A Perspective on California's Regulation of Tax Preparers, Certified Public Accountants, Architects, and Landscape Architects

By Julianne B. D'Angelo and Robert C. Fellmeth

For thirteen years, the Center for Public Interest Law (CPIL) has monitored the activities of many of the state's occupational licensing agencies, and has preached a consistent theme. Government should regulate a particular trade or profession only after an honest assessment of the marketplace and any flaws which present a threat of irreparable harm or prevent normal marketplace functioning from driving out incompetent, dishonest, or impaired practitioners. The licensing alternative should be reserved for trades and professions in which incompetence is likely to cause irreparable harm—that is, harm for which money cannot compensate. If there is likely irreparable harm, then a prior restraint-type barrier to entry (licensing) which addresses and prevents that precise harm should be imposed; additionally, the licensing agency should set industrywide standards of conduct and ethics, and police violations of those standards through a vigorous enforcement program.

In the absence of probable irreparable harm, numerous regulatory alternatives to licensing should be considered. These include the posting of a bond to ensure a fund to compensate injured consumers, a certification program which has the effect of disclosing information to consumers about the qualifications of a practitioner and protects the use of a title, a permit program, straightforward disclosure requirements, a rule of liability, straight statutory prohibitions on certain activities, tax incentives to encourage certain behaviors, antitrust litigation to restore the normally-functioning marketplace, etc.

This fall, the Senate Subcommittee on Efficiency and Effectiveness in State Boards and Commissions, chaired by Senator Dan McCorquodale, is scheduled to hold a series of interim hearings on the possible restructuring of several boards, commissions, and bureaus within the Department of Consumer Affairs (DCA). The Legislative Analyst has already gone on record as supporting complete elimination of many of the licensing programs to be reviewed by the Subcommittee, including the agencies which regulate certified public accountants, boxers, barbers, cosmetologists, guide dog trainers, cemeteries and crematories, funeral directors and embalmers, private investigators, repossessors, security guards, electronic and appliance repair dealers, the home furnishings and thermal insulation industries, landscape architects, certified shorthand reporters, and tax preparers.

Hopefully, the Subcommittee will take an in-depth look at various professions and trades currently regulated by DCA licensing boards, determine whether licensing is an appropriate regulatory mechanism or whether another regulatory alternative might better address the market flaw which justifies regulation, and seriously consider whether some licensing boards should be eliminated altogether, merged with other similar boards, or restructured to better achieve their public protection goals. CPIL will participate in these hearings, and—as the only entity in the state which regularly monitors and publishes reports on the activities of these agencies—offers these preliminary comments and suggestions with respect to a few of the DCA boards to be reviewed by the Subcommittee.

TAX PREPARER PROGRAM

Based upon the analysis set forth above, the Tax Preparer Program (TPP) should be abolished (with the exception of its bond requirement). We perceive no irreparable harm from the negligent and/or erroneous preparation of a tax return. To be sure, there may be a harm resulting from such negligent preparation—perhaps a civil penalty on the taxpayer from the IRS or FTB. But this harm is not irreparable; the civil penalty can be recouped from the tax preparer's $5,000 bond, which he/she is required to post under recent legislation carried by Senator Dan Boatwright. It would appear that this bond is sufficient to cover the kind of civil penalties assessable against taxpayers who utilize the services of a tax preparer. Additionally, the "repeat business" dynamic of the normal marketplace has considerable force here; no consumer would return to a tax preparer who is incompetent and errs on tax returns, and that tax preparer will eventually go out of business. The bond requirement, coupled with the normal functioning of the marketplace, appears to be a sufficient regulatory combination for this occupation.

Although TPP referred a few cases of criminal conduct by tax preparers to law enforcement in 1992–93 (26 cases out of 1,737 complaints received were referred for criminal action), TPP has no jurisdiction to deal with these cases. And other than the referral of these 26 cases to law enforcement, TPP engaged in negligible enforcement activity in 1992–93 (it revoked three licenses and filed one accusation). However, it spent 78.1% of its budget on enforcement.

California is one of only two states in the nation which regulates tax preparers, and the Tax Preparer Program has gone in and out of existence twice since 1973—resulting in no visible difference to California consumers.

In sum, TPP and its registration requirement should be abolished; its bond requirement should be retained and could be administered by a less costly mechanism within the Department of Consumer Affairs.

STATE BOARD OF ACCOUNTANCY

Contrary to the opinion of the Legislative Analyst, CPIL believes the public needs an occupational licensing agency to regulate certified public accountants (CPAs). Many societal actors (*e.g.*, investors, lenders, government agencies, retirement systems, pension plans) rely on the work and the word of CPAs in making many different kinds of business decisions. The recent crisis which has led to the downfall of the savings and loan industry is illustrative of the public's need for independent, objective, and competent analyses and audits of financial data.

The California Supreme Court's recent decision in *Bily v. Arthur Young & Company*, 3 Cal. 4th 370 (Aug. 27, 1992), heightens the need for an effective CPA board. In that case, the Supreme Court essentially immunized CPAs from civil liability for professional negligence to consumers or members of the public other than those with whom they have contracted. In other words, "third party" consumers who purchase stock in a com-

pany in reliance on a certified financial audit have no recourse in the courts if that audit has been negligently prepared; only those in "privity of contract" with the CPA (*i.e.*, the audited company) may sue the CPA for professional negligence. In issuing this ruling, the Supreme Court overturned a 1986 case which had always been the law in California with regard to the liability of CPAs to those who rely on their word. Whether or not we agree with the Court's holding, its impact is clear: *the Board of Accountancy is the only remedy for those third-party victims and is the only mechanism which can protect future clients of that CPA*. The *Bily* case has done for the accountancy profession what *Moradi-Shalal v. Fireman's Fund Insurance Co.*, 46 Cal. 3d 287 (1988), did for the insurance industry: Both cases extinguished a previously existing civil cause of action and forced relatively dormant regulatory agencies to provide an exclusive remedy to injured consumers and the public in general.

However, reliance on the regulatory remedy to detect and sanction competitive abuse is misplaced when it comes to the Board of Accountancy. Here, we are forced to rely on a cartel structure to represent the very different interests of the general public. In our view, the capture of state police power by proprietary interests has resulted in the following consequences.

• ***The barrier to entry into the CPA profession administered by the State Board is excessive and unclear***. According to the Business and Professions Code, applicants for CPA licensure must fulfill two primary requirements for licensure: (1) passage of the nationally standardized CPA exam (section 5082), and (2) completion of anywhere from 36 to 48 months of public accounting experience (depending on whether any of this experience is completed "in the employ" of a Board licensee) (section 5083). One year of the required experience may be waived if a candidate has a college degree in accounting or a related field (section 5084), and candidates who lack public accounting experience can still qualify for licensure if they have sufficient "equivalent experience" (section 5083(d)).

With regard to the exam, we recognize that every state uses the same nationally standardized exam and that it is probably futile to complain about it. However, the pass rate on this exam is extraordinarily low (and, by the way, is one of the most closely-guarded secrets in occupational regulation nationwide). Most examinees must take the test at least three times to pass all five parts; very few even attempt to take and pass all five parts on the first try, and the pass rate for those who do appears to be 15% or less. Any exam which flunks this many examinees is clearly testing more than the minimum standards of competence for an entry-level CPA. Even the State Bar exam has a 50% pass rate for first-time takers. DCA Director Jim Conran recently threatened the Board of Landscape Architects with sunset unless that agency abandoned the use of a national exam with a 6% nationwide pass rate (9% in California) (*see below*), and the Board of Accountancy's exam warrants the same challenge.

Then there is an additional barrier to entry: the substantial experience requirement of section 5083. Exactly what kind of experience qualifies toward licensure? The legislature has required the Board to adopt regulations "establishing the character and variety of experience necessary to fulfill the experience requirements set forth in this section" (section 5083(d)). So the Board adopted Rule 11.5, Title 16 of the California Code of Regulations, which very generally sets forth various kinds of accounting and auditing tasks which must be included in any qualifying experience. But Rule 11.5 neglects to include an important requirement imposed by the Board: All applicants must submit at least 500 hours of qualifying experience. Is this requirement in the statute? No. Is it in the rule which the legislature required the Board to adopt? No. Well, then how do applicants find out about it? It's printed on "Form E," the form which the employer(s) of a CPA applicant must complete to verify that the applicant has gained experience. In regulatory parlance, this is called "underground rulemaking"—the enforcement of a policy or standard of general application without adopting it through the rulemaking procedures of the Administrative Procedure Act (APA).

Additionally, over the past few years, the Board has completely overhauled its policy as to what qualifies as "experience" under Rule 11.5. Prior to 1989, the Board strictly interpreted the rule to require applicants to prove "demonstrate[d] satisfactory knowledge" of 17 auditing procedures. In response to requests from the professional associations, the Board changed its interpretation of this rule in March 1990. Apparently, the Board no longer requires applicants to have performed an actual audit, and instead requires applicants to have engaged in experience which "*enables* the applicant *to demonstrate* that he/she *has an understanding of* the requirements of planning and constructing an audit with minimum supervision which results in full disclosure financial statements."

This change was debated for two years and apparently represents a policy consensus on the part of the Board and the profession. We do not take issue with the substance of the change and—to the extent that the burdensome licensure requirements are eased for CPA applicants such that more can be licensed, enter this profession, and give consumers greater choice in this area—we endorse it. However, the way in which the Board accomplished this very important policy change illustrates its *modus operandi*. Once again, the Board did not sponsor a bill to initiate a legislative amendment, nor did it commence the rulemaking process to amend Rule 11.5; either of these processes would have given CPA applicants and their employers fair notice of the standards to which they are held for purposes of CPA licensure. In order to accomplish this change, the Board simply *modified the instructions to employers* on Form E. Obviously, this particular change is not insignificant. In our view, the Board's method of adopting this change also violates the APA. It deprives both CPA applicants and their employers of clear licensing criteria and standards which the Board is solely responsible for promulgating, and enables the Board and its Qualifications Committee (*see below*) to engage in arbitrary licensing decisions.

Finally, the Board has failed to properly set forth any criteria whatsoever which define "equivalent experience" (section 5083(d)) for candidates who lack public accounting experience. At meeting after meeting of this Board, we have witnessed members of the Board's Qualifications Committee express confusion as to what types of experience it should accept as "equivalent." In August 1990, the Board simply instructed the Committee to evaluate these applications "on a case-by-case basis"—obviously an unacceptable way to run a licensing program. Although section 5083(d) clearly requires the Board to adopt regulations establishing criteria for acceptable "equivalent experience," the Board has yet to comply with this directive.

• ***Excessive Privatization***. The Board of Accountancy is a large board, consisting of twelve members. Eight of these are Board licensees (seven CPAs and one public accountant, a license no longer issued by the Board), and the other four are non-licensee public members.

As a preliminary matter, we object to

the supermajority of professional members on this Board. This is not a novel objection, either by CPIL or by other public interest organizations. The purpose of this Board—and all boards within the Department of Consumer Affairs—is to protect consumers from incompetent, dishonest, and impaired practitioners. This Board is charged with exercising state police power toward the goals of consumer protection, consumer information, and consumer choice in the marketplace; and, toward those ends, not all of its decisions may be in the financial interests of the CPA profession. The presence of an excessive number of practitioners on this Board inhibits this function, as their statutory charge may conflict with their personal and professional pecuniary interests. In our view, there is no rational justification for the presence of professional members on occupational licensing boards charged with consumer protection; the profession is perfectly capable of, and very successful in, representing itself before the Board and the legislature. If subject-matter expertise is needed for a particular policy decision, a small standing advisory panel of practitioners could be created to advise the Board. There is simply no reason why the actual decisionmakers should or must be licensees.

In addition to the excessive number of CPAs on the Board itself, state law permits the Board to utilize the services of numerous non-Board-member CPAs to carry out its licensing and enforcement functions, at an extraordinary cost to CPAs (through licensing fees) and to consumers (to whom CPAs pass those licensing fees). As a result of this authorization, the Board operates largely through a massive committee structure, and most members of these committees are not appointed members of the Board. For example, under Business and Professions Code section 5020, the current membership of the Board's Administrative Committee, which oversees the Board's enforcement program, is 17, and none of these individuals are appointed Board members. The current membership of the Board's Qualifications Committee, which reviews the applications and Rule 11.5 experience completion forms of candidates for licensure (see above), is at least 20 (it was 26 in 1992), and none of these individuals are appointed Board members. The Board has at least six other standing committees, and most of the members of these committees are not Board members. These committees are not autonomous, but their recommendations are largely rubberstamped without detailed review by the full Board at its quarterly meetings.

This kind of committee structure is unheard of elsewhere in the Department of Consumer Affairs. For thirteen years, CPIL has monitored almost all other DCA agencies, and not one of them is permitted to utilize non-Board-member private-practice "volunteers" to the extent this Board does. And this structure is not free. In 1990–91, the Board and its many committees held 65 meetings (an average of over one per week!) at a cost of $289,000, including $152,000 for travel, $26,000 for meeting sites, and $111,000 for per diem payments to "volunteers."

The cost of this use of non-Board-member "volunteers" is obviously inappropriate, but the effect is even more significant. This Board is effectively—and improperly—delegating its state police power licensing and enforcement authorities to private individuals. These "volunteers" are able to strongly influence licensing and enforcement decisions affecting their colleagues and their competitors, without meaningful accountability to the public.

• ***Absence of Aggressive Enforcement Program.*** Contrary to the frequent representations of the Board and the CPA professional societies, the Board of Accountancy does not have an adequate enforcement program. Out of 6,039 inquiries received in 1992–93, the Board generated only 814 formal complaints, and took only 63 disciplinary actions (26 of which were stipulated). While these statistics are extremely low, they actually represent an improvement over past years, when the Board's enforcement program was literally moribund. The entire Lincoln Savings & Loan debacle resulted in the discipline of *one* CPA's license by this Board—and that individual got straight probation.

Additionally, the Board spends only a little over one-half of its budget on enforcement—much less than other boards which regulate practitioners who can wreak irreparable harm on the public.

Finally, the Board spends an excessive amount of its enforcement resources and energy policing "unlicensed practice" (*i.e.*, competition for CPAs). Of the 929 cases the Board says it closed in 1992–93, 346 were for unlicensed or unregistered practice. We believe the public would be better served if the Board would pursue incompetent and dishonest CPAs rather than expending its limited enforcement resources attempting to drive out the competition of the CPA profession.

• ***The Board acts more like a cartel than a state agency.*** The State Board of Accountancy—controlled by CPAs—appears more concerned with suppressing competition from non-CPAs who are lawfully permitted to perform some of the same functions as CPAs (such as tax preparers and non-CPA accountants functioning under Business and Professions Code section 5052) than with policing its own. For example, the Board recently began to enforce Rule 2, Title 16 of the California Code of Regulations, which prohibits anyone but a CPA from using the unmodified terms "accountant" or "accountancy" to describe him/herself or offered services. The Board claims that consumers are confused by a non-CPA's use of these terms, and that many consumers believe that someone holding him/herself out as an "accountant" must be licensed by the state. Others (including CPIL and non-CPA accountants and their professional associations) argue that the CPA-controlled Board is attempting to capture the use of a generic term to prevent the competition from truthfully and effectively advertising in telephone directories and other media, in violation of non-CPAs' first amendment commercial speech rights and due process rights.

This issue has been litigated for about five years, culminating in the California Supreme Court's decision in *Bonnie Moore v. State Board of Accountancy*, 2 Cal. 4th 999 (1992), *cert. denied*, ___U.S.___ (Feb. 22, 1993); CPIL appeared as an *amicus curiae* on behalf of the non-CPA plaintiff Bonnie Moore. In a 4–3 decision, the majority of the California Supreme Court held that the Board's adoption of Rule 2 was within its authority, but that the rule is unconstitutional because it is overly broad. The Court ruled that the Board must allow non-CPA accountants to use the terms "accountant" and "accountancy" in their advertising if those terms are accompanied with a disclaimer stating that the practitioner is not licensed or that the services offered do not require a license. Although the Supreme Court found Rule 2 to be constitutionally defective, the Board has not yet changed its rule.

It is important to note that the Board of Accountancy has never claimed that Bonnie Moore has held herself out to be a certified public accountant or engaged in tasks and functions reserved for a certified public accountant. In other words, the *Bonnie Moore* case does not concern allegations of unlicensed practice. Moore and her co-plaintiffs are lawfully engaged in tasks and functions for which the

legislature requires no license, and the legislature has never precluded non-CPA accountants from using the terms "accountant" or "accountancy." The CPA-controlled Board has assumed that role for itself.

Whereas the profession sees the Board as its reflection and its protection, the actual role of the State Board is to protect consumers from incompetent and dishonest CPAs, provide accurate information to consumers in the marketplace, and preserve consumer choice. The State Board should be above turf battles between different segments of the accounting profession, and should evenhandedly regulate the CPA profession with an eye toward consumer protection. The State Board belongs to the public, not to the CPA profession.

In sum, the state's licensure of certified public accountants is justified. However, the membership of the existing State Board of Accountancy should be revamped; its licensing exam should be scrutinized and it should be required to appropriately clarify its other entry standards; its excessive use of non-Board-member private-practice CPAs in licensing and enforcement decisionmaking should be eliminated; its enforcement program should be properly resourced and professionalized; and its repeated attempts to protect the CPA profession from competition should be declared as against public policy.

BOARD OF LANDSCAPE ARCHITECTS

The Board of Landscape Architects should be abolished. We perceive no irreparable harm from the incompetent preparation of landscape planning and design documents. As with tax preparers, there may be a harm resulting from such incompetence—perhaps monetary injury and attorneys' fees for a civil suit. But this harm is not irreparable. If the threatened harm is monetary only (as opposed to death, serious bodily injury, or other irreparable harm), the preferred regulatory alternative is the posting of a bond. And also as with tax preparers, the "repeat business" dynamic of the normal marketplace has considerable force here; no consumer would return to or recommend a landscape architect who is incompetent, and that landscape architect will eventually go out of business. A bond requirement, coupled with the normal functioning of the marketplace, appears to be a sufficient regulatory combination for this profession.

A properly functioning occupational licensing agency has three roles:

(1) formulation and administration of a barrier to entry (*e.g.*, exam(s), educational requirement, experience requirement, or combination thereof) which is capable of and tailored to preventing incompetent people from practice, because incompetent practice will cause irreparable harm to the public;

(2) the establishment of industrywide standards of professional conduct and behavior for licensees which protect the public from the irreparable harm which justifies licensing; and

(3) aggressive policing of violations of those professional standards through a vigorous enforcement program.

Evaluating the Board of Landscape Architects on these three criteria, we conclude that the Board has failed in all three areas.

• ***Barrier to Entry***. For many years, the Board has administered a nationally standardized licensing exam which has an extremely low pass rate. The 1991 national pass rate on the Board's exam was 6%; the California pass rate was 9%. These 1991 figures are not unusual; for several years, the Board expressed some dissatisfaction with the national organization which prepared the test but took no action because licensees and prospective licensees wanted to preserve license reciprocity with other states. In other words, the Board kept using this licensing exam in order to enable California licensees to practice in other states!

In December 1991, DCA Director Jim Conran expressed serious concerns about the Board's continued use of this exam. DCA's Central Testing Unit examined the test, concluded that numerous items were not related to the practice of landscape architecture, and identified several key problems with the development and grading of the exam. Conran directly told the Board that he would support a bill calling for its sunset unless it abandoned use of the national exam and developed its own exam which tests minimum standards of competence instead of "mastery" of landscape architecture. Regarding the reciprocity issue, Conran properly told the Board that "the fundamental purpose of state licensing programs is to protect the public of the state issuing the license. Reciprocity can only be an incidental benefit, not the primary reason for state licensure." Under Conran's threat—and only under his threat, the Board broke from the national organization and has developed its own test. The first administration of the new test occurred in June 1993, and the pass rate apparently exceeded 40%. While this is a substantial improvement over the national exam pass rate, it is still quite low for people who are required to have six years of education and/or experience.

In other words, the Board has finally revamped its entry criteria only in response to the threats of a particularly aggressive DCA Director. Left to its own devices, who knows how long the Board would have continued to impose the artificial barrier to entry into the landscape architecture profession in California.

• ***Establishing Professional Standards***. The Board does literally no standard-setting for the practice of landscape architecture in California. The only regulations the Board has ever adopted pertain to its licensing exam and the general barrier to entry into the profession in California. Outside of one provision which requires landscape architects to include their license number in advertising, not one Board regulation pertains to post-entry standards of conduct.

• ***Enforcement***. And the Board's enforcement program is non-existent. The Board received only 59 complaints in 1992–93, and only 43 complaints in 1991–92 (and 33 of those were from members of the profession, presumably complaining about unlicensed practice). The Board did not take one disciplinary action during either year. To our knowledge, this Board has revoked only two licenses in the past five years. It spends only 25% of its budget on enforcement. If Senator Boatwright's well-known regulatory agency evaluation benchmark ("enforcement, enforcement, enforcement!") is applied honestly to this Board, it flunks.

In short, the Board's licensing scheme serves primarily to protect existing members of the profession from competition, which does not serve public protection or public choice in the marketplace. And in the two other areas of traditional occupational licensing agency function, it does nothing of value toward its consumer protection mandate. The Board should be abolished and replaced with a bond requirement.

During the many years in which we have advocated abolition of this Board, we have heard well-articulated and passionate pleas from members of the profession about the positive contributions made by landscape architects. For example, landscape architects implement the federal Americans with Disabilities Act and statutes requiring water conservation, soil erosion protection, fire protection, and habitat creation and restoration. We laud these activities, but they have nothing to do with the issue before the legislature: *whether the harm presented by incompetent landscape architects is*

***irreparable** so as to justify **licensure**.* We submit that there is no real risk of irreparable harm; even if there were, this Board fails to address it meaningfully.

The Board and the members of the profession have also set forth a "parade of horribles" should the Board and its licensure requirement be abolished. Essentially, they appear to argue that the state's failure to license landscape architects will result in the flight of all landscape architects from California, such that we would be deprived of their admittedly valuable contributions. This is fairly ludicrous, as was the insurance industry's similar claim that all insurance companies would abandon California if Proposition 103 passed in 1988 (which it did, and—lo and behold—*several* insurance companies still sell policies in California!). The notion that any industry would abandon the largest and wealthiest state in the nation due to governmental regulation (or lack thereof) is simply not credible.

The profession also claims that landscape architects would be unable to procure liability insurance should the state fail to issue a landscape architect license. But the presence or absence of a licensure category is not critical to insurance availability; many licensed occupations have extraordinary trouble insuring their businesses (*e.g.*, the child care industry), and many unlicensed occupations have no trouble insuring their businesses (*e.g.*, owners of retail stores and developers). We hear no complaints from landscape architects in states which do not license them regarding the unavailability of liability insurance. Besides, landscape architects frequently work as subcontractors to other professionals who maintain liability insurance and whose policies can be adjusted to cover the work of the landscape architect. Even if the profession is correct that insurance will be harder to get should the state abolish the licensure requirement, the Insurance Commissioner can cure that problem with appropriate rulemaking to require the insurance industry to issue policies commensurate with the risks posed by the landscape architecture profession.

The insurance industry has no reason to boycott landscape architects as a group. If insurers are so insecure in their ability to evaluate the competence and hence risk presented by a group of practitioners so as deny coverage categorically, a more precise remedy than the Board's full-blown licensing system would be "certification" of minimum competence through education and/or examination with title protection for the term "landscape architect." But there is no reason to deny everyone the right to advise on landscaping for compensation simply because some persons have difficulty obtaining insurance. The requirement of a "license" to practice imposes unnecessary restraints to solve a phantom problem which—if real—the "certification" of competence of those using the title "landscape architect" would address.

In sum, the Board of Landscape Architects and its licensure requirement should be abolished and replaced it with a required bond, to ensure the availability of a fund from which injured consumers could be compensated, and which could be less expensively administered by the Department of Consumer Affairs. At the very most, the Subcommittee might consider some sort of certification program which would protect use of the title "landscape architect."

BOARD OF ARCHITECTURAL EXAMINERS

CPIL believes that there is a risk of irreparable harm (physical injury and/or death) due to improperly designed structures, such that existence of the Board of Architectural Examiners is justified.

CPIL also observes that the Board's stringent licensure requirements (eight years of education and experience and the passage of a nationally standardized written test and a California oral exam) appear to be screening out incompetent architects without being overly burdensome, as reflected in a 53% pass rate for the written exam and a 66% pass rate for the oral exam. The Board receives very few complaints (293 in 1992–93, 130 of which were from members of the profession presumably complaining about unlicensed practice) and takes very little disciplinary action.

However, we have four comments about the Board's operations.

• ***Oral Examination***. To qualify for licensure, the Board requires applicants to pass an extensive multi-day written exam provided by the National Council of Architectural Registration Boards (NCARB) and a one-hour oral examination administered in California. Recently, the Board (and particularly its staff) has questioned the continued need for the oral exam, because:

–DCA's Central Testing Unit (CTU) has criticized the use of an oral exam in addition to a written exam unless there are some demonstrated "higher order" skills needed to competently practice which cannot be tested on a written exam. CTU properly questions what the Board's oral exam adds to the extensive written exam, and the Board should answer this question.

–CTU has also criticized the Board's method of administering its oral exam, noting that it is administered by different exam commissioners who have varying levels of training and experience, such that there is no assurance of consistent grading among the various commissioners.

–In spite of the fact that the oral exam appears to have problems in content and grading, the Board has no appeals process for the oral exam.

–The oral exam is extremely expensive to administer. The Board recently had to increase the fee for the oral exam to $100 (in addition to the written exam, which now costs $490), because its cost to administer the oral exam was $255,000 more than the fee generated!

The Board should revisit this issue.

• ***Written Contract Requirement***. The Board of Architectural Examiners should seek legislation requiring architect-consumer contracts for professional services to be in writing; all changes thereafter agreed to by the parties should similarly be in writing. Many other trades and professions have a written contract requirement (*e.g.*, attorneys, home improvement and swimming pool contractors, appliance repair dealers, automotive repair dealers), and they generally serve to promote clearer communication between licensee and consumer and eliminate mid- or post-project confusion and disputes which eventually clog our courts. The largest percentage of complaints closed by the Board in 1992–93 (other than unlicensed practice) concerned contractual disputes; the Board could both provide greater consumer protection and eliminate these complaints if it adopted a written contract requirement.

The genesis of the written contract requirement is the adhesive relationship often extant between licensees and their customers. Small builders often use the services of architects. They may agree on a contract price. But as with many professions, it is difficult to arrive at a secure price for services to be rendered in the future. Often, the design is subject to alteration, or to a new fact or preference requiring additional work. How much should one charge beyond the agreed price? Traditionally, many professionals have been in an advantageous position in billing; they control a valuable asset in which the consumer has invested substantial moneys. It is not uncommon for such professionals, especially for attorneys and engineers, to submit a high bill

which is totally unexpected for relatively minor additional work beyond an agreed-to price. Often, the submission is made shortly before a trial or important hearing by an attorney, or just before a building permit application must be submitted by an engineer. In either case, a kind of extortion ensues—one which has been a continuing problem for consumers.

Attorneys are bound by a special fiduciary duty to bill fairly; the State Bar's attorney discipline system has been strengthened recently to assist in such efforts. The Bar has also developed an extensive fee dispute arbitration system. Finally, the State Bar Act now requires that services expected to exceed $1,000 be subject to a written contract to assure the enforceability of the amounts charged.

Other professions and trades have also responded in varying degrees to this problem, such as the Contractors State License Board and the Board of Landscape Architects (the latter now requiring written contracts). But the boards regulating architects and engineers have failed or refused to impose any check on the billing abuses borne of adhesive advantage. In the case of the architect, the plans are in the hands of the professional and require building permit approval. The architect is in a position to render a large bill. There may be no practical substitute in terms of alternative plans. There may be a time limit which requires acquiescence to an unfair, last-minute bill.

The problem of excessive billing has much precedent. The optimum solution is to follow the tried and true law of contracts, adjusting appropriately for the adhesive setting which may be likely. This means simply that once a price has been agreed to, the professional abides by it until and unless an alteration is agreed to by the customer—and in advance of the services to be rendered. The customer has the right to say, "I can't afford it if it will cost that," "Forget it," or "I know someone else who will do it for less, even taking into account the value of the prior work." This means that an original price estimate may change, but it will not change based on the unilateral imposition of one party. As fair as such a rule may appear to be, it is honored in the breach by most professionals. The Board of Architectural Examiners has yet to impose the kind of check which is appropriate and warranted.

• ***Price Fixing***. Architects have traditionally offered their services for a fee which equals a percentage of the final project cost, particularly for large commercial projects. Such a formula constitutes, on its face, an unjustified form of horizontal price fixing. Any price formula which is unrelated to cost and which facilitates agreement between competitors is a subject of proper concern for a regulator. The broad enabling acts commonly applicable to trade or professional regulation expect the regulator to assure fair competition and to avoid marketplace abuse, particularly those which *create* a market flaw. Ironically, many regulated professions have used the fact of regulation to engage in such price fixing—expecting those who enforce antitrust law to defer to the oversight presence of the regulator. Real estate brokers, with their traditional commission of 6% of sale price for residential properties, are a case in point. The imposition of 8% of project cost as the architect's fee includes all of the above abuses. The architectural service costs and the project costs may have only a very vague relationship. To the extent that this pricing pattern persists, it should be a priority of the Board to end it affirmatively. Its task is not to represent the economic interests of practitioners, nor to facilitate or countenance economic arrangements which create market flaws. Rather, its intended task is to address existing market flaws and compensate for them in the interests of the larger citizenry.

• ***Proprietary Specifications***. Architects design major private and public real property projects. Their work includes more than plans; it includes the specification of materials to be used. A common historical abuse in this area has been the use of "proprietary" or "canned" specifications. This often occurs when one entity has an exclusive dealership for a given product. Its distributor is happy to provide a "canned" specification for a material which can only be met by a single brand: his.

For example, a building needs inside ceilings. Alpha Product's manufacturer or distributor might give to an architect, for her use, a prewritten specification for inside ceilings of a type, size, and composition which describes only Alpha Product. The easy-to-plug-in canned specification may save the architect some work, and—if she has an interest in the enterprise—perhaps facilitate substantial side profit. This practice is often difficult to detect. General contractors bidding on the project will call the Alpha distributor, who will give them all the same high price to include in all of their respective bids. They all know that this is the material which must be used, and they all know they are all getting the same high price in estimating a bid to build. And the architect generally makes 8% of the project price.

Is the Board proactively monitoring for these kinds of breaches of fiduciary duty? Where? How?

CONCLUSION

Congratulations to the Subcommittee for taking the kind of proactive look at these agencies which the *agencies* should be replicating in their examination of the industries they regulate.

The boards and bureaus selected for examination by the Subcommittee—only a few of which are discussed above—vary substantially. A justification for the licensure of tax preparers and landscape architects is difficult to understand. Although arguments for bonding the former and certification for the latter could be made, a full-blown prior restraint licensing system lacks merit. In contrast, the existence of licensing boards for accountants and architects has an articulable rationale: These professionals are capable of wreaking irreparable harm if incompetent. But there are serious flaws involving both of these boards. The Board of Architectural Examiners exhibits some promise as a regulatory entity, but it has yet to challenge the tribal rules of the profession, a common malady among regulatory bureaucracies. And as to the State Board of Accountancy, it is preferable to have no agency than the one currently presiding. This agency is symptomatic of the worst features of our political system: capture of the state by a vested profit-stake interest.

Regrettably, the same interests excessively influence the legislature as well. California has *no* campaign contribution limitations for legislative or statewide officials currently in force. Those with an immediate proprietary stake in public policies control the agencies empowered to act on behalf of all of us. And they inhibit our elected representatives from providing the countervailing check the founding fathers intended. The condition precedent to any meaningful regulatory reform is thusly framed: The state must consider long-run and larger impacts, and the state must decide on the merits.