the patient was not warned, and if a reasonable person in the patient's situation would not have consented to the procedure if the person had been informed of the material risk.<sup>3</sup> Chapter 1140

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8. *Id.* § 2590(h) (enacted by Chapter 343). *See generally id.* § 2052 (West 1990) (establishing that anyone who practices, attempts to practice, advertises or holds himself or herself out as practicing medicine as a physician without a physician is guilty of a misdemeanor); *id.* § 2053 (West 1990) (establishing that anyone who willfully practices medicine as a physician without a license is punishable by imprisonment in county or state jail for not more than one year); Ellen L. Hodgson, *Restrictions on Unorthodox Health Treatment* 24 UCLA L. REV. 647, 656-57 (1977) (describing sanctions that are possible for practicing medicine without a license).

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1. *See Truman v. Thomas*, 27 Cal. 3d 285, 288, 611 P.2d 902, 904, 165 Cal. Rptr. 308, 311 (1980); *Smith v. Weaver*, 407 N.W.2d 174, 178 (Neb. S. Ct. 1987) (defining material risk as one which a reasonable person in the patient's position would regard as significant in making the decision to continue or forgo treatment).

2. *Cobbs v. Grant*, 8 Cal. 3d 229, 242, 502 P.2d 1, 9, 104 Cal. Rptr. 505, 513 (1972); *see* CAL. BUS. & PROF. CODE § 2257 (West 1990); CAL. HEALTH & SAFETY CODE § 1704.5 (West Supp. 1992) (providing that a physician's failure to inform breast cancer patients by means of a standardized written summary of alternative efficacious methods of treatment which may be medically viable constitutes unprofessional conduct); RESTATEMENT (SECOND) OF TORTS § 892B, cmt. i (1979) (stating that consent given without sufficient information as to the likely results of medical treatment is not valid); *see also* *Stone v. Foster*, 106 Cal. App. 3d 334, 346, 164 Cal. Rptr. 901, 914 (1980) (applying the *Cobbs* standard to cosmetic surgery).

3. *Cobbs*, 8 Cal. 3d at 245, 502 P.2d at 15, 104 Cal. Rptr. at 519; *see* ALASKA STAT. § 09.55.556(a) (1991) (providing that a health care provider may be liable for failing to obtain the informed consent of the patient); NEV. REV. STAT. § 449.740(1)(a) (1991) (requiring a physician to

requires a physician to provide a patient considering cosmetic, plastic, reconstructive, or similar surgery<sup>4</sup> with a standardized written summary<sup>5</sup> to inform the patient of all risks associated with silicone implants and injections, and collagen injections used in the surgery.<sup>6</sup>

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obtain informed consent in writing prior to inserting a breast implant into a patient); VA. CODE ANN. § 18.2-76 (Michie 1992) (requiring informed consent prior to performing an abortion); *Jamison v. Lindsey*, 108 Cal. App. 3d 223, 231, 166 Cal. Rptr. 443, 447 (1980) (providing the following as an appropriate jury instruction that is consistent with the broad duty of disclosure; "it is the duty of a physician or surgeon to disclose to the patient all relevant information to enable the patient to make an informed decision whether to seek additional treatment following surgery"). *But see* CAL. BUS. & PROF. CODE § 2397(a) (West 1990) (providing an exception to requirement of informed consent in emergency situations).

4. *See* CAL. BUS. & PROF. CODE §§ 2259(a), 2259.5(a) (enacted by Chapter 1140) (specifying that the type of surgeries covered are those utilizing silicone implants or collagen injections).

5. *See id.* §§ 2259(a), 2259.5(a) (enacted by Chapter 1140) (requiring the use of language that is simple and readily understood by a layperson). Written information prepared by the manufacturer and based on the physician insert may be substituted for the standardized written summary. *Id.* Physicians and surgeons shall not be liable for compliance with this section until the Medical Board of California publishes and distributes copies of the standardized written summaries to physicians and surgeons. *Id.* §§ 2259(g), (j), 2259.5(g), (j) (enacted by Chapter 1140). Prior to the surgery, the physician and surgeon shall note in the patients chart that the standardized written summary has been given to the patient. *Id.* §§ 2259(b), 2259.5(b) (enacted by Chapter 1140); *cf.* CAL. WELF. & INST. CODE § 5326.3 (West 1984) (requiring a treating physician to utilize the standard written consent form promulgated by the State Department of Mental Health for each patient being treated).

6. CAL. BUS. & PROF. CODE §§ 2259(a), 2259.5(a) (enacted by Chapter 1140); *cf. id.* § 2257 (West 1990) (providing a similar law regarding breast cancer treatment); *id.* § 2250 (West 1990) (providing a similar law for sterilization surgery). Completion of the written summary alone shall constitute a rebuttable presumption of informed consent. *Id.* §§ 2259(b), 2259.5(b) (enacted by Chapter 1140). Failure to note in the patients chart that the standardized written summary has been given constitutes unprofessional conduct. *Id.* §§ 2259(c), 2259.5(c) (enacted by Chapter 1140); *see* *Rosberg v. Minnesota Mining & Mfg. Co.*, 181 Cal. App. 3d 726, 731, 226 Cal. Rptr. 299, 305 (1986) (holding that a manufacturer of breast implants was not liable under a products liability theory because the manufacturer's warnings were adequate and the product's benefits outweighed its risks); *see also* Philip J. Hiltz, *Scientists Tie Breast Implant to Cancer*, N.Y. TIMES, Aug. 1, 1991, § 1, at 18, col. 1; *Doctors Urged to be Frank on Breast Implant Risk*, N.Y. TIMES, Aug. 1, 1991, § B, at 6, col. 4; Malcolm Gladwell, *Breast Implant Maker, FDA Urge Delays to Review Safety*, WASH. POST, Apr. 18, 1991, § 1, at A4 (providing a general overview of problems associated with breast implants); *cf.* MD. HEALTH-GEN. CODE ANN. § 20-114(a) (1991) (requiring a physician to inform patients of the advantages, disadvantages, and risks associated with breast implants prior to inserting breast implants); *id.* § 20-114(b) (1991) (providing the duties of the Department of Health and Mental Hygiene with regard to a standardized written summary).

## **Business Associations and Professions; prescription drugs**

Business and Professions Code § 4047.7 (repealed); § 4047.6 (amended).

AB 1226 (Hunter); 1991 STAT. Ch. 485

Existing law permits a pharmacist,<sup>1</sup> with limited exceptions, to substitute a generic drug<sup>2</sup> for a prescribed brand named drug when filling a prescription.<sup>3</sup> Under prior law, the Director of Health Services (Director)<sup>4</sup> was required to establish a formulary,<sup>5</sup> listing generic drugs which were determined to be unsafe for substitution by a pharmacist for the prescribed drug.<sup>6</sup> Prior law further required the Director to mail a copy of the formulary to each licensed pharmacist, licensed physician and surgeon, and each person licensed by the

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1. See CAL. BUS. & PROF. CODE § 4037 (West 1990) (defining registered pharmacist).

2. See *id.* § 4047.6(f) (West 1990) (defining generic drug as the chemical or generic name of those drug products having the same active chemical ingredients as the original drugs which they represent).

3. *Id.* § 4047.6(a) (amended by Chapter 485). The generic drug may only be used as a substitute for the prescribed drug if the generic drug contains the same active chemical ingredients of the same strength, quantity and dosage form as the prescribed drug. *Id.*; see *id.* § 4047.6(b) (amended by Chapter 485) (setting forth the limited exceptions where substitution is prohibited); *id.* § 4333(b) (West 1990) (requiring every pharmacy to display a notice, conspicuous to prescription drug consumers, concerning the possibility of generic drug product selections). Many states allow pharmacists to substitute a generic drug for a prescribed drug. See, e.g., ALASKA STAT. § 08.80.295 (1991); ARIZ. REV. STAT. ANN. § 32-1963.01 (1991); NEV. REV. STAT. § 639.2583 (1991). See also 21 U.S.C. § 321(g)(1) (1991) (defining drug, and providing that a generic drug product is also a drug); *United States v. Generix Drug Corp.*, 460 U.S. 453, 460 (1983) (holding that because a generic drug is a drug within the meaning of 21 U.S.C. § 321(g)(1), the statutory prohibition against the marketing of a new drug without prior FDA approval also applies to generic drugs).

4. See CAL. HEALTH & SAFETY CODE §§ 102, 103 (West 1990) (stating the powers and duties of the Director of Health Services).

5. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 485 (1st ed.) (defining formulary as a book containing a list of medicinal substances and formulas).

6. 1991 Cal. Legis. Serv. ch. 359, sec. 30, at 1746 (West) (amending CAL. BUS. & PROF. CODE § 4047.7); see CAL. CODE REGS. tit. 17, § 10417 (1992) (specifying the procedure for adding or deleting a generic drug from the negative formulary list). But see 75 Cal. Op. Att'y Gen. 41, 46 (1992) (stating that an out-of-state pharmacy which is registered in California as a nonresident pharmacy may substitute generic drugs which are listed on the negative drug formulary when filling prescriptions and mailing them to people in California, without violating the former Business and Professions Code § 4047.7).



Osteopathic Medical Board of California.<sup>7</sup> Chapter 485 eliminates the requirement that the Director establish the drug formulary.<sup>8</sup>

*JME*

## **Business Associations and Professions; private works of improvement--retention of funds**

Civil Code §§ 3260 (amended).  
AB 1352 (Eastin); 1991 STAT. Ch. 387

Existing law specifies that an owner<sup>1</sup> must release retention proceeds<sup>2</sup> withheld from an original contractor<sup>3</sup> under the terms of a contract<sup>4</sup> for the construction of any private work of improvement<sup>5</sup> within forty-five days of the issuance of a certificate of occupancy.<sup>6</sup> Chapter 387 requires an owner to pay a contractor the retention

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7. 1991 Cal. Legis. Serv. ch. 359, sec. 30, at 1746 (West) (amending CAL. BUS. & PROF. CODE § 4047.7); *see* CAL. BUS. & PROF. CODE § 2099.5 (West Supp. 1992) (stating the requirements which must be satisfied in order to obtain osteopathic surgeon or physician certification).

8. 1992 Cal. Stat. ch. 485, sec. 2, at \_\_\_\_ (repealing CAL. BUS. & PROF. CODE § 4047.7).

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1. *See* CAL. CIV. CODE. § 3092(g) (West 1974) (defining owner as a person owning an interest or estate in a building, improvement or structure who causes it to be altered, repaired, or structured).

2. *See* HAROLD D. HAUF, BUILDING CONTRACTS FOR DESIGN & CONSTRUCTION 121 (2d ed. 1976) (explaining the practice of retaining proceeds). Retention proceeds are derived from the practice of withholding a certain percentage of the money due a contractor for work already performed as a guarantee against failure to complete the contracted work or to ensure that the completed work is satisfactory. *Id.*

3. *See* CAL. CIV. CODE. § 3095 (West 1974) (defining original contractor as a contractor who has a direct contractual relationship with the owner).

4. *See id.* § 3088 (West 1974) (defining contract).

5. *See id.* § 3106 (West 1974) (defining work of improvement as a construction, alteration, addition to, or repair of, among other things, any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, or railroad).

6. *Id.* § 3260(c) (amended by Chapter 387); *see id.* § 3260(a) (amended by Chapter 387) (limiting this section to contracts made on or after July 1, 1993); CAL. GOV'T CODE § 66007(e) (West Supp. 1992) (providing that a certificate of occupancy must have the same meaning as described in the California Uniform Building Code §§ 305 through 307); CAL. UNIF. BLDG. CODE §§ 305-306 (1991) (defining and specifying the required contents of a certificate of occupancy).

withheld by the owner within forty-five days following the date of completion<sup>7</sup> of a private work of improvement.<sup>8</sup>

*DCHIV*

## **Business Associations and Professions; real estate brokers-- transfer of negotiable instruments**

Business and Professions Code § 10233.2 (new).  
SB 1520 (Johnston); 1992 STAT. Ch. 158

Under existing law, delivery<sup>1</sup> of a promissory note<sup>2</sup> to a lender is necessary to effect transfer of the negotiable instrument.<sup>3</sup> Chapter 158 provides that where a real estate broker<sup>4</sup> negotiates a loan or sells a promissory note, the deed of trust or other instrument

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7. See CAL. CIV. CODE § 3260(c)(1)-(3) (amended by Chapter 387) (defining date of completion). The date of completion is the date that: (1) A public agency issuing the building permit issues a certificate of occupancy covering the work; (2) a notice of completion is recorded; or (3) the work is completed as defined by § 3086. *Id.*; see CAL. UNIF. BLDG. CODE § 308 (1991); CAL. CIV. CODE § 3093 (West Supp. 1992) (defining notice of completion); *id.* § 3086 (West 1974 & Supp. 1992) (defining completion); *cf.* IDAHO CODE § 29-115 (Michie Supp. 1992) (giving the contractor 35 days to release a specified amount of the retention when the project is substantially complete as agreed upon by the parties or the full amount upon full compliance unless there is a dispute).

8. CAL. CIV. CODE § 3260(c) (amended by Chapter 387); see *id.* § 3260(a) (amended by Chapter 387) (limiting Chapter 387 to those contracts entered into on or after January 1, 1993).

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1. See CAL. COM. CODE § 1201 (West Supp. 1992) (defining delivery).

2. See BLACK'S LAW DICTIONARY 1214 (6th ed. 1991) (defining promissory note); CAL. COM. CODE § 3104 (1964) (defining the form of notes as negotiable instruments).

3. CAL. COM. CODE § 3202 (West Supp. 1992). A transfer is complete if the transferee qualifies as a holder. *Id.*; see *id.* § 1201(20) (West Supp. 1992) (defining a holder as a person in possession of the document); *id.* § 9305 (West 1990) (requiring the actual physical transfer of the document for other forms of security to be valid); *In re Pike*, 62 B.R. 765, 767 (W.D. Mich. 1986) (requiring perfection pursuant to Article 9 of the Uniform Commercial Code to maintain interest rights superior to a Chapter 7 trustee); *In re Staff Mortgage & Inv.*, 625 F.2d 281, 283 (9th Cir. 1980) (holding that the failure of the lender to take possession of the property resulted in its security interest being unprotected, and the trustee having a superior claim. *But see* CAL. REV. & TAX. CODE § 610(b)(1) (amended by 1992 STAT. Ch. 395, sec. 1, at \_\_\_) (describing as evidence of a claim of ownership a deed, judgment, or other instrument that creates or legally verifies that person's ownership interest in the property). See CAL. COM. CODE § 3104 (1964) (defining form of negotiable instruments).

4. See CAL. BUS. & PROF. CODE § 10131 (West 1987) (defining real estate broker).

evidencing an interest in the property<sup>5</sup> may be perfected<sup>6</sup> upon recordation<sup>7</sup> of the deed of trust or other instrument, regardless of whether the broker retains possession of the instrument.<sup>8</sup>

SEA

## **Business Associations and Professions; security services**

Business and Professions Code §§ 7547.2, 7547.21, 7547.22, 7547.23, 7596.8, 7596.81, 7596.82, 7596.83 (new); Penal Code §§ 832.15, 832.16 (new); § 12052 (amended).  
AB 2917 (Friedman); 1992 STAT. Ch. 1341

Under existing law, employees of private patrol operators<sup>1</sup> and alarm company operators<sup>2</sup> who carry firearms<sup>3</sup> must have a firearms

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5. See CAL. REV. & TAX. CODE § 107 (West Supp. 1992) (defining possessory interests).

6. See BLACK'S LAW DICTIONARY 1137 (6th ed. 1991) (defining perfection of security interest); CAL. COM. CODE §§ 9302-9306 (West 1990) (defining the conditions under which an interest may be perfected).

7. See CAL. BUS. & PROF. CODE § 10234 (West 1987) (requiring a real estate licensee who negotiates a sale or exchange of a promissory note secured by a trust deed on real property to cause proper assignment and recording of evidence of the interest with the county recorder).

8. *Id.* § 10233.2 (enacted by Chapter 158). According to the author of Chapter 158, the express purpose of the Chapter is to perfect property interests secured by deeds of trust or other instruments creating similar interests that might otherwise be regarded in legal proceedings as inferior to other interests for want of physical delivery of the instrument creating the interests. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF S.B. 1520, at 2 (Apr. 21, 1992). See *In re Staff Mortgage & Inv.*, 625 F.2d 281, 283-84 (9th Cir. 1980) (suggesting that were the Legislature so inclined to permit perfection of a security interest in an instrument absent physical possession, the Legislature would have so worded the relevant sections of the California Business Code relating to delivery and perfection of security interests, but that in the absence of such a law, physical possession was a necessary condition of perfection).

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1. See CAL. BUS. & PROF. CODE §§ 7544-7549.3 (West Supp. 1992) (establishing the requirements for private patrol operators). In order to become a private patrol operator, California law requires a minimum of one year experience as a patrolman, watchman, or guard. *Id.* § 7544.1 (West Supp. 1992). Operators must also register with the Bureau of Collection and Investigative Services and file two fingerprint cards with the Bureau. *Id.* § 7546 (West Supp. 1992).

2. See *id.* § 7590.2 (West Supp. 1992) (defining alarm company operator as any person who for any consideration whatsoever, engages in business or accepts employment to install, maintain, alter, sell on premises, monitor, or service alarm systems, or responds to alarm systems except for any alarm agent).

permit<sup>4</sup> issued by the Bureau of Collection and Investigative Services (Bureau).<sup>5</sup> Chapter 1341 prohibits the Bureau from issuing or renewing a permit to any applicant prohibited from possessing, receiving, owning, or purchasing a firearm under the Penal Code or the Welfare and Institutions Code.<sup>6</sup> Chapter 1341 further provides that prior to issuing a permit, the Bureau must provide the Department of Justice (Department)<sup>7</sup> with specified information<sup>8</sup>

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3. See CAL. PENAL CODE § 12001 (West Supp. 1992) (defining firearms for purposes of the Penal Code).

4. See CAL. BUS. & PROF. CODE § 7512.13 (West Supp. 1992) (defining firearms permit); see also *id.* § 7596 (West Supp. 1992) (requiring alarm company operators to complete a course of training in the use of firearms and the powers of arrest); *id.* § 7596.3 (West Supp. 1992) (requiring alarm company operators to file a fingerprint card, complete an application for a firearms permit, and be a citizen of the United States or have legal residence status); *id.* §§ 7545, 7545.1 (West Supp. 1992) (setting forth the same requirements for private patrol operators).

5. *Id.* §§ 7547.1, 7596.3 (West Supp. 1992); see *id.* §§ 7501-7501.8 (West Supp. 1992) (setting forth the powers, duties, and organization of the Bureau of Collection and Investigative Services).

6. *Id.* §§ 7547.2, 7547.21, 7596.8, 7596.81 (enacted by Chapter 1341); see CAL. WELF. & INST. CODE §§ 8100, 8103 (West Supp. 1992) (prohibiting patients in mental institutions and persons who have conveyed violent threats to a licensed psychiatrist, or persons adjudged by a court to be a danger from possessing, purchasing, or owning a firearm); see also *People v. Ratcliff*, 223 Cal. App. 3d 1401, 1409-1410, 273 Cal. Rptr. 253, 258 (1990) (holding that even if a felon is granted a full pardon, the felon cannot carry a firearm if his previous felony involved the use of a dangerous weapon); *Review of Selected 1990 California Legislation*, 22 PAC. L.J. 484 (1991); *Review of Selected 1991 California Legislation* 23 PAC. L.J. 572 (1992) (discussing amendments to §§ 8100 and 8103 of the Welfare and Institutions Code); cf. *Bradford v. Cardoza*, 195 Cal. App. 3d 361, 365-66, 240 Cal. Rptr. 648, 650 (1987) (holding that a felon who was granted a full presidential pardon for receiving stolen government property could not be denied a gun permit); see, e.g., KAN. STAT. ANN. § 75-7b17 (1990) (prohibiting the Kansas Attorney General from issuing a firearms permit to any person who has been declared incapacitated or mentally ill and has not been restored to capacity and mental health); see also CAL. PENAL CODE §§ 12021-12021.1 (West Supp. 1992) (establishing that specified persons convicted of crimes including felonies and narcotics offenses may not possess, purchase, or own a firearm); *Review of Selected 1990 California Legislation* 22 PAC. L.J. 484 (1991); *Review of Selected 1991 California Legislation* 23 PAC. L.J. 555 (1992) (discussing amendments to Penal Code §§ 12021 and 12021.1); see, e.g., N.J. STAT. ANN. § 2C:58-3 (West Supp. 1992) (stating that the New Jersey Attorney General may not issue a firearms permit to any person who has been convicted of a crime or is confined to a mental institution).

7. See CAL. GOV'T CODE §§ 15000-15006 (West 1992) (establishing the California Department of Justice).

8. See CAL. BUS. & PROF. CODE §§ 7547.2(b), 7547.21(b), 7596.8(b), 7596.81(b) (enacted by Chapter 1341) (requiring the Bureau to provide the Department with the name, social security number, and fingerprints of each applicant for a gun permit).

regarding the applicant.<sup>9</sup> The Department must then inform the Bureau within sixty days if the applicant falls under the aforementioned Penal Code or Welfare and Institutions Code sections.<sup>10</sup>

In addition, under Chapter 1341, a firearms permit is to be immediately revoked if the Department notifies the Bureau that a permit holder is prohibited from possessing a firearm under Penal Code sections 12021 and 12021.1 or Welfare and Institutions Code sections 8100 and 8103.<sup>11</sup> An applicant who has been denied a permit under Chapter 1341 may reapply upon the expiration of the prohibition under the Penal Code or the Welfare and Institutions Code.<sup>12</sup> Further, Chapter 1341 requires the Department to notify any state or local agency employing a peace officer<sup>13</sup> upon receipt of fingerprints and any other necessary information as to whether the peace officer is prohibited from possessing, receiving, owning, or purchasing a firearm under the above mentioned Penal Code or Welfare and Institutions Code provisions.<sup>14</sup>

*SRM*

### **Business Associations and Professions; sexual relations between attorney and client**

Business and Professions Code § 6106.9 (new).  
AB 1400 (Roybal-Allard); 1992 STAT. Ch. 740

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9. *Id.* §§ 7547.2(b)-(c), 7547.21(b)-(c), 7596.8(b)-(c), 7596.81(b)-(c) (enacted by Chapter 1341); *cf.* *Ambrogio v. Board of Firearms Permit Examiners*, 607 A.2d 460, 462-63 (Conn. Super. 1992) (holding that a statute requiring an applicant to disclose full information regarding his criminal record is discretionary).

10. CAL. BUS. & PROF. CODE §§ 7547.2(b)-(c), 7547.21(b)-(c), 7596.8(b)-(c), 7596.81(b)-(c) (enacted by Chapter 1341).

11. *Id.* §§ 7547.23, 7596.83 (enacted by Chapter 1341).

12. *Id.* §§ 7547.2(d), 7547.21(d), 7596.8(d), 7596.81(d) (enacted by Chapter 1341); *see, e.g.*, CAL. PENAL CODE § 12021(c) (West Supp. 1992) (establishing a ten year limitation to persons convicted under specified sections).

13. *See* CAL. PENAL CODE § 830 (West 1985) (defining peace officer).

14. *Id.* §§ 832.15 (a)-(b), 832.16(a)-(b) (enacted by Chapter 1341). *See generally* Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983) (discussing handgun legislation as a way of reducing violent crime).

Existing law requires the State Bar<sup>1</sup> to establish rules regarding sexual conduct between attorneys and their clients.<sup>2</sup> Chapter 740 provides that attorneys who expressly or impliedly demand sexual relations<sup>3</sup> from a client as a condition for legal services may be subject to disciplinary action.<sup>4</sup> Chapter 740 additionally provides that if an attorney performs services incompetently<sup>5</sup> as a result of any sexual relations with a client, or if the sexual relations would be

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1. See CAL. BUS. & PROF. CODE §§ 6000-6031 (West 1990) (establishing the State Bar and setting forth its powers and duties and criteria for membership).

2. *Id.* § 6106.8(n) (West Supp. 1992). The State Bar is required to establish regulations for sexual conduct between attorneys and their clients which must be approved by the California Supreme Court. *Id.* The State Bar submitted a proposed regulation to the California Supreme Court; however, the court has not approved it. SENATE COMMITTEE ON JUDICIARY, ANALYSIS OF AB 1400, at 3 (June 23, 1992).

3. See CAL. BUS. & PROF. CODE § 6106.9(d) (enacted by Chapter 740) (defining sexual relations as sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse). Chapter 740 excludes sexual relationships which are from marriage or pre-dated the attorney-client relationship. *Id.* § 6106.9(b) (enacted by Chapter 740). See generally Linda M. Jorgenson & Pamela K. Sutherland, *Fiduciary Theory Applied to Personal Dealings: Attorney-Client Sexual Contact*, 45 ARK. L. REV. 459 (1992); *Oregon Attorneys Ban Sex with Clients*, WASH. TIMES, Sept. 28, 1992, at A2; Stephanie Smith, *Courting Trouble; Ethics Don't Bar Lawyers from Affairs with Clients, But It's a Tangle*, CHI. TRIB., May 24, 1992, at CN11; Jan Crawford et al., *Lawyers Exposing 'Dirty Little Secrets'*, CHI. TRIB., Jan. 21, 1992, at C3 (discussing the problem of sexual conduct of attorneys toward clients).

4. CAL. BUS. & PROF. CODE § 6106.9(a) (enacted by Chapter 740); see *In re Gibson*, 369 N.W.2d 695, 699-700 (Wis. 1985) (holding that unsolicited sexual advances to a client warrants a 90-day suspension from practice); *In re Wood*, 358 N.E.2d 128, 133 (Ind. 1976) (holding that attempts to exchange legal services for sexual favors constitutes a violation of state disciplinary rules and warrants a suspension of at least one year). Chapter 740 provides that attorneys will be disciplined for employing coercion, intimidation, or undue influence to enter into sexual relations with clients. CAL. BUS. & PROF. CODE § 6106.9(a)(2) (enacted by Chapter 740). See *Barbara A. v. John G.*, 145 Cal. App. 3d 369, 383, 193 Cal. Rptr. 422, 432 (1983) (finding that the potential for coercion, intimidation, or undue influence by the attorney over the client exists because the attorney has superior bargaining power); see also Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 92, at 4 (1987) (discussing ethical considerations of a lawyer/client sexual relationship). See generally MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.7(b), 2.1 (1991); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-110(A) (1980) (discussing the responsibilities lawyers owe clients, and when a lawyer may not represent a client). See generally Geoffrey C. Hazard, Jr., *Lawyer-Client Sex Relations Are Taboo*, NAT'L. L. J., Apr. 15, 1991, at 13 (discussing the debate in California over rules governing the sexual conduct of attorneys).

5. See CAL. BUS. & PROF. CODE § 6106.9(a) (enacted by Chapter 740) (defining incompetently as violating Rule 3-110 of the Rules of Professional Conduct of the State Bar of California).

likely to damage or prejudice the client's case, the attorney will be subject to disciplinary action.<sup>6</sup>

*MLM*

## **Business Associations and Professions; sports trading cards**

Business and Professions Code §§ 21670, 21671, 21672  
(new); Penal Code § 19.8 (amended).  
AB 3597 (Umberg); 1992 STAT. Ch. 1120

Existing law regulates the sale of secondhand goods.<sup>1</sup> Chapter 1120 adds sports trading cards<sup>2</sup> to those goods regulated by prohibiting the sale of sports trading cards that have been altered or refurbished<sup>3</sup> without a certificate stating specified information.<sup>4</sup> Chapter 1120 further provides that the knowing manufacture,

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6. *Id.* § 6106.9(a)(3) (enacted by Chapter 740). Chapter 740 requires the State Bar to keep statistical records regarding the number of complaints received. 1992 Cal. Stat. ch. 740, sec. 2, at \_\_\_\_\_. The State Bar must also establish procedures to respond to complaints. *Id.*

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1. *See* CAL. BUS. & PROF. CODE §§ 21500-21669.1 (West Supp. 1992) (regulating the sale of secondhand watches, builders tools, junk and tangible personal property, as well as the conduct of swap meets).

2. *See id.* § 21670 (b) (enacted by Chapter 1120) (defining legitimate sports trading cards); *id.* § 21670(c) (enacted by Chapter 1120) (defining counterfeit sports trading card); *id.* § 21670(d) (enacted by Chapter 1120) (defining unlicensed sports trading card). According to a study by the NPD research group, 17.98 billion football, hockey, and baseball cards were sold in the United States between June 1990 and June 1991 generating sales worth \$1.399 billion. Michael Hiestand, *Study Peeks Inside Trading Cards Boom*, USA TODAY, Mar. 26, 1992, at 5C.

3. *See* CAL. BUS. & PROF. CODE § 21670(a) (enacted by Chapter 1120) (defining altered or refurbished).

4. *Id.* § 21671(a) (enacted by Chapter 1120). The certificate must show the following: (1) The type of refurbishing or altering done to the card; (2) the date the work was done; (3) the cost of the work; (4) and the name, address, and phone number of the person doing the work. *Id.* Violation of Chapter 1120 is punishable by a civil penalty of not more than \$1000 and/or a refund of the full amount paid for the card or the full retail value of any non-monetary compensation given in exchange for the card. *Id.* § 21671(b) (enacted by Chapter 1120). Each card sold represents a separate violation. *Id.* § 21671(b)(2) (enacted by Chapter 1120).

production, or distribution of unlicensed or counterfeit sports trading cards with intent to deceive, injure, or defraud<sup>5</sup> is a misdemeanor.<sup>6</sup>

SRM

## **Business Associations and Professions; unsatisfied judgments against contractors**

Business and Professions Code § 7071.6 (amended).  
AB 2491 (Mountjoy); 1992 STAT. Ch. 1045

Under existing law, the Contractor's State License Board (Board)<sup>1</sup> must require, as a condition precedent to issuing, reinstating, or reactivating a license, that the applicant file a judgment bond if the applicant has failed or refused to pay a contractor, subcontractor, consumer, materials supplier, or employee based on an entered and unsatisfied judgment.<sup>2</sup> Existing law also requires licensees to notify the Registrar<sup>3</sup> in writing of any entered and

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5. See *Continental Airlines Inc. v. McDonnell Douglas Corp.*, 216 Cal. App. 3d 388, 428, 264 Cal. Rptr. 779, 801 (1989) (noting that fraudulent intent may be derived by inference from circumstances and acts of parties); *People v. Dollar Rent-A-Car Sys.*, 211 Cal. App. 3d 119, 129, 259 Cal. Rptr. 191, 196 (1989) (stating that it is necessary only to show that members of the public are likely to be deceived, actual deception or confusion is not required).

6. CAL. BUS. & PROF. CODE § 21672(a) (enacted by Chapter 1120). Each card sold represents a separate violation. *Id.* § 21672(b)(2) (enacted by Chapter 1120). Such a misdemeanor is punishable by a fine not exceeding \$250. CAL. PENAL CODE § 19.8 (amended by Chapter 1120). This bill was enacted to protect the integrity of the sports trading card market. 1992 Cal. Stat. ch. 1120, sec. 1 at \_\_\_\_\_. See generally John Leptich, *Uninvited Counterfeiters Enter Card Game*, CHI. TRIB., Nov. 8, 1991, at C11 (discussing the problem of counterfeit trading cards).

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1. See CAL. BUS. & PROF. CODE § 7000 (West Supp. 1992) (establishing the Contractor's State License Board); *id.* §§ 7000-7019 (West 1975 & Supp. 1992) (providing for the administration of the Board).

2. *Id.* § 7071.6(d) (amended by Chapter 1045). The judgment bond requirement applies only to unsatisfied judgments that are substantially related to the qualifications, functions, and duties of a licensee. *Id.* Further, the requirement does not apply to judgments that are fully discharged in bankruptcy. *Id.*

3. See *id.* § 7011 (West 1975) (establishing the position and duties of a Registrar of Contractors).



unsatisfied judgments within ninety days of the judgment.<sup>4</sup> Chapter 1045 increases the sanctions for a failure to notify, by also prohibiting the licensee from serving as the responsible managing officer,<sup>5</sup> responsible managing partner, or responsible managing employee<sup>6</sup> for any other licensee until proof of satisfaction of the judgment is submitted to the registrar.<sup>7</sup>

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4. *Id.* § 7071.6(e) (amended by Chapter 1045). Without such notification, existing law mandates a license suspension until proof of judgment satisfaction is submitted to the registrar. *Id.*

5. *See id.* § 7068(a) (West Supp. 1992) (requiring an applicant for managing officer to have the degree of knowledge and experience of building, safety, health, and lien laws that the Contractors State License Board deems necessary for the safety and protection of the public).

6. *See id.* § 7068(d) (West Supp. 1992) (stating that a responsible managing employee is an individual who is a bonafide employee of the applicant and is actively engaged in the classification of work for which such employee is responsible).

7. *Id.* § 7071.6(e) (amended by Chapter 1045). If a licensee is serving as a responsible managing officer, responsible managing partner, or responsible managing employee when a suspension occurs, that suspension will constitute a disassociation of the licensee from the firm, and the Registrar must notify the licensee's personnel of the disassociation. *Id.*; *see id.* § 7068.2 (West 1992) (establishing procedures for the disassociation of a licensee); *see also* NEV. REV. STAT. § 624.3018 (1992) (prohibiting certain persons from serving as an officer, director, associate, or partner of a licensee). *See generally* *Most Renters Would Like to Buy, Survey Shows*, WASH. POST Oct. 17, 1987, at F12 (describing a Virginia law that established the Virginia Contractor's Transaction Recovery Fund that is a fund from which plaintiffs can recover unsatisfied judgments, and whereby a contractor's license is revoked until that fund is replenished).