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Does Enforcement of Architects' Regulations Protect the Public Welfare? Not Enough.

by **Thomas Spector**

Serve the public. Protect our turf. State law and AIA code enforcement for architects decidedly emphasize turf. How so? Can this be changed?

A cynical opinion of professionals' motives — The professions are self-serving clubs that successfully enlist state power to guarantee their members' socioeconomic advantages — and in response, an embattled professional outlook, have become dishearteningly durable features of our society. With work, this unhappy situation is reversible, but the professions must shoulder most of this work. A robust defense of professional licensure should demonstrate that 1) the profession provides a unique public good requiring extensive training and judgment, that 2) professional self-regulation is the best choice given the complexity of the subject, and that 3) the professions employ the state's policing power ethically to deliver a net public benefit.

Critics of the professions usually focus on the third defense and cite a poor record of enforcement to characterize restrictive occupational licensing as primarily self-serving. They view the codes of ethics and standards of practice the professions write for themselves as barriers erected to assist the professions in maintaining their privileges, or as sociologist Magali Sarfatti Larson puts it in *The Rise of*

Professionalism, tools that aid in “justifying inequality of status and closure of access in the occupational order.”¹ In a similar vein, law scholar Walter Gellhorn warns of “the many occupational groups that have managed to convert licensure from a sharp weapon of public defense into a blunt instrument of self-enrichment.”² The record often supports these interpretations: Professionals are notoriously lax when it comes to initiating self-discipline and lenient when they are finally compelled to discipline rogue colleagues. The codes of ethics they abide by are impotent for self-regulation, and the laws governing their practices are most effective at securing their turf.

The absence of a strong demonstration of public welfare arising from the regulation of traditional professions makes it all too easy for other occupations to pile on the professional licensing bandwagon, thus further deflating expectations of public welfare being served through such licensing. While Larson leaves the impression that occupational restrictions are always self-serving, Gellhorn suggests that a judicious culling between necessary and unnecessary regulation is in order: “I am comforted by the thought that surgeons and structural engineers must pass scrutiny by someone more knowledgeable than I am or am likely to become about their

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qualifications. On the other hand I think it absurd to set up elaborate mechanisms as precautions against my being dissatisfied with the way my hair has been cut, my toenails trimmed, my muscles kneaded, my hearing aid fitted, or my drains unclogged." ³ If the occupations that do materially affect the public well-being were more aggressively self-policing, then it would become more difficult for those occupations that do not engage a significant public protection to sustain their blatantly self-serving attempts at securing licensure. A spirited defense of the professions, then, must be able to justify not only the concept of the profession in question, but also show that the everyday reality of professional self-regulation is effectively performed in the public interest.

How well, then, does the architecture profession regulate itself for the public interest? The architecture profession has two main sources of standards for professional behavior: the AIA Code of Ethics and Professional Conduct, and state registration laws. To come to some preliminary conclusions on this matter, my research assistant and I gathered and organized several years of enforcement data on both. (There is a third standard, NCARB's Code of Professional Conduct, but this document is written to be transposed into state registration law, which in many states, it is. Thus I do not study this separately from enforcement of state laws.) The results suggest several areas for discussion and future study if the architecture profession wishes to mount a more aggressive defense of its ethical mission of serving the public welfare through professional regulation.

ENFORCEMENT OF THE AIA CODE OF ETHICS

First my assistant and I looked at ten years of enforcement of the canons of the AIA's Code of Ethics and Professional Conduct (COE), from its reinstatement in 1989 through 1999. In those years, the AIA ethics committee carried out forty-seven ethics enforcement actions. Thirty-five, or 70%, involved Canon 5: architects' obligations to one another. This left only thirteen cases in ten years' time that could be said to be concerned with archi-

tecs' behavior towards clients or the public. This seventy-thirty split demonstrates that the AIA's ethics panel's primary task is to police in-house complaints by architects against one another for not giving proper credit for work jointly done, for not allowing someone to take samples of their work with them when they depart, or other similar infractions. Thus, the ethics panel's primary activity is to provide an internal forum to prevent disputes between architects from going public and thus potentially tarnishing the profession's reputation. Perhaps there is a strong public good served by this activity, though I have never seen one proposed, much less defended. This is not to say that a mechanism for resolving disputes between professionals or between professionals and their employees has no value, it is only to say that its value to the public is minimal.

Does it seem plausible that the dearth of ethics actions against architects reflects an incredibly high standard of behavior among the nation's 60,000 AIA members, or is it more likely that clients and the public seek to redress their grievances elsewhere? This is a question such data cannot answer conclusively; one can only speculate then look elsewhere for a more likely source for redress: state registration laws.

ENFORCEMENT OF STATE REGISTRATION LAWS

For several reasons, the assumption that clients and the public are more likely to seek redress for their complaints and receive more attentive treatment through registration law has intuitive appeal. First, the law is more locally enforced than the AIA's Code, and, as a result, more likely to be responsive. Second, state boards are composed of professionals and laypersons ultimately answerable to state legislatures — hence clients and members of the public are likely to receive a more sympathetic hearing. Finally, state law has more teeth in it: Your entire livelihood is potentially at stake should your behavior be found sufficiently wanting.

We solicited data from every state board regulating architects and were successful in gathering the last three years

of enforcement actions for thirty-one states, including the most populous ones: California, New York, Texas, Florida, Illinois, plus twenty-seven others, representing jurisdiction over 80,652 of the nation's 100,522 resident architects or just over 80%.⁴ This netted 665 enforcement actions to study. We tabulated them according to type of infraction.

Clearly, transgressions against architects' turf accounted for the lion's share of enforcement activity. Prosecutions for unlicensed practice accounted for over half (352) of all prosecutions. If we include false advertising (forty-one prosecutions) and plan stamping (fifty-six) in this category, the total reaches 449 out of 624 — 70% of all enforcement actions were against non-architects or those seeking to help non-architects invade their protected domain.

Other areas of prosecution were:

- Negligence: 56 (California alone accounts for twenty-six of these.)
- Failure to complete or report the required continuing education hours: 5 (This is likely to go up as continuing education becomes required everywhere.)
- Felony: 32 (Fifteen in New York resulted mainly from one sting operation that snared architects, interior designers, contractors, and brokers, making this number abnormally high.)
- Reciprocity problems in which architects misrepresented their qualifications or made other false statements to the board: 26
- Theft of seal: 11
- Theft of plans: 8
- Miscellaneous: 78. (These actions were primarily for enforcement of unusual state laws. For example, California had seventeen such prosecutions related to its law requiring an architect's stamp on all documentation, including change orders and contracts. Texas accounted for twenty-nine actions, all related to architects who ran afoul of its law requiring plan submittal for architectural barriers and ADA review prior to submittal for construction. Once these two large sources are factored out, the miscellaneous category dwindles to thirty-two that fit no nationwide category.)

In addition to prosecuting licensing

law, some state boards, at least, are prosecuting practitioners for matters unrelated to practice. Florida, for example, suspended a license for an architect's failure to pay back student loans, and Illinois suspended an engineer's license (the same board regulates architects) for failure to pay child support.

A feature of national enforcement that drew our attention is the lack of uniformity in enforcement from state to state. It's to be expected that the picture would reflect some differences among the jurisdictions, but the unevenness stands out more than the uniformity. Some examples: California, with roughly one quarter of the nation's registrations (both home and reciprocal) prosecutes negligence much more vigorously than do other states — one half of all the cases we found. Nevada zealously enforces unlicensed practices (ULPs) and false advertising — forty-nine ULP cases (more than in California or any other state). North Carolina was also impressively zealous: It prosecuted twenty-two ULP cases, far more than its more populous neighbor, Georgia, which had only two. The Tennessee Board appears to have come down particularly hard on plan stamping: it had six prosecutions, as many as New York, which has more than triple its population. The Ohio Board, on the other hand, has had its hands full with a virtual crime ring of seal thieves: It prosecuted six out of a nationwide total of eleven. Ohio has also uniquely gone after businesses using the term architect in their titles ("Software Architects," "Audio Architects," etc.), even when such titles are clearly not attempts to surreptitiously practice architecture. Remarkably, Ohio's more peaceable neighbor, Indiana (like New Hampshire), had no prosecutions whatever during the three year period.

Another aspect of the lack of uniformity in behavior from state to state is not only in what is prosecuted, but also in the rate of prosecution. Nevada, for example, not only aggressively goes after ULPs, its board is by far the most zealous in the nation. In a comparison of the overall number of prosecutions to the number of resident architects, the Nevada board far outstrips any other state in per capita en-

forcements: one enforcement action for every seven architects. The next closest states in actions per resident architect are South Carolina and South Dakota, with a one-in-thirty-three rate. Most states prosecute at a rate of less than one per 100.

The unevenness in both type and rate of enforcement is a potentially serious issue. On the one hand, if enforcement lacks continuity, it could call into question the efficacy of the current practice of state licensing. On the other, the very practice of dispersed enforcement guarantees variation among jurisdictions. The one area of uniformity is in enforcement of ULPs and plan stamping, the preponderant enforcement activity of all boards.

LEGISLATIVE INITIATIVES

Is it surprising, then, given the preponderance of enforcement actions devoted to policing interlopers, that state boards often find themselves fighting a rear-guard action in defense of the public health, safety, and welfare they serve? This shows up most visibly at the level of proposed state legislation, where state boards all too often find themselves lobbying intensely merely to preserve architects' already narrow prerogatives. Not only does this occur in the now familiar spectacle of interior design practice legislation and in California's celebrated "competition killer" amendment to state law proposed (and defeated) in 1998, it also occurs in a potpourri of other legislative measures.

Some legislative news is actually heartening: In California, the requirement that even contracts must be stamped has been dropped, and school districts can no longer ask architects to hand over copyrights of their plans. Minnesota has secured a measure making it harder for would-be plan-stampers with an amendment that "provides a clear record of the preparer, or person directly supervising the preparation" of construction documents.⁵ The apparently indefatigable Nevada Board has convinced the legislature to both tighten up the definition of "design professional" and prohibit public bodies from seeking to require architects to "indemnify or hold harmless the public body from any liability, dam-

age, loss or action caused by the negligence, recklessness, or intentional misconduct of the public body."⁶ Bravo, Nevada!

But more often, state boards are seeking to cope with things like these:

The Alabama Board has been seeking to close loopholes in state law for specialty contractors who perform otherwise unlawful design work under the auspices of their specialty exemption.

In Missouri, the Board has struggled with the rising power of the design-build industry and has finally secured an orderly process within which design-builders can contract for design services and then subcontract with licensed professionals.

The Oregon Board has been dismayed that certain qualified construction contractors are legally exempted from architectural registration even if they offer architectural services, but this board has been unable to change things. In Tennessee, an alarming piece of legislation was introduced in the 2000 session that would "exempt existing structures with no change in use-group classifications from the requirement of having a registered architect and engineer prepare plans and specification," no matter the size or occupancy type of the structure.⁷ The Oklahoma Board has battled not only interior designers for several sessions, but also a group calling itself Certified Building Designers, who want the right to design certain types and sizes of buildings formerly reserved for architects. And in Texas, the Board of Architects and Engineers has opined that, as a result of newly legislated building energy efficiency standards, architects "may be requested to certify that they have designed their projects in compliance with the energy codes under certain circumstances," thus unleashing a new potential source of liability.⁸ From such examples emerges a pattern of business interests' insouciant incursions, legislative and regulatory unconcern, and state boards' obvious weakness at instigating beneficial change, a weakness that is hard to regard as other than humiliating for the profession.

Magali Larson would maintain that incursions into the architecture profession

by interior designers, contractors, design / builders, certified building designers, and the like are entirely predictable results of the search by other occupations for some of the market protections offered licensed professions. The weaker a profession's grip on its market, the more likely the incursions. But we really don't need neo-Marxist explanations to understand the mechanisms behind many of these legislative actions or would-be-actions. We need only reflect on the difficulty architects have answering a hostile local legislator's taunt — "Show me a single instance when an architect's stamp prevented a collapse or a death" — to understand how easily the profession is put in a vulnerable, defensive position, when it seems as though it should be obvious to anyone of average intelligence that that the world needs more — not less — of what we do.

ENFORCING THE PUBLIC GOOD

Of course weeding out unlicensed practitioners serves the public welfare. The problem is, it serves practitioners' well-being even more by enforcing their limited monopoly. It is perfectly legitimate for state boards to prosecute interlopers aggressively. But what disheartens those who wish to shore up the profession's ethical legitimacy is when prosecuting ULPs, plan stamping, and false advertising makes up the preponderance of a board's activities. Then it seems that the critics are correct: the state boards' primary mission is to serve the regulated. Until the state boards can demonstrate that they are just as tough and zealous in holding those they regulate to high standards as they are in going after the unlicensed, they will always be vulnerable to legislative taunts and cynical critics. This vulnerability is only heightened when we look at the overall enforcement picture nationwide and see such variation in both what is enforced and in the frequency of enforcement.

Should state licensing law become widely recognized as concerned with maintaining high standards of public service within the profession as it is with turning away outsiders seeking a piece of the business, the occupational licensing of architects could easily join Gellhorn's short-

list of structural engineers and surgeons as the occupations whose protection meets a significant public need. For this to come to pass, however, a change in emphasis is required. How to start?

Architects and their state boards can't unilaterally remake practice law to their liking. They can effect beneficial change only fitfully and in piecemeal fashion. Architects can, however, demonstrate the gravity with which they approach their craft by beginning to express the importance, urgency, and social benefit of what they do with the one document and source of self-regulation fully under their control: The AIA Code of Ethics and Professional Conduct. The COE could be a source of leadership, but in its current incarnation, it is not. It fails to provide, as Victoria Beach has emphasized through the Boston Society of Architects' Ethics Forum, "meaningful ethical standards to defy — or embrace."⁹

To lead the profession, the COE would need to be both unequivocal and specific concerning architects' obligations to society and the benefits the public has a right to expect from them. Further, if the code is still to address practitioners' behavior toward one another, then it could at least be explicit about the unacceptability of coercive employment practices towards the profession's most vulnerable members: its interns. Addressing these issues would be a start towards a professional standard that practitioners would find motivating and the public would regard as admirable. As it stands, the critics, unfortunately, get the last word. □

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NOTES

1. Magali Sarfatti Larson, *The Rise of Professionalism: A Sociological Analysis* (Berkeley: University of California Press, 1977), xviii.
2. Walter Gellhorn. "The Abuse of Occupational Licensing," *University of Chicago Law Review*, Fall 1976.

3. *Ibid.*, 25.

4. NCARB, 2003.

5. The Communicator, September 2002, <www.aeislaid.state.mn.us>, Minnesota statute 326.12 subdivision 3.

6. Legislative Wrap-Up, 2001. Las Vegas: Nevada State Board of Architecture, Interior Design, and Residential Design. Nevada SB 255, Chapter 279, Statutes of Nevada.

7. Legislative Update, Spring 2000, Nashville: Tennessee State Board of Architectural and Engineering Examiners.

8. TBAE Bulletin, summer 2002. Austin: Texas Board of Architectural Examiners.

9. Victoria Beach, "Got Ethics?" Chapter Letter, Boston Society of Architects, September 2001.