

1-1-1985

Business Associations and Professions

University of the Pacific; McGeorge School of Law

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>

Part of the [Legislation Commons](#)

Recommended Citation

University of the Pacific; McGeorge School of Law, *Business Associations and Professions*, 16 PAC. L. J. 503 (1985).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol16/iss2/10>

This Greensheet is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Business Associations and Professions

Business Associations and Professions; arbitration of attorney's fees

Business and Professions Code §§6200, 6201, 6202, 6203, 6204, 6206, (amended).

AB 3475 (Harris), 1984 STAT. Ch 825

In 1978, the California Legislature enacted a mandatory attorney fee arbitration statute to provide for compulsory arbitration of fee disputes between California attorneys and their clients.¹ The purpose of the statute was to provide an effective, expeditious, simple, low cost procedure, and an alternative forum for the resolution of disputes between an attorney and a client over legal fees.² The California Legislature apparently amended the mandatory attorney fee arbitration statute in 1982 in order to alleviate some of the ambiguities and practical inadequacies of the statute.³ Chapter 825 amends the mandatory attorney fee arbitration statute to make substantive changes and further clarifications in the law governing arbitration of attorney fee disputes.⁴

Subject Matter Jurisdiction

Under prior law, the mandatory attorney fee arbitration statute was not applicable when a client was seeking affirmative relief against an attorney based upon allegations of attorney malpractice or professional misconduct.⁵ A problem arose in the administration of the mandatory

1. 1978 Cal. Stat. c. 719, §1, at 2249 (enacting CAL. BUS. & PROF. CODE §§6200-6206). See generally *Review of Selected 1978 California Legislation*, 10 PAC. L.J. 278-82 (1979) (outlining and explaining the significant portions of sections 6200-6206 of the Business and Professions Code).

2. Hargarten, *Fine Tuning California's Mandatory Attorney Fee Arbitration Statute*, 16 U.S.F.L. Rev. 411, 411 (1982).

3. Compare 1978 Cal. Stat. c. 719, §1, at 2249 (enacting CAL. BUS. & PROF. CODE §§6200-6206) with 1982 Cal. Stat. c. 979, §2, at 3558, (amending CAL. BUS. & PROF. CODE §6202); 1982 Cal. Stat. c. 979, §§1-4, at 3557-60 (amending CAL. BUS. & PROF. CODE §§6201-6204).

4. Compare CAL. BUS. & PROF. CODE §§6200-6206 with 1978 Cal. Stat. c. 719, §1, at 2249 (enacting CAL. BUS. & PROF. CODE §6206) and 1979 Cal. Stat. c. 878, §1, at 3062 (amending CAL. BUS. & PROF. CODE §§6201-6204) and 1982 Cal. Stat. c. 979, §§1-4, at 3557-60 (amending CAL. BUS. & PROF. CODE §§6201-6204); see also Hargarten, *supra* note 2, at 411.

5. Compare 1978 Cal. Stat. c. 719, §1, at 2249 (enacting CAL. BUS. & PROF. CODE §§6200-6206) with CAL. BUS. & PROF. CODE §§6200(b)(2), 6203(a).

attorney fee arbitration statute because the statute did not provide whether evidence concerning attorney malpractice or professional misconduct could be considered by arbitrators in fee dispute arbitrations for the purpose of determining the amount of the fee to which an attorney was entitled.⁶ With the enactment of Chapter 825, the mandatory attorney fee arbitration statute continues to be inapplicable to claims for affirmative relief against an attorney based upon allegations of malpractice or professional misconduct.⁷

The arbitrators, however, may receive evidence relating to claims of malpractice or professional misconduct to the extent those claims bear upon the fees to which an attorney is entitled.⁸ Thus, arbitrators may not award affirmative relief in the form of damages for injuries underlying a claim of malpractice or professional misconduct.⁹ An arbitrator, however, may consider evidence of such claims to determine the value of an attorney's services.¹⁰

Issuance of Subpoenas

Prior to the enactment of Chapter 825, the mandatory attorney fee arbitration statute did not expressly authorize state and local bar associations to issue subpoenas in an attorney fee arbitration.¹¹ Under prior law, local bar associations may have been exceeding their legal authority by issuing subpoenas.¹² With the enactment of Chapter 825, the Legislature has specifically given arbitrators of attorney fee disputes the express power to (1) take and hear evidence pertaining to the proceeding,¹³ (2) administer oaths and affirmations to witnesses,¹⁴ and (3) compel, *by subpoena*, the attendance of witnesses and the production of books, papers, and documents pertaining to the proceeding.¹⁵

6. See Hargarten, *supra* note 2, at 420. The problem arises when the client may not be seeking affirmative relief by way of damages for alleged malpractice, but may predicate the proof of excessive attorney's fees upon the alleged incompetence of the attorney. *Id.*

7. CAL. BUS. & PROF. CODE §6200(b)(2).

8. *Id.* §6203(a).

9. See *id.* An arbitrator can award a refund of unearned prepaid fees; however, an arbitrator may not award damages or any other form of affirmative relief. *Id.*

10. *Id.*

11. Compare 1978 Cal. Stat. c. 719, §1, at 2249 (enacting CAL. BUS. & PROF. CODE §§6200-6206) with CAL. BUS. & PROF. CODE §§6200-6206; see also Hargarten, *supra* note 2, at 429.

12. See Hargarten, *supra* note 2, at 429. The power of the State Bar to issue subpoenas exists pursuant to the general grant of authority to the Department of Committees and Sections. *Id.* Local bar associations, however, do not have a similar grant of authority. *Id.*

13. CAL. BUS. & PROF. CODE §6200(f)(1).

14. *Id.* §6200(f)(2).

15. *Id.* §6200(f)(3).

Judicial Immunity

Courts have recognized judicial immunity as a means of promoting fearless and independent decision making.¹⁶ Judicial immunity has been extended to provide protection to arbitrators acting in a quasi-judicial capacity.¹⁷ In a recent California case, however, the appellate court denied quasi-judicial immunity to an arbitrator who had violated the rules of the American Arbitration Association by failing to render a timely award.¹⁸ The court also refused to grant judicial immunity to the organization sponsoring and administering the arbitration procedure.¹⁹ Chapter 825 expressly grants judicial immunity to an arbitrator, to the arbitration association, and to the directors, officers, and employees of an arbitration association for any arbitration conducted pursuant to the mandatory attorney fee arbitration statute.²⁰ This immunity is identical to the immunity that attaches in judicial proceedings.²¹

Stay of Proceedings

Under existing law, an attorney's client may stay an action brought by the attorney for recovery of a fee by serving and filing a request for arbitration pursuant to the provisions existing law.²² Prior law stated that upon the filing and service of the request for arbitration the action must be stayed *unless* the court found that the matter was not an appropriate one for arbitration under the provisions of the mandatory fee arbitration statute.²³ The language of the statute indicated that the granting of a stay was an act of judicial discretion.²⁴

16. See *Wvatt v. Arnot*, 7 Cal. App. 221, 224-30, 94 P. 86, 88-9 (1907); *Oppenheimer v. Ashburn*, 173 Cal. App. 2d 624, 631-34, 343 P.2d 931, 933-36 (1959).

17. See *Lundgren v. Freeman*, 307 F.2d 104, 117 (9th Cir. 1962). If an arbitrator's decisions can subject the arbitrator to a civil lawsuit, the decisions that are made are more likely to be governed by fear of a lawsuit than by unfettered judgment as to the merits of the cases that must be decided. *Id.*

18. *Baar v. Tigerman*, 140 Cal. App. 3d 979, 987, 189 Cal. Rptr. 834, 840 (1983).

19. *Id.* at 986, 189 Cal. Rptr. at 839. The court recognized that the immunity of the sponsoring organization is derived from the arbitrator, and when the arbitrator is not entitled to immunity, neither is the arbitration association. *Id.*

20. CAL. BUS. & PROF. CODE §6200(e).

21. *Id.* "With respect to all judicial officers...the settled law of the supreme court of the United States...is that, where they act within their jurisdiction, they are not amenable to any civil action for damages. No matter what their motives may be, they cannot be inquired into." *Perry v. Meikle*, 102 Cal. App. 2d 602, 605, 228 P.2d 17, 19 (1951).

22. CAL. BUS. & PROF. CODE §6201(b). An action that has been filed in small claims court may not be stayed under the provisions of the mandatory fee arbitration statute and is not subject to arbitration as long as the small claims action is pending. *Id.*

23. Compare 1978 Cal. Stat. c. 719, §1, at 2249 (enacting CAL. BUS. & PROF. CODE §§6200-6206) with CAL. BUS. & PROF. CODE §6201(b).

24. See 1978 Cal. Stat. c. 719, §1, at 2249 (enacting CAL. BUS. & PROF. CODE §§6200-6206); see also Hargarten, *supra* note 2, at 424-29.

Chapter 825 clarifies that a court action *will be* stayed upon the filing and service of a request for arbitration without the necessity of a court order.²⁵ The stay may be vacated in whole or in part, however, after a hearing duly noticed by any party or the court, if the court finds that the action, or any part of the action, is not an appropriate one for arbitration under the mandatory attorney fee arbitration statute.²⁶ Thus, under Chapter 825, judicial discretion is not necessary for purposes of staying an action, but is essential for vacating the stay of an action or proceeding.²⁷

If a civil action for the collection of fees has been stayed, Chapter 825 provides that any petition to confirm, correct, or vacate the arbitrator's award must be filed in the court in which the action is pending.²⁸ If no action is pending in any court, the arbitrator's award may be confirmed, corrected, or vacated by filing a petition to confirm, correct or vacate the award pursuant to provisions of existing law in any court having jurisdiction over the amount of the award.²⁹

Trial After Arbitration

Chapter 825 provides that even if the parties to the arbitration have not agreed in writing to be bound by the arbitrator's decision an arbitration award becomes binding upon the passage of thirty days after mailing of notice of the award³⁰ unless a party has sought, within thirty days, a trial after arbitration.³¹ If an action for collection of attorney's fees previously has been stayed, the trial may be initiated by filing a rejection of arbitration award and a request for trial after arbitration within thirty days after mailing of notice of the award.³² Under Chapter 825, the opposing party³³ in the pending action must file a responsive pleading within thirty days following service of the

25. CAL. BUS. & PROF. CODE §6201(c).

26. *Id.*

27. Compare 1978 Cal. Stat. c. 719, §1, at 2249 (enacting CAL. BUS. & PROF. CODE §§6200-6206) with CAL. BUS. & PROF. CODE §§6201(b), 6201(c); see also Hargarten, *supra* note 2, at 424-29.

28. CAL. BUS. & PROF. CODE §6203(b).

29. *Id.*; CAL. CIV. PROC. CODE §§1285-1287.6 (confirmation, correction or vacation of an award).

30. Chapter 825 requires the arbitrator to deliver notice of the award and an original declaration of service of the award to each of the parties. CAL. BUS. & PROF. CODE §6203(a).

31. *Id.* §6203(b).

32. *Id.* §6204(b). If the rejection and request for trial after arbitration is not filed within thirty days after mailing of the notice of the award, the award becomes binding on all parties. *Id.* §6203(b). In the absence of an agreement to be bound by the arbitration, either party may be entitled to a trial after arbitration. *Id.* §6204(a).

33. The party who did not file the rejection of award and request for trial after arbitration is the opposing party. See *id.* §6204(b).

rejection of arbitration award and request for trial after arbitration.³⁴

If no action for collection of fees is pending at the time of the arbitration award, the trial after arbitration procedure may be initiated by the commencement of an action in the court having jurisdiction over the amount of money in controversy within thirty days after mailing notice of the award.³⁵

Tolling of Statute of Limitations

Under existing law, arbitration may not be commenced if the statute of limitations would bar the bringing of a civil action requesting the same relief.³⁶ Chapter 825 provides that the statute of limitations for bringing a civil action to resolve an attorney fee dispute is tolled from the time the arbitration procedure is initiated until the earlier of (1) thirty days after receipt of notice of arbitration award, or (2) receipt of notice that the arbitration is otherwise terminated.³⁷

34. *Id.*

35. *Id.* §6204(c).

36. *Id.* §6206.

37. *Id.*

Business Associations and Professions; attorney collection agencies

Business and Professions Code §6077.5 (new).
AB 1252 (Calderon); 1984 STAT. Ch 118

Under existing law, a person, other than an attorney,¹ engaged directly or indirectly in collecting claims owed or due another is a collection agency² and must be licensed.³ The manner in which a debt may be collected is governed by the Robbins-Rosenthal Fair Debt Collection Practices Act (hereinafter referred to as the Act).⁴ Attorneys

1. See CAL. BUS. & PROF. CODE §6854 (persons excluded from the definition of collection agency). Grossman v. Vaupel, 13 Cal. App. 3d 706, 709, 91 Cal. Rptr. 876, 877 (1970) (discussing the exception of an attorney's employees).

2. CAL. BUS. & PROF. CODE §6852 (definition of collection agency).

3. *Id.* §6870.

4. CAL. CIV. CODE §§1788-1788.32; see also Federal Fair Debt Collection Practice Act, 15 U.S.C. §§1692-1692o (providing federal regulations for debt collections).

are exempt from the provisions of the Act,⁵ but are regulated by the California Rules of Professional Conduct.⁶

With the enactment of Chapter 118, an attorney and an attorney's employee who is employed primarily to assist in the collection of a consumer debt⁷ (hereinafter referred to as an employee) must comply with the obligations imposed on debt collectors⁸ under the provisions of existing law.⁹ Chapter 118 provides that an attorney or employee is prohibited from taking or threatening to take nonjudicial action to effect the disposition or disablement of property if (1) no present right exists through an enforceable security interest, to possession of the property which is claimed as collateral,¹⁰ (2) no present intention to take possession of the property exists,¹¹ or (3) the property is exempt by law from the intended disposition or disablement.¹²

Chapter 118 requires an attorney's employees who are not members of the State Bar of California to identify themselves, their employer, and their job title or capacity when communicating with a debtor¹³ or any other person concerning a debt.¹⁴ Chapter 118 provides that an attorney or employee may not communicate, without prior consent from the debtor or a court of competent jurisdiction, with a debtor in connection with the collection of any debt at an unusual time or place or at a time or place which is known or should be known to be inconvenient to the debtor.¹⁵ Chapter 118 also prohibits an attorney

5. CAL. BUS. & PROF. CODE §6854 (exempting members of the State Bar of California from the definition of collection agency); *see also* *Henningsen v. Mayfair Packing Co.*, 41 Cal. 2d 558, 562, 261 P.2d 521, 523 (1953) (an attorney's secretary falls within the attorney exception when a reasonable inference can be drawn that the secretary was the attorney's alter ego in enforcing the claim). *But see* *Grossman v. Vaupel*, 13 Cal. App. 3d 706, 709, 91 Cal. Rptr. 876, 878 (1970) (the secretary exception created in *Henningsen* does not create a new class of exception from the regulatory provisions of the Collection Agency Act sections of the Civil Code).

6. CAL. BUS. & PROF. CODE §6076 (rules of professional conduct).

7. The terms consumer debt and consumer credit mean money, property or their equivalent, due or alleged to be due from a person by reason of a consumer credit transaction. CAL. CIV. CODE §1788.2(f).

8. *Id.* §1788.2(c) (definition of debt collector).

9. CAL. BUS. & PROF. CODE §6077.5(a).

10. *Id.* §6077.5(e)(1).

11. *Id.* §6077.5(e)(2).

12. *Id.* §6077.5(e)(3).

13. A debtor is defined as a person from whom a debt collector seeks to collect a consumer debt which is due and owing or alleged to be due and owing from that person. CAL. CIV. CODE §1788.2(h).

14. CAL. BUS. & PROF. CODE §6077.5(a). *See also* CAL. CIV. CODE §1788.11 (requiring the same disclosures for licensed collection agencies).

15. CAL. BUS. & PROF. CODE §6077.5(c). For purposes of communicating with a debtor, an attorney or employee will assume that the convenient time for communicating with a debtor is after 8 a.m. and before 9 p.m. local time at the debtor's location. *Id.* *See also* CAL. CIV. CODE §1788.11(c) (prohibiting collection agencies from communicating with the debtor with the frequency so as to be unreasonable and to constitute harassment of the debtor).

or employee from charging the debtor for communications without revealing the purpose of the communication.¹⁶ In addition, Chapter 118 specifies that an attorney must cease communicating with a debtor if (1) the debtor provides written notification to the attorney that the debtor wishes the attorney to stop further communications, or (2) the debtor gives notification of refusal to pay a debt.¹⁷ An attorney, however, may continue communicating with the debtor to (1) advise the debtor that further efforts are being terminated, (2) notify the debtor of specific remedies which may be invoked, and (3) notify the debtor that the attorney or the creditor intends to invoke specific remedies.¹⁸ Communications also may be continued if suit has been filed or is about to be filed, and the debtor is not represented by counsel or has appeared in the action in propria persona.¹⁹

Within five days after an attorney or employee makes initial contact with a debtor in connection with the collection of an unsecured debt, Chapter 118 requires the attorney or employee to send the debtor a written notice containing specific information about the debt.²⁰ If the debtor notifies the attorney within thirty days that the debt, or any portion of the debt, is disputed, the attorney must cease collections, except for filing suit on the debt until the attorney provides the debtor with written documentation of the debt or judgment or the name and address of the original creditor.²¹ Finally, a willful breach of Chapter 118 by an attorney or employee constitutes cause for the imposition of attorney discipline in accordance with provisions of existing law.²²

16. CAL. BUS. & PROF. CODE §6077.5(f). Prohibited charges include, but are not limited to, charges for collect telephone calls and telegram fees. *Id.*

17. *Id.* §6077.5(d)(1)-(4).

18. *Id.*

19. *Id.*

20. The notice must contain the amount of the debt, the name of the creditor to whom the debt is owed, and statements that (1) unless the debtor objects to the debt within thirty days after receipt of the notice, the debt will be assumed to be valid, (2) if the debtor provides written notification that the debt is disputed the attorney or employee will obtain and mail, to the debtor, written documentation of the debt or judgment against the debtor, and (3) upon written request, within thirty days, the attorney or employee will provide the debtor with the name of the original creditor. *Id.* §6077.5(g)(1)-(5).

21. *Id.* If a debtor owes more than one debt and makes a single payment to an attorney or employee with respect to the debts, the payment may not be applied to any debt that is disputed by the debtor. *Id.* §6077.5(h). When applicable, the payment must be applied in accordance with the debtor's directions. *Id.*

22. *Id.* §6077.5(i); see also *id.* §6077 (providing for discipline of state bar members for breach of the rules of professional conduct).

Business Associations and Professions; employment agencies

Business and Professions Code §§9909.5, 9909.6, 9960.1, 9984.1 (new); §§9902, 9971, 9984 (amended).
SB 1749 (Montoya); 1984 STAT. Ch 1185

Under existing law, an employment agency¹ must be licensed by the Bureau of Employment Agencies² (hereinafter referred to as the Bureau), and is required to post a surety bond of \$3,000 with the Bureau.³ Chapter 1185 includes employment counseling services⁴ within the definition of employment agency⁵ and requires employment counseling services to post a \$10,000 surety bond with the Bureau.⁶ Certain types of employment counseling businesses, however, are excluded from the licensing requirements.⁷ Excluded businesses are (1) those retained solely by an employer to assist its current or former employees, (2) those engaging solely in the preparation of resumes and cover letters and not charging more than \$300 to any one customer, (3) educational institutions, and (4) licensed psychologists operating within the scope of their licensed practice.⁸

Existing law requires every employment agency to give each employment applicant a contract or receipt containing certain information regarding agency services.⁹ Chapter 1185 additionally requires all contracts for employment counseling services to include (1) a waiver of a job guarantee,¹⁰ (2) a statement of refund provisions,¹¹ and (3) a statement of the applicant's right to cancel the contract within three days.¹²

1. CAL. BUS. & PROF. CODE §9902 (definition of employment agency).

2. *Id.* §9941 (types of businesses which must be licensed by the Bureau of Employment Agencies).

3. *Id.* §9960.

4. An employment counseling service is any business that procures or implies the procurement of employment or employment assistance, or advertises certain services for a fee, including career counseling, aptitude testing, or resume preparation. *Id.* §9909.5.

5. *Id.* §9909.6. See also *id.* §§9902(d) (adding employment counseling services to those businesses which must be licensed), 9941 (licensing provisions).

6. *Id.* §9960.1.

7. *Id.* §9909.6.

8. *Id.*

9. *Id.* §9984 (information required for employment agency contracts).

10. *Id.* §9984.1(a)(5). The waiver must state "No verbal or written promise or guarantee of any job or employment is made or implied under the terms of this contract." *Id.*

11. *Id.* §9984.1(a)(3). The address of the Bureau of Employment Affairs also must be given. *Id.* §9984.1(a)(6).

12. *Id.* §9984.1(a)(7). The right-to-cancel-within-three-days clause can be omitted when time is of the essence and the employment counseling services must be performed within three days of the contract, provided the customer writes and signs a waiver of the right to cancel. *Id.* §9984.1(b). The contract also must include: (1) the name and address of the employment

counseling service, the person signing the contract, and the person to whom the services are to be provided; (2) a description of the services to be provided and the duration of the contract; (3) any applicable refund provisions; and (4) amount of the fee to be charged. *Id.* §9984.1(a)(1), (2), (3), (4).

Business Associations and Professions; revisions to the revised limited partnership act

Business and Professions Code §17900 (amended); Corporations Code §§15611, 15612, 15621, 15622, 15624, 15631, 15632, 15636, 15637, 15641, 15642, 15653, 15654, 15662, 15666, 15685, 15800 (amended).

AB 796 (Stirling); 1984 STAT. Ch 103

AB 2796 (Calderon); 1984 STAT. Ch 474

(Effective July 1, 1984)

In 1983, the California Legislature enacted the California Revised Limited Partnership Act¹ (hereinafter referred to as the Act) which became effective on July 1, 1984.² Chapters 103 and 474 were enacted, and became operative on July 1, 1984,³ in order to clarify and revise certain provisions of the Act.⁴

Elimination of Duplicate Filing

The Act requires foreign limited partnerships⁵ to file a designation of agent for service of process with the Secretary of State *prior* to transacting business in California.⁶ Prior to Chapter 103, the Act also required the same filing within forty days *after* a foreign limited partnership commenced business in California.⁷ Chapter 103 corrects that duplication by exempting foreign limited partnerships from the forty day filing requirement.⁸

The Act provides for the use of fictitious business names⁹ by limited

1. CAL. CORP. CODE. §15721 (short title), §§15611-15723; see *Review of Selected 1983 California Legislation*, 15 PAC. L.J. 479 (1984) (analysis of the California Revised Limited Partnership Act).

2. 1983 Cal. Stat. c. 1223, §15, at ____.

3. 1984 Cal. Stat. c. 103, §17, at ____; *id.* c. 474, §6, at ____.

4. *Id.* c. 103, §16, at ____.

5. CAL. CORP. CODE §15611(f) (definition of foreign limited partnership).

6. *Id.* §15692(c).

7. 1983 Cal. Stat. c. 1223, §12, at ____ (enacting CAL. CORP. CODE §15800).

8. Compare CAL. CORP. CODE §15800 with 1983 Cal. Stat. c. 1223, §12, at ____ (enacting CAL. CORP. CODE §15800).

9. See generally CAL. BUS. & PROF. CODE §§17900-17930 (fictitious business name law).

partnerships, including a requirement that the name be included in the certificate on file with the Secretary of State.¹⁰ Under the provisions relating to fictitious business names, however, the partnership was required to file a statement with the county clerk in addition to the certificate required under the Act.¹¹ Chapter 103 eliminates the duplicate filing requirement by revising the definition of a fictitious business name to exclude all limited partnerships having a certificate on file with the Secretary of State.¹²

Partnership Name

Under the Act, the name of the limited partnership could not be the same as, or resemble so closely as to tend to deceive, the name of another limited partnership.¹³ Chapter 103 allows a limited partnership to adopt a name that is substantially the same as that of an existing limited partnership with the consent of the existing partnership and a finding by the Secretary of State that the public will not likely be misled.¹⁴ Additionally, Chapter 103 provides that the use by limited partnerships of a name in violation of this law may be enjoined.¹⁵

Removal of General Partner

The Act provides that a general partner¹⁶ is removed automatically as a general partner from the limited partnership under a variety of circumstances including the general partner's withdrawal, removal, bankruptcy, death, and incompetency.¹⁷ Notice that a general partner had been removed was not required to be given to persons who had dealt with the partnership.¹⁸ Chapter 474 provides that until an amended certificate of limited partnership is filed with the Secretary of State, a general partner is deemed to be acting as a general partner with respect to third parties doing business with the limited partnership, regardless of automatic removal.¹⁹

10. CAL. CORP. CODE §15621(a)(1) (filing requirements); *see id.* §15612 (partnership name requirements for both foreign and domestic limited partnerships).

11. 1970 Cal. Stat. c. 618, §4, at 1222 (enacting CAL. BUS. & PROF. CODE §17900).

12. *Compare* CAL. BUS. & PROF. CODE §17900 with 1970 Cal. Stat. c. 618, §4, at 1222 (enacting CAL. BUS. & PROF. CODE §17900).

13. 1983 Cal. Stat. c. 1223, §10, at ____ (enacting CAL. CORP. CODE §15612(c)).

14. CAL. CORP. CODE §15612(c).

15. *Id.* §15612(e).

16. *Id.* §15611(g) (definition of general partner).

17. *Id.* §15642.

18. *See id.* §§15641-15644 (Article 4 of the California Revised Limited Partnership Act regarding general partners).

19. *Id.* §15642.

Obligation to Return a Distribution

The Act provided that a partner was obligated to return a distribution from a limited partnership when, after the distribution, the partnership liabilities exceeded the fair salable value of the partnership assets.²⁰ Under Chapter 474, the fair salable value standard is replaced with the fair value standard for the return of distribution formula.²¹

20. 1983 Cal. Stat. c. 1223, §10, at ____ (enacting CAL. CORP. CODE §15666).

21. CAL. CORP. CODE §15666. *See* CAL. REV. & TAX. CODE §110 (definition of fair market value).

**Business Associations and Professions;
partnership real property**

Corporations Code § 15010.7 (new); §§15009, 15010 (amended).
AB 2268 (Cortese); 1984 STAT. Ch 477

Under existing law, the acts of every partner undertaken in furtherance of the normal activities of the business bind the partnership unless the partner lacks authority to act in the particular matter and the person with whom he is dealing has knowledge of that lack of authority.¹ Existing law also provides that a partnership may recover title to real property that has been conveyed by a partner acting without authority unless the property has been conveyed to a bona fide purchaser for value without knowledge that the partner has exceeded his authority.² In these circumstances, knowledge that a partner lacked authority to act on behalf of the partnership must have been actual knowledge or knowledge of other facts as in the circumstances of bad faith.³ Chapter 477 extends the definition of knowledge to include constructive notice constituting knowledge of a partner's limited authority.⁴

Existing law permits a statement by the partnership setting forth the names of the partners to be recorded in any county.⁵ This statement

1. CAL. CORP. CODE §15009.

2. *Id.* §15100.

3. *Id.* §15003.

4. *Id.* §§15009, 15010. *See id.* §15010.7 (statement constituting constructive notice).

5. *See id.* §15010.5 (statement of partnership).

of partnership raises a conclusive presumption, in favor of a bona fide purchaser for value of partnership real property in any county where the statement is recorded, that the partnership statement is correct.⁶ Case law has held that a recorded statement of partnership which included a limitation with respect to the authority of a partner to bind the partnership is not sufficient notice of the limitations of authority.⁷ Chapter 477 provides that a statement of partnership may contain restrictions upon the authority of individual partners to convey, encumber, or transfer interests in partnership real property, provided the statement otherwise is valid under the law and is signed, acknowledged, and verified by all the partners.⁸ Additionally, when title to the real property appears in the partnership name or otherwise indicates ownership by the partnership, Chapter 477 specifies that the statement constitutes constructive notice of the contents of the restrictions and is conclusive as to any real property located in each county in which such a statement is recorded.⁹

6. *Id.*

7. *See* Owens v. Palos Verdes Monaco, 142 Cal. App. 3d 855, 869, 191 Cal. Rptr. 381, 390 (1983).

8. CAL. CORP. CODE §15010.7.

9. *Id.*

Business Associations and Professions; voting of membership

Corporations Code §§315, 1505, 5310, 5615, 5616, 6210, 7236, 7310, 7420, 7511, 7614, 7615, 8210, 8613, 9243, 9310, 9680, 12376, 12455, 12484, 12570 (amended); §§6213, 8213, 12573 (repealed).
AB 3106 (Stirling) 1984 STAT. Ch 812

Loans to Officers or Directors

Under existing law, a corporation¹ is prohibited from making a loan of money or property to, or guaranteeing the obligation of, any director² or officer of the corporation or the parent³ of the corporation

1. CAL. CORP. CODE §162 (definition of corporation).

2. *Id.* §164 (definition of director).

3. *Id.* §175 (definition of parent).

unless the transaction⁴ is approved by the shareholders.⁵ Prior law prohibited a corporation from making a loan or guarantee to an officer or director of a subsidiary⁶ of a corporation unless the transaction was approved by the shareholders.⁷ Chapter 812 removes the latter prohibition and clarifies existing law relating to approval by shareholders by providing that the approval of a majority of the shareholders entitled to act is required.⁸ In addition, Chapter 812 specifies that in the case of a corporation having more than one class or series of shares outstanding, shareholders entitled to act are holders (1) of those classes or series entitled to vote on all matters before the shareholders, or (2) entitled to vote on the approval of loans or guarantees to the corporate directors or officers.⁹ Furthermore, Chapter 812 also includes within the definition of shareholders entitled to act a requirement for separate class or series voting, or for more or less than one vote per share, only to the extent required by the articles of incorporation.¹⁰

Elections

Existing law provides that a nonprofit or cooperative corporation may elect as directors the candidates receiving the highest number of votes.¹¹ Chapter 812 provides that in the case of cumulative voting, candidates receiving the highest number of votes may be elected as directors subject to any lawful provision specifying election by classes.¹²

4. Any loan or guarantee made pursuant to an employee benefit plan also requires approval. *Id.* §315(a).

5. See 1982 Cal. Stat. c. 36, §2, at 68 (amending CAL. CORP. CODE §315); CAL. CORP. CODE §185 (definition of shareholders). See generally *Review of Selected 1982 California Legislation*, 14 PAC. L.J. 389-391 (1983) (loans to corporate directors and officers).

6. CAL. CORP. CODE §189 (definition of subsidiary).

7. See 1982 Cal. Stat. c. 36, §2, at 68 (amending CAL. CORP. CODE §315).

8. Compare 1982 Cal. Stat. c. 36, §2, at 68 (amending CAL. CORP. CODE §315) with CAL. CORP. CODE §315. For purposes of Corporations Code section 315(a) and (c), approval by a majority of the shareholders entitled to act means either (1) written consent of a majority of the outstanding shares excluding those shares owned by any officer or director eligible to participate in the plan or transaction that is subject to this approval, (2) an affirmative vote of a majority of the shares present at a duly held meeting at which a quorum is present without counting any shares held by any officer or director eligible to participate in the plan or transaction, or (3) the unanimous vote or written consent of the shareholders. CAL. CORP. CODE §315(g).

9. CAL. CORP. CODE §315(g).

10. *Id.*

11. *Id.* §§5616(c) (nonprofit corporations), 7615(c) (nonprofit corporations), 12484(b) (cooperative corporations).

12. *Id.*

Liability

Under existing law, directors of a corporation who approve specific corporate actions¹³ are jointly and severally liable to the corporation for the benefit of all the creditors entitled to sue or to the corporation itself.¹⁴ The amount of damages recoverable from a director for illegal loans, guarantees, or distributions is limited to the amount of the illegal distribution or the amount of loss suffered by the corporation as a result of the illegal loan or guarantee.¹⁵ Chapter 812 limits the liability of a director by providing that, in an action for the benefit of entitled creditors, damages may not exceed the liabilities of the corporation owed to nonconsenting creditors at the time of the violation.¹⁶

Under existing law, any person who knowingly receives an improper distribution including a payment in redemption of a membership, is liable to (1) the corporation in the case of a cooperative corporation¹⁷ or (2) the entitled creditors in the case of a nonprofit corporation.¹⁸ Chapter 812 provides that in the case of a cooperative corporation, liability may be imposed on behalf of the entitled creditors¹⁹ and, in the case of a nonprofit corporation, liability may be imposed on behalf of the corporation.²⁰

13. See *id.* §§7236(a)(1)-(3), 12376(a)(1)-(3).

14. *Id.* §§7236(a), 12376(a).

15. *Id.* §§7236(d), 12376(d).

16. *Id.* §§7236(d), 12376(d).

17. *Id.* §12455(a).

18. *Id.* §7420(a).

19. *Id.* §12455(b).

20. *Id.* §7420(b).

**Business Associations and Professions;
small business preference**

Government Code §14838 (amended); §14842.5 (new); Streets and Highways Code §94.4 (new).

SB 2042 (Montoya); 1984 STAT. Ch 739

SB 2044 (McCorquodale); 1984 STAT. Ch 668

The Small Business Procurement and Contract Act¹ (hereinafter referred to as the Act) was enacted in 1983 to aid, counsel, assist, and protect small businesses in order to preserve free competitive enterprise.² The Act provides for a small business preference in state construction or procurement of goods contracts in cases when responsibility and quality are equal.³ Chapter 668 specifically adds service contracts to the types of contracts that are to be given this preference.⁴

Existing law provides penalties for businesses that intentionally or negligently furnish false information regarding their certification as a small business.⁵ Chapter 739 additionally authorizes the Department of General Services (hereinafter referred to as the Department) to impose a civil penalty not to exceed \$5,000 for specific violations⁶ relating to the certification of small business enterprises.⁷ Chapter 739 further provides that when a violation occurs within three years of another violation, the Department is required to prohibit that business from entering into a state project or state contract, making a bid to a state entity, being a subcontractor to a contractor for a state entity, and being a supplier to a state entity.⁸

Under existing law, the Department of Transportation is required to regulate the awarding of highway contracts funded solely by state funds to minority businesses according to federal statutory law.⁹ To

1. CAL. GOV'T CODE §§14835-14843. *See id.* §14837(c) (definition of small business); *see also* 2 CAL. ADMIN. CODE. §§1896-1896.12 (regulations implementing the Small Business Procurement and Contract Act).

2. CAL. GOV'T CODE §14836(b) (legislative policy behind the Act).

3. *Id.* §14838(b). The preference given to small businesses is five percent of the lowest responsible bid, not to exceed \$50,000 for any bid. *Id.* *See also* 2 CAL. ADMIN. CODE. §1896.2 (regulations pertaining to how the preference is calculated).

4. *Compare* CAL. GOV'T CODE §14838(b) with 1983 Cal. Stat. c. 838, §3, at ____ (enacting CAL. GOV'T CODE §14838). The provision that adds service contracts, unless renewed, is automatically repealed on July 1, 1986. 1984 Cal. Stat. c. 668, §1, at ____ (enacting CAL. GOV'T CODE §14838(g)).

5. CAL. GOV'T CODE §14842. The penalties include paying to the state the difference between the actual contract amount and what the cost would have been if properly awarded, payment of a penalty of up to 10% of the contract price, and suspension of doing business with the state for up to two years. *Id.* §14842(a).

6. The specific violations relating to small business certification are fraudulent certification as a small business, fraudulent representation to a state official or employee regarding the small business certification, obstruction of an investigation into the certification of a small business, and fraudulently obtaining public money to which the person is not entitled. *Id.* §14842.5(a)(1)-(4).

7. *Id.* §14842.5(b).

8. *Id.* §14842.5(c).

9. CAL. STS. & HY. CODE §94.3.

be a small business concern, Chapter 739 requires that a minority business enterprise meet federal law requirements¹⁰ in addition to the following state requirements: (1) at least fifty-one percent owned by one or more women or minority¹¹ individuals, and (2) the management and daily operations are controlled by one or more of the women or minority owners.¹² Chapter 739 provides that the following are unlawful and punishable by a civil penalty of up to \$5,000:¹³ (1) fraudulent certification of a minority business,¹⁴ (2) fraudulent representation to a state official or employee regarding the certification of a minority business,¹⁵ (3) obstruction of an investigation into the certification of a minority business,¹⁶ and (4) fraudulently obtaining public money to which the person is not entitled.¹⁷ Additionally, under Chapter 739, a second violation within three years requires the Department of Transportation to impose the same sanctions as a second violation of the small business certification provisions.¹⁸

10. Federal law states the criteria of a small business concern to be a business within certain industries that is independently owned and operated and which is not dominant in its field of operation. The Small Business Administration is required to designate the size standards for each industry. 15 U.S.C. §632(a). *See also* 13 C.F.R. §121 (small business size standards).

11. CAL. STS. & HY. CODE §94.4(d) (definition of minority).

12. *Id.* §94.4(e).

13. *Id.* §94.4(b).

14. *Id.* §94.4(a)(1).

15. *Id.* §94.4(a)(2).

16. *Id.* §94.4(a)(3).

17. *Id.* §94.4(a)(4).

18. *Compare* CAL. GOV'T CODE §14842.5 (penalties for violation of small business certification provisions) *with* CAL. STS. & HY. CODE §94.4(a)-(c) (penalties for violation of minority business provisions).

Business Associations and Professions; desist and refrain orders

Corporations Code §§25532, 31403 (amended); Health and Safety Code §1391 (amended).

AB 2547 (Lewis); 1984 STAT. Ch 619

Existing law authorizes the Corporations Commissioner¹ (hereinafter

1. CAL. CORP. CODE §25005 (definition of Commissioner).

referred to as Commissioner) to order any issuer² or offeror, of a security³ to desist and refrain from further offers or sales⁴ if, in the Commissioner's opinion, a sale or offer is subject to qualification⁵ and is being offered or sold without being qualified.⁶ The Commissioner also may order any unlicensed person to desist and refrain from acting as a broker-dealer⁷ or investment advisor⁸ without the appropriate license.⁹ Furthermore, under existing law, when a franchise exempt from registration¹⁰ is offered for sale, the person to whom a cease and desist order is directed is entitled to a full adjudicatory hearing.¹¹ Chapter 619 requires each of these persons, within one year from the date of service of the order, to file a written request for a hearing on desist and refrain orders issued by the Commissioner.¹² If the person fails to file the request, the order is final.¹³

Under existing law, the Commissioner may issue an order directing a plan, solicitor firm, or any representative thereof to cease and desist from engaging in any act or practice in violation of the provisions of the Knox-Keene Health Care Service Plan Act of 1975.¹⁴ Prior law provided that within fifteen days after service of the cease and desist order the respondent could request a hearing on the question of whether acts or practices in violation of the Knox-Keene Act had occurred.¹⁵ With the enactment of Chapter 619, if a person fails to file a written request for a hearing within one year from the date of the order, the order is deemed to be the Commissioner's final order and is not subject to review by any court or agency.¹⁶

2. *Id.* §25010 (definition of issuer).

3. *Id.* §25019 (definition of security).

4. *Id.* §25017 (definition of offer and sale).

5. *Id.* §§25111-25113 (method of qualification). *See also* 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Corporations* §224 (8th ed. 1974) (procedure for qualification).

6. CAL. CORP. CODE §25532(a). *See generally* 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Corporations* §250 (8th ed. 1974) (discussing orders to desist).

7. CAL. CORP. CODE §25004 (definition of broker).

8. *Id.* §25009 (definition of investment advisor).

9. CAL. CORP. CODE §25532(b). *See also* CAL. CORP. CODE §25217 (licensing standards).

10. *See* CAL. CORP. CODE §31101 (exemption from registration).

11. *Id.* §25532(c). *See also* CAL. GOV'T CODE §§11506, 11509 (hearing procedures).

12. CAL. CORP. CODE §§25532, 31403.

13. *Id.* §§25532, 31403.

14. CAL. HEALTH & SAFETY CODE §§1340-1399.5.

15. 1975 Cal. Stat. c. 941, §2, at 2099 (enacting CAL. HEALTH & SAFETY CODE §1391).

16. CAL. HEALTH & SAFETY CODE §1391.

**Business Associations and Professions;
sale of alcoholic beverages**

Business and Professions Code §25663 (amended).
SB 1593 (Dills); 1984 STAT. Ch 770

Under existing law, to employ or use the services (hereinafter referred to as employ) of a person less than twenty-one years old during business hours, in or on a portion of any premises primarily designed for the sale, service and consumption of alcoholic beverages is a misdemeanor.¹ With the enactment of Chapter 770, off-sale licensees² who employ a person less than eighteen years old for the sale of alcoholic beverages may have their licenses revoked.³ A person less than eighteen years old, however, may be employed to sell alcoholic beverages if that person is under the continuous supervision of a person twenty-one years of age or older.⁴

1. CAL. BUS. & PROF. CODE §25663.

2. See *id.* §§23393, 23394. An off-sale licensee is authorized to sell to consumers only, and not for resale, beer and wine; or beer, wine and distilled spirits for consumption off the premises where sold. *Id.*

3. *Id.* §25663.

4. *Id.*

**Business Associations and Professions;
alcohol sales—underage persons**

Business and Professions Code §25658 (amended).
AB 2248 (Moore); 1984 STAT. Ch 403

Existing law provides that a person under the age of twenty-one who purchases or consumes any alcoholic beverage in any on-sale premises is guilty of a misdemeanor.¹ Under prior law, this offense was punishable by a minimum fine of \$200, no part of which could be suspended.² Chapter 403 lowers the minimum fine to \$100³ and provides for punishment of not less than twenty-four hours or more

1. CAL. BUS. & PROF. CODE §25658(a).

2. 1983 Cal. Stat. c. 1092, §63 at ____ (amending CAL. BUS. & PROF. CODE §25658(b)).

3. In no case may a fine be suspended. CAL. BUS. & PROF. CODE §25658(b).

than thirty-two hours of community service.⁴ For a first offense, Chapter 403 specifies that the court may administer the prescribed punishment in any combination.⁵ A person under the age of twenty-one with a previous conviction for the same offense is punishable by both the \$100 minimum fine and between twenty-four hours and thirty-two hours of community service, unless the court finds community service to be inappropriate.⁶

4. CAL. BUS. & PROF. CODE §25658(b). Community service must be completed during hours when the person is not employed and is not attending school. *Id.*

5. *Id.*

6. *Id.* The court must make a finding and state on the record the reasons why community service would be inappropriate. *Id.*

