



University of San Diego

Center for Public Interest Law

Children's Advocacy Institute

January 13, 2005

The Honorable Michael Alpert, Chair, and Commissioners  
Milton Marks "Little Hoover" Commission on  
California State Government Organization and Economy  
925 L Street, Suite 805  
Sacramento, CA 95814

re: Outline of Oral Testimony on GRP 1 (Boards and Commissions)

Dear Commissioner Alpert:

Thank you for inviting me, as a representative of the Center for Public Interest Law (CPIL) at the University of San Diego School of Law, to testify before the Commission on Governor's Reorganization Plan (GRP) 1 on January 26, 2005. CPIL is a nonprofit, nonpartisan, academic organization that — since 1980 — has monitored and evaluated the performance of California agencies that regulate businesses, trades, and professions, and is the only public interest organization in the state that has consistently monitored the boards of the Department of Consumer Affairs (DCA) — all of which are now proposed for abolition under GRP 1.

The California Performance Review (CPR), the CPR Commission, and the Schwarzenegger Administration have commenced an important discussion on the reorganization of the structure of state government. Although we respectfully recommend rejection of GRP 1 for the reasons outlined below, this discussion should continue and appropriate state government deregulation and restructuring should occur. We reiterate our offer to share our experience and expertise with the Little Hoover Commission and the Administration to advance this goal.

As codified in AB 269 (Correa) (Chapter 107, Statutes of 2002), the highest priority of DCA and its occupational licensing agencies (including its boards, commissions, and bureaus) is public protection — that is, protection of consumers from state licensees who are unqualified, incompetent, negligent, dishonest, or impaired. The statute expressly provides that where public protection conflicts with another interest sought to be promoted, "protection of the public is paramount." This mandate demands a transparent regulatory structure that incorporates (1) subject matter expertise in the particular trade/profession at issue; and (2) independence from the particular trade/profession regulated. Similarly, occupational regulation should be consistent and predictable (so as to afford equal protection to licensees), and responsive to the needs and interests of the general public.

As described above, CPIL has monitored California's boards, bureaus, and departments — both inside and outside the Department of Consumer Affairs — for 25 years. CPIL has criticized the performance of many boards over the past 25 years, but the problems we identified do not necessarily stem from the fact that they are boards as opposed to bureaus or departments. CPIL agrees that some of the boards listed in GRP 1 could be abolished with no harm whatsoever to the public, and that some regulatory programs (and the agencies that administer them) are unnecessary and should be entirely abolished. Although GRP 1 proposes abolition of some advisory boards and task forces which have either never been created or have fulfilled their missions, it does not propose deregulation of professions that need not be regulated; instead, it merely converts the boards regulating those professions to bureaus. CPIL also agrees that some regulatory boards could be converted to bureaus, and that other large boards could be downsized to promote efficiency. GRP 1 does not propose these changes either. Instead, GRP 1 imposes a “one-size-fits-all” regulatory structure on many (but not all) occupational licensing boards which will substantially lessen transparency and accountability to the public.

The statute governing GRPs requires the executive branch to “prepare . . . reorganization plans in the form and language of a bill as nearly as practicable . . .” Government Code § 12080.2. At this time, that required bill language has yet to materialize. As such, the precise details of exactly how the proposed conversion of boards to bureaus will be implemented are unclear. However, as to the concept of conversion, CPIL will address the following issues at the hearing:

- GRP 1 purports to emerge from the CPR report and to apply the “rigorous criteria” utilized by the CPR authors. As we stated to the CPR Commission, the CPR report is flawed — it reflects a misapprehension about the nature and functions of regulatory boards, it contains little analysis of the nexus between its findings and its recommendations, and it provides an insufficient basis for changes of the magnitude it proposes.<sup>1</sup> Even assuming such “rigorous criteria” were advanced by the authors of the CPR report, GRP 1 — without explanation or analysis — proposes the abolition of a number of boards that the CPR report proposed to preserve. Of import, GRP 1 newly proposes to abolish — with no prior public hearing or process — a number of the state's most important health care regulatory boards. Conversely, GRP 1 — again without explanation or analysis — proposes to preserve numerous boards that the CPR authors slated for abolition. In other words, GRP 1 rejects either the “rigorous criteria” or their application by the CPR to the boards in question — for unidentified reasons.
- GRP 1 insists that the abolition of boards will “result in increased accountability and transparency of operations.” However, political accountability is premised on the

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<sup>1</sup> See Robert C. Fellmeth, *Extended Testimony of the Center for Public Interest Law on the Recommendations in the California Performance Review Report* (Sept. 27, 2004) at <[www.cpil.org](http://www.cpil.org)> or <[http://cpr.ca.gov/updates/archives/davis\\_schedule.shtml](http://cpr.ca.gov/updates/archives/davis_schedule.shtml)>.

public's ability to find out what government is doing — and GRP 1 will hinder that ability in many significant areas. It will destroy the “public forum” currently required of state regulatory boards under the Bagley-Keene Open Meeting Act, Government Code § 11120 *et seq.* That statute requires multimember regulatory boards to post an advance agenda of all topics to be discussed and acted upon at a public meeting; share with the public documents related to public agenda items and distributed to board members prior to the meeting; consider public comment in making decisions on action items; and generally make all important policy decisions in a public setting, subject to public and media scrutiny. The GRP's proposal to replace this statutorily-required “public forum” transparency with bureau chiefs selected by and reporting only to the executive branch and with ad hoc advisory committees — whose existence is apparently at the sole discretion of the executive branch, whose composition is unexplained, and whose authority is unclear — is inadequate to ensure either accountability or effective public participation in government decisionmaking. Rather than promoting transparency and government in the public interest, the proposal will heighten the ability of organized special interests to excessively influence occupational regulation in which they have a profit stake, to the exclusion of meaningful monitoring and participation by the public.

The Bagley-Keene Act is clear and eloquent: “It is the public policy of this state that public agencies exist to aid in the conduct of the people's business and the proceedings of public agencies be conducted openly so that the public may remain informed. In enacting this article the Legislature finds and declares that *it is the intent of the law that actions of state agencies be taken openly and that their deliberation be conducted openly.* The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.” Government Code § 11120 (emphasis added).

- GRP 1 would also affect the existing checks and balances between the executive and legislative branches in overseeing state boards. Abolition of the boards listed in GRP 1 would eliminate approximately 190 board appointments currently made by the Legislature, and an additional 115 gubernatorial appointments which must be confirmed by the Senate. GRP 1 would effectively concentrate the operations of these agencies solely within the executive branch. This will result in disruption and dislocation of important government programs every time a new Governor is elected, and will create an unnecessarily adversarial relationship between the legislative and executive branches with regard to the oversight of these agencies.
- Although the Governor, in his State of the State Address, justifiably condemned board members who “make \$100,000 a year for only meeting twice a month,” the

members of virtually all of the boards proposed for elimination are volunteers and receive only \$100 per day for days on which they perform board business. Only four of the boards proposed for abolition pay full-time salaries. Very little money would be saved by the abolition of the remaining boards, and — due to the special fund nature of many of them (including all DCA boards) — the general fund will not benefit at all. Conversely, considerable expertise, experience, continuity, and the transparency of the public forum in which these boards must currently operate will be lost.

- GRP 1 overlooks two dynamics that have evolved over the past decade:
  - (1) the emergence of “public member majority” boards: Whereas each occupational licensing board used to be controlled in large majority by members of the profession regulated by that very board (creating a clear conflict of interest for professional members who are supposed to regulate in the public interest), many DCA occupational licensing boards are now controlled by “public members” with no profit-stake interest in their own government decisionmaking; and
  - (2) the growth of the “sunset review process” under Government Code § 473 *et seq.*, under which (since 1995) the legislative and executive branches regularly and comprehensively evaluate the performance of the state’s regulatory boards on an individual basis. As opposed to GRP 1’s “broad-brush” proposal to abolish all DCA boards, the sunset review process affords government and the public an opportunity to individually review and take action on a board consistent with its performance.
- Both the CPR report and GRP 1 disproportionately focus on the licensing function of these boards, to the almost complete exclusion of their more significant rulemaking (quasi-legislative) and enforcement (quasi-judicial) functions — which often benefit from diverse expertise of board members permitted to specialize in a particular subject matter area, and which clearly benefit from the “public forum” requirement of the Bagley-Keene Act. Quasi-legislative rulemaking adopted by boards is already reviewed by the executive branch (including the DCA Director for DCA boards, and the Office of Administrative Law for all agencies subject to the Administrative Procedure Act), such that it seems gratuitous to limit the public forum through which many interests can meaningfully participate in government regulation. And neither the CPR report nor GRP 1 have addressed the obvious inefficiencies in agency enforcement programs — programs intended to remove incompetent or dishonest practitioners from the marketplace, but which suffer from inadequate coordination between investigators and prosecutors, excessive delay, duplicative review and decisionmaking by reviewers who lack knowledge of the evidence, and inadequate disclosure to enable consumers to protect themselves.

For these reasons, CPIL recommends that GRP 1 — which cannot be amended — be rejected. Neither the CPR report nor GRP 1 have identified a solid public policy reason to deprive both the public and licensees of the public forum now afforded by boards regulating significant professions that currently engage in important policymaking in the sunshine, and instead convert them to a “one-size-fits-all” regulatory structure controlled solely by the executive branch and empowered to make policy decisions without meaningful public scrutiny.

Having said that, CPIL agrees that (1) some of the boards listed in GRP 1 should be abolished;<sup>2</sup> (2) some licensing requirements and the agencies that administer them should be abolished and/or converted to voluntary certification programs;<sup>3</sup> (3) some regulatory boards that spend most of their time and budgets on licensing and engage in little standardsetting and enforcement should be converted to bureaus<sup>4</sup> — if and only if the licensing requirement is deemed

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<sup>2</sup> These include task forces and advisory boards that were created by legislation signed by the Governor, but have not been staffed or have fulfilled their specific missions. Obvious examples include the Brown v. Board of Education of Topeka Advisory Commission, the Commission of the Californias, the California Campus Sexual Assault Task Force, the California Commission for Economic Development, the Electronic Commerce Advisory Council of California, the Interagency Aquatic Invasive Species Council, and the Small Business Reform Task Force.

<sup>3</sup> In 1985, CPIL outlined substantive criteria which government should honestly evaluate before intervening in the marketplace to license trades, professions or businesses. Robert C. Fellmeth, *A Theory of Regulation: A Platform for State Regulatory Reform*, 5:2 CAL. REG. L. REP. 3 (Spring 1985). The California Legislature later codified similar criteria in two important statutes creating the “sunrise process” (which should occur before the legislature creates a new regulatory program), Government Code § 9148 *et seq.*, and the “sunset review process” through which the legislative and executive branches regularly evaluate the continued necessity and performance of some of the state’s regulatory boards, Business and Professions Code § 473 *et seq.* Under these criteria, licensing is unnecessary if (a) incompetence, negligence, dishonesty, and/or impairment will not cause irreparable harm; (b) incompetence, negligence, dishonesty, and/or impairment will generally cause only monetary harm that can be addressed by a bond requirement or through a small claims court/civil remedy; and/or (c) practitioners do not generally contract with unsophisticated members of the public but primarily with other licensees (*e.g.*, landscape architects serve as subcontractors on projects headed by architects or engineers), large corporations, or other sophisticated “consumers” that are capable of assessing competence and protecting themselves via contractual arrangement.

Applying these criteria, CPIL has contended for many years that the licensing requirements administered by the New Motor Vehicle Board and the Court Reporters Board should be repealed. CPIL is not alone. A 1978 study commissioned by the Department of Consumer Affairs recommended repeal of licensing requirements for court reporters, landscape architects, and geologists and geophysicists. Harry L. Summerfield, *A Report of the Regulatory Review Task Force* (April 1978). In 1994, the Senate Subcommittee on Efficiency and Effectiveness in State Boards and Commissions recommended repeal of the licensing requirements for landscape architects and the conversion to bureaus of several existing DCA boards. Senator Dan McCorquodale, Chair, *Reforming and Restructuring California’s Regulatory Agencies* (April 11, 1994).

<sup>4</sup> Examples of DCA boards that historically focus on licensing and do little in the way of standardsetting or enforcement include the Board of Barbering and Cosmetology, the Board for Geologists and Geophysicists, the Board of Guide Dogs for the Blind, the Board for Professional Engineers and Land Surveyors, and the Landscape Architects Technical Committee (formerly the Board of Landscape Architects). The boards regulating barbers and cosmetologists, guide dog schools and trainers, and landscape architects have all been sunsetted by the legislature within the past decade; all have found their way back into existence through trade association lobbying.

necessary; (4) some large regulatory boards could be downsized and/or converted to a public member majority to promote independence and efficiency;<sup>5</sup> and (5) all full-salary boards should be closely scrutinized to ensure that board members earn the salaries they are paid. CPIL would welcome the opportunity to work with the Administration to craft appropriate criteria and apply them to existing boards in a rational fashion.

Thank you for the opportunity to address the Commission.

Sincerely,



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<sup>5</sup> Examples of large DCA boards that could be downsized include the Medical Board of California, the California Board of Accountancy, the Dental Board of California, and the California Athletic Commission. The Advisory Committee on Managed Health Care is an example of a large non-DCA board that should not be abolished but could be downsized.