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PRACTICING PRESERVATION: A MANDATE  
FOR PROFESSIONAL ACCOUNTABILITY

Jacqueline Virginia Prior

A THESIS

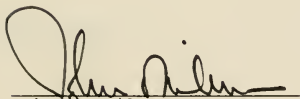
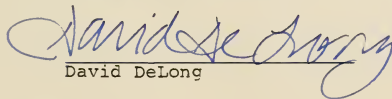
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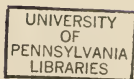
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## I. INTRODUCTION .

A recurring aspect of many historic preservation projects is the participation of a multitude of professionals. As in any undertaking which affects real property and the built environment, architects, engineers, landscape architects, lawyers and accountants may become involved in the planning and implementation of the project. Due to the unique factors present in preservation projects, however, the roles of those traditional professions are being increasingly supplemented (and to some extent replaced) by the newly emerging "preservation professionals." Some of these new preservation professionals already belong to the traditional professions. Many have modified their titles with some variant of the term historic preservation, such as "preservation architect," "historical architect" or "preservation lawyer," implying either a hybrid profession or special expertise within their primary professions.<sup>1</sup> Others belong to the growing group of "preservation consultants," suggesting that the field of historic preservation has progressed to a point where a separate and distinct profession has developed.

As in the case of the traditional professions, the new preservation professionals are in a position of having clients rely on their expertise and integrity. Such reliance may have substantial economic consequences, as well as irreversible impact on cultural resources. As the financial stakes in preservation projects increase and clients become more sophisticated, preservation professionals are more and more likely



to be held both legally and ethically accountable for their advice and actions. However, due in part to the relative youth of historic preservation as a field of professional endeavor and the diversity of backgrounds of those who practice within it, there are at present no clear cut and generally acceptable guidelines for professional accountability within the field. The fundamental question which must be addressed by those involved is "who should be doing what?", both in terms of competence and in terms of interplay with the traditional licensed professions.

This thesis will focus on preservation as a field of professional endeavor.<sup>2</sup> It will attempt to identify the range of expertise and scope of services performed by those engaged in historic preservation as a vocation, and determine whether preservation in fact constitutes a separate and distinct profession. In addition, it will analyze the special legal and ethical implications of engaging in a "preservation practice," and address the question of whether a system for qualifying preservation professionals through licensing, certification or other means is either desirable or feasible.





## II. THE DEFINITION AND SCOPE OF PRESERVATION PRACTICE

Any attempt to create a framework for professional accountability must begin by establishing the definition and scope of the subject profession. Relevant questions include: who are the people who consider themselves preservation professionals, what do they do and for whom do they do it?

No comprehensive survey of all professionals practicing within the preservation field has as yet been undertaken. Consequently, a profile of the profession as it currently exists must of necessity be gleaned from a variety of sources which can best be divided into two groups: (1) well-considered outlines of what the profession should be as reflected in university programs whose mission is to train preservation professionals; and (2) an ad hoc appraisal of what the profession is by a limited review of the activities of selected practitioners in the field.

Like the subject matter of historic preservation, the prevailing feature of preservation as a profession is diversity. Groups which have tried to define the field have grappled with the problem of including all of its aspects. The Committee on Promotion and Tenure of the National Council for Preservation Education defines "historic preservation" as

a very broad term used to describe the activities which promote the protection and continued use of the built environment.

\* \* \*

Defined this broadly, the field draws on a range of disciplines within the traditional divisions of the university: archaeology, architectural



history, architecture, art conservation, business, cultural geography, economics, folklife, history, landscape architecture, law, personnel management, planning, political science, public administration, real estate, sociology, and tax accounting.<sup>1</sup>

The Study Committee on Architectural Conservation of the National Conservation Advisory Council observed in its Report of 1977 that

the term historic preservation has become generic and serves as the umbrella name for participation in the broad movement. The committee recognizes historic preservationist as the universal term that encompasses individuals involved at varying levels and in varying degrees in the preservation, restoration, rehabilitation, reconstruction, or adaptive use of historic building fabric and the administrative and public education responsibilities for those activities.<sup>2</sup>

A review of the educational programs intended to train historic preservation professionals tends to support these broad definitions of the profession. In 1981, the National Trust for Historic Preservation conducted its most recent comprehensive survey of graduate and undergraduate offerings in historic preservation education.<sup>3</sup> Sixty-nine institutions responded as having either historic preservation programs or historic preservation related courses as part of their curricula. Of the forty who had course offerings sufficient to be considered preservation "programs", fourteen had "generalist" programs offering a degree in historic preservation and emphasizing a basic education in history preservation per se. The remaining programs were "specialist" programs, offering degrees in fields as varied as archaeology, anthropology, interior design, architecture, landscape architecture, urban, regional and community planning, urban studies,



history, architectural history, and folk studies, with a specialization in historic preservation.<sup>4</sup> The "historic preservation related" courses offered by institutions not having a preservation program were even more diverse, and were sponsored by departments of history, urban planning, art, interior design, anthropology, law, art history, geography, architecture, environmental design, American studies, urban and regional planning, sociology, landscape architecture, home economics, museology, and social work.

Although there are presently no comprehensive statistics available concerning the career paths of alumni of the historic preservation training grounds or of historic preservation practitioners in general, it is reasonable to expect that the composition of the profession would parallel that of the educational programs, as the educational institutions respond to the needs of their professional constituencies and graduates of the programs increasingly populate the ranks of historic preservation practitioners. A review of the limited information available concerning practitioners in the field does reveal one overriding characteristic in common with the educational programs -- that of diversity.<sup>5</sup> Also present among the practitioners is the division, as in historic preservation education, between the "specialists" and the "generalists."

The practice of historic preservation as a field composed of specialists from the traditional, established professions is most clearly articulated by the American Institute of Architects' proposed "preservation team," through which



(according to the AIA) "the services required for [a] preservation project may be performed best by a team of qualified and experienced specialists working together under the coordination of [the] architect."<sup>6</sup> While the AIA model clearly reflects the bias and economic self-interest of one professional group, it provides an initial framework for identifying the participants in the preservation field. The members of the preservation team under the AIA model are either licensed professionals or hold advanced degrees in traditional academic disciplines. They include: (1) the architect (the "team leader"), who is licensed, has "considerable experience" and five to six years of higher education; (2) the historical or preservation architect, who is "primarily concerned with the historic preservation process," and has special training in and knowledge of early building techniques; (3) the historian, who is a graduate in history with one or more degrees, and may be a specialist in architectural history or the particular period of the project; (4) the archaeologist, who is a "qualified professional" with a graduate degree in archaeology, anthropology, or a "closely related field," with specialized experience in research, field work and analysis; (5) the engineers, who are licensed professionals with special qualifications in civil, structural, mechanical and electrical engineering and who are "sensitive to the requirements of preservation projects;" (6) the landscape architect, who is a specially trained professional, experienced in the design of land forms and gardens and understands modern and historic





plant material and landscape construction techniques; (7) the architectural conservator, who is a "skilled preservation technologist" knowledgeable in conservation of architectural materials; and (8) others, who are consultants whose "special knowledge, skills, and experience are required to ensure the proper execution of the project."<sup>7</sup> Other "specialists" involved in historic preservation projects (although not identified in the AIA "preservation team") are city and regional planners, interior designers, accountants and lawyers.

Most notable for its absence from the AIA "preservation team" is any mention of the "preservation consultant" who most nearly represents the "generalist" contingent of practitioners in the preservation field. Preservation consultants themselves come from diverse backgrounds. In addition to those with generalist degrees in historic preservation, preservation consultants commonly have backgrounds or training as architects, preservation architects, architectural historians and archaeologists. Others have backgrounds in American studies, art history, history or geography. Some have no formal training at all, having gained their experience and knowledge through the pursuit of an interest in preservation.<sup>8</sup>

The activities engaged in by preservation professionals may be broadly described as any service which facilitates the protection and continued use of the built environment. Specific services include: historical research and documentation; archaeological investigation; structural investigation and recordation; materials conservation; developing designs,



specifications and cost estimates for sensitive restoration, rehabilitation or adaptive reuse of historic buildings; assisting in the procural of approvals from local, state and national governmental authorities such as historical review boards and the National Park Service, including preparing applications and appearing before such authorities in a representative capacity; conducting surveys of historic buildings or districts; preparing National Register nominations for historic buildings or districts; preparing design guidelines for enforcement of historic district ordinances; drafting local historic ordinances; preparing neighborhood and downtown revitalization plans; undertaking feasibility studies for buildings or areas; preparing maintenance programs; preparing interpretive plans for historic sites; and undertaking litigation or lobbying efforts relating to historic buildings or areas. Clients for whom such services are rendered include private real estate developers seeking to take advantage of federal tax benefits available for certified historic rehabilitations; non-profit organizations desiring to up-grade their communities or protect particular historic resources; and local, state and federal governmental authorities, who, in addition to administering publicly owned historic properties, must, by virtue of federal legislation, increasingly take historic preservation values into consideration in connection with their planning and economic development functions. The underlying goals of the clients who retain preservation professionals may differ considerably. Some clients, such as



organizations which operate historic sites to educate the public, seek the assistance of preservation professionals in order to further preservation values. Others, such as real estate developers, may have interests at odds with traditional preservation values and may view preservation professionals primarily as facilitators for obtaining necessary government approvals.

The form of practice through which preservation professionals perform their services also varies. Some members of the traditional licensed professions perform preservation related services as part of their mainstream practices, such as undertaking litigation to protect a historic site as part of a general law practice or providing designs and specifications for a historic rehabilitation as part of a general practice of architecture. Others have chosen to concentrate exclusively on preservation projects. In order to provide their clients with as extensive a range of services as possible, they may utilize multiple skills of their own (such as a licensed architect with a degree in architectural history or a licensed lawyer with a degree in historic preservation) or combine with historic preservation specialists or generalists to form a multidisciplinary preservation consulting firm. Unlicensed preservation professionals may practice on their own as preservation consultants or together with licensed professionals in a multidisciplinary organization.

The scope of historic preservation as a professional pursuit is therefore very broad. Practitioners engaged in it



exhibit a wide range of training and skills. Their services are varied and their clients are diverse. Holding this diverse group together are a shared focus -- the built environment, and a common value -- preservation of cultural resources.





### III. THE POTENTIAL FOR BECOMING A SEPARATELY RECOGNIZED PROFESSION

Given the relative youth of historic preservation as a vocational endeavor, as well as the diversity within its ranks, a fundamental issue is whether it is, or has the potential for becoming, an independently recognized profession. Since many groups seek the prestige, as well as the legal and economic benefits of professional status, the issue of what distinguishes a "profession" from the larger population of skilled trades or occupations has been the subject of frequent scrutiny.

Wilbert Moore, in his comprehensive study of the professions, suggests a model for identifying professions on the basis of a scale of attributes. The scale begins with the practice of a full time occupation and advances with the addition of the following characteristics: a commitment to a calling, including acceptance of "appropriate norms and standards and identification with professional peers and the profession as a collectivity;" organization, including a mechanism to maintain standards of performance and control access to the occupation; high educational attainment; a service orientation; and the autonomy of conduct made possible through the possession of very specialized knowledge.<sup>1</sup> The work of a professional, according to Moore, involves the application of general principles and standardized knowledge to concrete problems requiring solution or palliative measures.<sup>2</sup>



When faced with the task of determining what constitutes a profession in a legal context, courts have used criteria which parallel the attributes enunciated in Moore's model. The Supreme Court of the United States has observed that

[t]he word [profession] implies professed attainments in special knowledge as distinguished from mere skill. A practical dealing with affairs as distinguished from mere study or investigation; and an application of such knowledge to uses for others as a vocation, as distinguished from its pursuit for its own purposes.<sup>3</sup>

Tax cases, in which individuals have claimed statutory exemption from the payment of certain taxes on the grounds of being engaged in a profession rather than a trade or business, provide a particularly well developed framework for determining whether a particular vocation merits professional status.<sup>4</sup> The New York courts, which have dealt with this issue most frequently, have defined "profession" as implying "knowledge of an advanced type in a given field of science or learning gained by a prolonged course of specialized instruction and study."<sup>5</sup> Factors considered indicative of activity constituting the practice of a profession include: an extensive educational background of the sort which leads to an advanced degree in science or learning; the requirement of a license which indicates that sufficient qualifications have been met prior to engaging in the occupation; control of the profession by standards of conduct, ethics and malpractice liability; barriers to carrying on the occupation as a corporation; and devotion to public service.<sup>6</sup>

The manner in which the courts have applied these factors to particular occupations provides some insight into



the degree to which historic preservation might be considered a profession. In an early case, industrial designing, which had only recently developed as a separate field of endeavor, was held to be a profession.<sup>7</sup> Crucial to the court's determination was the fact that industrial designing as a field of endeavor was recognized by many institutions of learning which included courses in it in their curricula and awarded degrees of Bachelor of Arts in Industrial Design.<sup>8</sup> The fact that the petitioner did not himself have such a specialized degree was not dispositive, for the court reasoned that

[t]he graduates from the universities, institutes and schools who will have scholastic degrees as Industrial Designers doubtless will be regarded as professional men. It is paradoxical that petitioner and his present associates now engaged in the field, who are lecturing in these courses and teaching these students, should be classified otherwise.<sup>9</sup>

Moreover, licensing by the state was held not to be a satisfactory standard by which to alone determine professional status.<sup>10</sup>

The fact that colleges and universities had formal courses of study leading to degrees in landscape architecture (which had not yet been subjected to state licensing statutes) was also important to the New York Court of Appeals in determining that it, too, was a profession.<sup>11</sup> In reviewing the courses of study offered by the universities, the court observed that "[l]andscape architecture appears to lie between the professions of architecture and engineering...."<sup>12</sup> Although the petitioner had no degree because none was given when he was "pioneering", that was not considered important



due to the "extent, variety and importance of his work" which included writing, lecturing and membership in the American Society of Landscape Architects.<sup>13</sup>

The lack of a specialized program or advanced degree has similarly been critical in denying professional status to certain fields. Professional status was denied a real estate appraiser where, although he had a college degree, none was required for becoming a real estate appraiser, there were no universities or colleges offering a degree in real estate appraising and there was no official license or certification for real estate appraising activities.<sup>14</sup> A consulting actuary was denied professional recognition even though he had a Ph.D. and was a fellow in the Casualty Actuarial Society whose membership was bestowed through examination.<sup>15</sup> The court noted that "certain college courses are given in actuarial science, but there is no such degree."<sup>16</sup>

Educational recognition standing alone, however, will not succeed in providing professional status, as evidenced in a case denying professional status to a labor and industrial relations consultant even though certain colleges offered courses and degrees in the field.<sup>17</sup> The existence of common standards within the field, whether state imposed or internally enforced has been mentioned repeatedly by courts as a requisite of professional status.<sup>18</sup> A West Virginia court refused to accord an interior designer professional status, despite her educational credentials and skills, because she failed to establish that she was "a member of any discipline





with widely accepted standards of required study or specified attainments in special knowledge as distinguished from mere skill."<sup>19</sup>

The public service aspect of professionalism has also been a factor considered significant by some courts. Professional status has been denied where "rather than being devoted to public service in the traditionally professional sense, petitioner sold his services to nonprofessional businesses and carried on his activities in the field of business itself."<sup>20</sup> Under such analysis, professional status was denied to a furniture designer,<sup>21</sup> a graphic designer,<sup>22</sup> and a management engineer.<sup>23</sup> In contrast, a translator/interpreter was held to be devoted in his work to "public service in a traditionally professional sense" where his translation and interpretation of foreign languages was "vital, not only in courts of record, but in international forums."<sup>24</sup>

The courts' treatment of occupations which interface with the traditional, licensed professions are of particular interest to the historic preservation field. An architectural renderer, who provided services to licensed architects, was held not to be a professional even though in addition to artistic ability he had knowledge of and training in architecture.<sup>25</sup> In so holding, the court noted that the petitioner was not a licensed architect:

His claim to professional status derives from the fact that he works in a field related to that of a recognized profession. The status of a professional...does not include persons who, while working in fields related to recognized professions, have not yet achieved that recognition themselves.<sup>26</sup>



And, just as a person may not gain professional status by merely working closely with recognized professionals, holding a license in a recognized profession will not necessarily confer professional status on a second occupation. Such a situation was examined in the case of a "sales engineer", who was a licensed professional engineer acting as a manufacturer's agent for various companies.<sup>27</sup> Essentially, his work was selling his principals' products. In holding that his occupation of sales engineer did not have professional status, the court observed:

There seems little question that petitioner's engineering education and experience were in some cases of value in his work, but there is no evidence of any substance that they were essential to it or that either was prerequisite to his contractual arrangements with any of the companies concerned. Neither is there any intimation that comparable education and training were required or were usual in the cases of others engaged in similar business activities with these or other companies manufacturing similar lines.

\* \* \*

We conceive a proper test to be whether the application of professional education, training and skill was either essential to produce the income, or so material to its production as reasonably to warrant the conclusion that without them the taxpayer could not have profitably pursued the particular occupation, under normal conditions of business and competition.<sup>28</sup>

An examination of the field of historic preservation under the criteria set by Moore and the various court cases shows that while it has the potential for becoming a recognized profession, it does not yet have all of the requisites for professional standing. It has succeeded in meeting the most difficult and most important criteria -- that of



obtaining recognition of institutions of higher learning and becoming the subject of specialized, advanced degrees. An increasing number of participants in the field will therefore meet the criteria of high educational attainment or fall under the rubric of "pioneers".

The field also exhibits the characteristic service orientation of professions. Participants in the field apply general principals and specialized knowledge concerning preservation theories and techniques to solve problems for others. There is a public service aspect to their work in that the ultimate goal of what they do is to preserve cultural resources.

A critical element which is missing, and the primary obstacle to assumption of professional status by preservationists, is a sense of collectivity and common identification with professional peers among those who practice in the field. Without such unity of interest and cooperation, the creation of common standards of competence, conduct and ethics, as well as the political momentum required to attain state licensing or certification, has been impossible. No professional group or organization presently exists which concerns itself with the practice of historic preservation comparable to the American Institute of Architects, the American Society of Interior Designers or the American Bar Association.

The absence of a common professional identity within the field can be attributed to two factors: the youth of the field as a professional endeavor, and the diversity of persons operating within it. As a relatively new field, it lacks a



widespread understanding of what the business of historic preservation really is, let alone a common agreement concerning who is qualified to perform which services. Moreover, at this stage of its development, a sense of jurisdictional competition exists between the separate disciplines engaged in the field, as well as between those with formal preservation training and those without formal training who may have gained their expertise as pioneers in the field.

While the need for standards has not been addressed from within the profession, there has been some movement on the part of the federal government and the states toward the professionalization of historic preservation. Pursuant to the National Historic Preservation Act of 1966,<sup>29</sup> state government historic preservation programs which have been approved by the Secretary of the Interior are eligible for certain federal financial assistance. Such approved programs must employ a "professionally qualified staff," as well as provide for an "adequate and qualified State Historic Preservation Review Board" whose duties include reviewing National Register nominations and providing general advice, guidance and "professional recommendations to the State Historic Preservation Officer."<sup>30</sup>

Significantly, the Department of the Interior regulations which set forth the requisite professional standards for qualified staff and members of the State Review Board do so in terms of component specialized disciplines. With respect to program staff, a full-time professional in each of the





disciplines of history, archaeology and architectural history must be included. In addition, the state may supplement the staff with "other professional disciplines, such as planning, law, architecture, historic architecture, historical archaeology, accounting and grants management."<sup>31</sup> Paradoxically, historic preservation as a distinct subject matter is recognized only to the extent that a graduate degree in historic preservation may satisfy the requisite qualifications for a professional in architectural history.<sup>32</sup> Similarly, while all members of the State Review Board must have a demonstrated "competence, interest or knowledge in historic preservation" the professional members of the Board (who must comprise the majority) are to be selected from the disciplines of history, archaeology, architectural history and architecture.<sup>33</sup>

Some states, in carrying out the mandate for approved historic preservation programs, have been more inclined to recognize historic preservation as a distinct field of expertise. This is evidenced by state statutes establishing the review boards required by the federal legislation. For example, Pennsylvania requires that its board include "at least one member with demonstrated competence in each of the following disciplines: architecture, archaeology, architectural history, history and historic preservation."<sup>34</sup> The Florida board must have at least three members with practical experience in the preservation of historic or archaeological sites "as demonstrated in...the following fields: architecture, architectural history, historic preservation,



history, or archaeology."<sup>35</sup> Of the members of the North Carolina board, at least five are to have "professional training or experience in the fields of archives, history, historic preservation, historic architecture, archaeology, or museum administration."<sup>36</sup>

Although historic preservation does not yet have independent professional status, it has the potential for achieving it. There have already been small, but significant, steps towards recognition. In order to achieve full recognition as a profession, the practitioners engaged in the field must acquire a sense of commonality. This will require common agreement on the parameters of the field (including a delineation of responsibilities between specialists), ethical standards and standards of minimum competence.



#### IV. THE REGULATORY IMPLICATIONS OF ENGAGING IN PRESERVATION PRACTICE

Given the diversity and multidisciplinary nature of the field of historic preservation, the roles of the various licensed and unlicensed professionals who participate in it frequently overlap. Consequently, an unlicensed preservation consultant may perform some services which might be considered to be within the realm of one of the licensed professions, while a licensed professional may engage in activities which were not traditionally within the scope of his practice. Such overlap in professional roles may have regulatory implications. Unlicensed preservation consultants must avoid unwittingly engaging in the unauthorized practice of a regulated profession, while some licensed professionals must remain cognizant of ethical limitations on their participation in a secondary occupation.

The incidence of professional overlap occurs most frequently in those services which respond to needs arising out of government intervention or community involvement in the historic preservation process. Accordingly, one finds preservation consultants, as well as the traditional licensed professionals, offering to assist clients in such tasks as devising neighborhood and downtown revitalization plans, drafting local historic ordinances, undertaking surveys of areas for evaluation as possible local or National Register historic districts, drafting design guidelines for historic districts, preparing National Register nominations, assisting



in the certification process in projects which seek to qualify for federal investment tax credits, assisting in obtaining approvals from local historical review boards for proposed rehabilitation projects, and preparing feasibility studies and development plans for historic buildings or districts.

It is in the major rehabilitation projects which seek to take advantage of federal investment tax credits (and possibly other government financial assistance) where one finds the participation of the greatest variety of professions. Architects, preservation consultants, accountants and lawyers all offer and provide services to clients for the purpose of expediting these projects.

Such projects will normally require interface with the State Historic Preservation Officer and the National Park Service (under the Department of Interior) to establish historical significance of the property (by submission of a National Register nomination or a Preservation Certification Application -- Part I) and to obtain approval for the planned, as well as the completed, rehabilitation work (by submission of Preservation Certification Applications -- Part II and Part III).<sup>1</sup> The project is also subject to examination by the Internal Revenue Service for compliance with the tax laws. If the property is covered by a local historic preservation ordinance, approval for the proposed work must also be obtained from the local historical review board or commission. Moreover, if the developer intends to utilize federal funds in the project, it will be subject to additional separate





review procedures, including, but not limited to, an archaeological evaluation of the site.<sup>2</sup> Of course, all of the government approvals typically required by any real estate development project, such as zoning and building code permits, will also be required. All of these procedures are governed by standards dictated by their respective statutes and regulations, which may not be identical or even compatible with one another.

The services required to assist a client through this regulatory morass involve historical research and investigation, designing and planning, and advocacy. Opinions and advice must also be provided to the client concerning what the various requirements are and how they relate to one another, how to formulate plans which are likely to be accepted, the likelihood of acceptance, and how the various steps may impact upon the financial feasibility of the project.

It is therefore not surprising that architects, preservation consultants, lawyers and accountants are all engaged in this process, since it requires skills normally associated with all those disciplines. There has not been, however, any clear delineation of the roles of these separate professional groups, resulting in some confusion concerning responsibilities and possible conflict with existing regulations concerning the practice of professions.

It is well settled that the right to practice a profession is subject to the police power of the states. In its



landmark decision upholding the right of the states to regulate admission to the practice of professions, the Supreme Court of the United States stated that:

The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud.<sup>3</sup>

Persons who engage in the practice of a profession without a license as required by the state may be subjected to injunctive proceedings and criminal prosecution.<sup>4</sup> Moreover, an unlicensed person may not be able to collect his fee for services rendered to a client if the services constituted the unauthorized practice of a regulated profession.<sup>5</sup> Such a result is based upon the rationale that an agreement to provide services in violation of a regulatory requirement is against public policy, and therefore unenforceable as an illegal contract. Thus, a court has refused to require a client to pay for architectural services even where the services had been fully performed in accordance with the agreement and the client was aware of the fact that the plaintiff was not a licensed architect.<sup>6</sup>

The issue of unauthorized practice is most relevant to the unlicensed preservation consultant whose work may take him into the gray areas bordering the practice of architecture or law. Many states, including Pennsylvania, prohibit the practice of architecture, as well as use of the title "architect", by anyone who is not licensed under the relevant regulatory statute.<sup>7</sup> The "practice of architecture" is defined



in the Pennsylvania statute as:

The rendering or offering to render certain services, hereinafter described, in connection with the design and construction of a structure or group of structures which have as their principal purpose human habitation or use, and the utilization of space within and surrounding such structures. The services referred to in the previous sentence include planning, providing preliminary studies, designs, drawings, specifications, and other design documents, construction management and administration of construction contracts.<sup>8</sup>

The statute provides several exemptions to accommodate persons working under an architect's supervision, licensed engineers, the construction industry, utilities, government agencies and people who design their own single-family residences. Also exempted from the statute is "the preparation of any drawings or other design documents for the remodeling or alteration of a building not involving structural or egress changes or additions thereto, provided that the author of such plans or other design documents shall not receive any compensation as the author thereof."<sup>9</sup>

Consequently, it appears that an unlicensed preservation consultant is severely limited in the extent to which he may provide recommendations for the design and execution of restoration or rehabilitation projects. While he may legitimately opine as to the nature and historical significance of a property as it existed in the past or exists in the present, prescribing the design, materials or methods of construction for proposed rehabilitation work might be construed as the practice of architecture. Of course, a preservation consultant acting as a consultant to or employee of a licensed architect



would fall under the statutory exemption for persons acting under the personal supervision of an architect.

In determining whether non-licensed individuals are engaging in the unauthorized practice of architecture under the pretense of engaging in some other profession, the courts have looked at the nature of the services rendered, as well as whether the other activity has independent professional status. Thus, a person who characterized his business as that of a decorator and designer was found to be illegally engaged in the practice of architecture where the services he actually performed included furnishing detailed plans and specifications for the construction of his clients' houses.<sup>10</sup> Industrial designers, however, were held not engaged in the practice of architecture.<sup>11</sup> Although their services included making designs and plans relating to the general appearance of the interior and exterior of their client's building, actual construction plans and specifications were to be prepared by an architect. Citing Teague v. Graves, supra, the court recognized industrial designing as a separate legally recognized profession and held that "the services performed...consisted of industrial design work and not architectural work."<sup>12</sup>

In the same manner, an architectural designer was held to be engaged in the unauthorized practice of architecture where he consulted with clients, determined their needs and prepared architectural plans and specifications. In so holding, the court accepted the testimony of the Dean of "South Carolina's only architectural school" that there was no





separate profession of architectural design.<sup>13</sup> Accordingly, a movement towards independent professional recognition would greatly assist preservation consultants in distinguishing themselves from architects and thereby forestall potential allegations of unauthorized practice.

As in the case of architecture, anyone who practices law without a license is subject to criminal prosecution regardless of what he calls himself.<sup>14</sup> What constitutes "practice of law" is not defined by statute, but rather determined by the highest court of each state, which has ultimate jurisdiction to regulate the practice of law. Although the courts deal with the issue on a case by case basis, in general, anyone "who acts in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counseling, advising and assisting him in connection with these rights and duties is engaged in the practice of law."<sup>15</sup>

The preservation consultant (or other non-lawyer professional) who assists clients along the regulatory road to effectuating a successful historic rehabilitation project will display many of the attributes normally associated with lawyers. He will provide advice to his client and draft various applications based upon his interpretation of applicable statutes and government regulations. He may also act as his client's representative before regulatory bodies which determine whether the project meets the criteria set forth in those various regulations.



A large percentage of tax act projects (approximately eighty percent in Pennsylvania) involve the participation of a preservation consultant.<sup>16</sup> It is the preservation consultant who generally acts as the advocate for the project. He will be the person who deals with the staff of the State Historic Preservation Office during the preliminary phases of review, he will attend the meeting of the State Review Board at which the historical significance of the property is determined, and he will participate in the National Park Service appeal process for Part II certifications.<sup>17</sup> Some preservation consultants participate in Internal Revenue Service reviews. Others, however, draw the line for their participation between dealing with the National Park Service and dealing with the Internal Revenue Service. While they are willing to interpret regulations promulgated by the Department of the Interior, they consider the tax code and Treasury regulations to be the dominion of attorneys and accountants. At the local historical review board level, an architect or preservation consultant (rather than a lawyer), will usually make at least the initial presentation to the board for approval under the local ordinance for proposed changes to the property.<sup>18</sup>

In determining whether an individual is engaged in the unauthorized practice of law, the courts are once again influenced by whether the individual is engaged in the practice of a separately recognized profession. In a case involving an industrial relations consultant, the court determined as



an initial matter that the field of industrial relations was a distinct and separate profession, as reflected in the fact that it was "the subject of college classroom instruction as a technical profession in itself."<sup>19</sup> It went on to find that the use of the consultant's knowledge of the law "as a mere incident of the application of his skill in and understanding of related scientific principles, policies and techniques... toward the adjustment of essentially nonlegal issues and controversies...does not, without more, constitute the practice of law."<sup>20</sup>

The precise point at which a non-lawyer trespasses into the practice of law has been frequently debated in the case of accountants. Since both accountants and lawyers are involved in the field of taxation, courts have been called on to determine when an accountant goes beyond the practice of tax accounting into the practice of tax law. In an early case, a Massachusetts court held that an accountant's preparation of tax returns for wage earners, although requiring some consideration of the law, did not constitute the practice of law.<sup>21</sup> In so holding, the court was influenced to a great extent by the relative simplicity of the tax return forms, noting that they are accompanied by "plain printed instructions" and though they might appear formidable, "they can readily be filled out by any intelligent taxpayer...who has the patience to study the instructions."<sup>22</sup>

The distinction between using legal knowledge as an incident of traditional accounting work and engaging in the



business of providing opinions on specific questions of tax law was made by a New York court in determining that an accountant in the business of "tax consulting" was engaged in the unauthorized practice of law.<sup>23</sup> In that case the accountant had been retained solely to give an opinion on how a particular transaction would be viewed by the Internal Revenue Service based upon his review of applicable law, regulations and Treasury rulings.

Moreover, the resolution of legal issues, even if incidental to the practice of another profession, may nevertheless constitute the unauthorized practice of law if "difficult or doubtful legal questions are involved which...reasonably demand the application of a trained legal mind."<sup>24</sup> Accordingly, an accountant who in the course of preparing a tax return advised his client as to whether his business had the legal status of a partnership, whether his relationship with his common-law wife was a valid marriage for exemption purposes, whether he should file a joint return and whether certain losses and costs of improvements were deductible, was held to be engaged in the practice of law.<sup>25</sup>

The tendency for the resolution of one legal issue to depend on the resolution of some other issue (such as the resolution of a federal tax law question depending on the application of state corporation or family law) illustrates the problem involved when a non-lawyer attempts to resolve legal issues within his field of expertise. Courts have repeatedly considered and rejected the argument that a non-lawyer





professional may know more about the law of his particular limited field than some licensed lawyers and therefore should be entitled to practice law within his limited field. While assuming that the fact of his knowledge of the particular specialty might indeed exceed that of some lawyers, a thorough knowledge and understanding of basic legal concepts, legal processes and the interrelation of the law, as well as the discipline and ethical standards imposed on licensed attorneys by the courts, have been considered essential to engaging in any aspect of the practice of law.<sup>26</sup>

The issue of whether non-lawyer specialists may represent clients before administrative or regulatory agencies has been the focus of considerable debate. Both the Internal Revenue Service and the Patent and Trademark Office have permitted qualified non-lawyers to represent clients in their proceedings.<sup>27</sup> Although such practice has been attacked by various states as the unauthorized practice of law, it has been upheld by the Supreme Court of the United States under the supremacy clause of the United States Constitution.<sup>28</sup> Essentially, since federal law expressly permits qualified non-lawyers to practice before those agencies, the states cannot interfere with their consulting with clients or otherwise preparing for proceedings.

Attempts by state administrative or regulatory agencies to initiate similar systems for the admission of non-lawyers to practice before them have met with mixed results. Courts which have attacked the power of regulatory agencies or the



state legislatures' power to enable regulatory agencies to permit non-lawyers to represent clients before them have done so under the rationale that the practice of law falls under the exclusive jurisdiction of the highest court of the state.<sup>29</sup>

Consequently, the courts of some states have severely limited the kinds of services which non-lawyers may render in connection with state regulatory procedures. Thus, the Supreme Court of Wisconsin held that a non-lawyer who made applications to the Wisconsin Public Service Commission on behalf of his clients for authority to conduct trucking operations and appeared before the Public Service Commission on behalf of his clients was engaged in the unauthorized practice of law.<sup>30</sup> The court held that while a layman may investigate facts or procure evidence pertinent to his client's situation, make reports, or testify before a court or administrative tribunal, he may not advise his client or others concerning the rights or liabilities arising from his investigation. Accordingly, he was enjoined from: (a) giving legal advice and instruction to clients to inform them of their rights and obligations; (b) preparing documents for clients which required knowledge of legal principles not possessed by ordinary laymen; and (c) appearing as an advocate asserting legal rights for a client before public tribunals which possess power and authority to determine the rights of such clients according to law.<sup>31</sup>

The Supreme Court of Colorado further refined the test for what a layman may or may not do in connection with



representing clients before a regulatory agency in terms of whether the agency is acting in a judicial or legislative capacity.<sup>32</sup> The Court held that the following would constitute the practice of law before administrative commissions:

- (1) instructing and advising a client in regard to an agency matter so that he may properly pursue his affairs and be informed as to his rights and obligations;
- (2) preparing documents for a client which require familiarity with legal principles beyond the understanding of the ordinary layman;
- (3) preparing for filing before an administrative agency, applications, pleadings, or other procedural papers requiring legal knowledge and techniques;
- (4) appearing for a client before an administrative tribunal in adversary or public proceedings involving rights of life, liberty or property;
- (5) representing a client in an evidenciary proceeding requiring legal training, knowledge and skill; and
- (6) representing a client in a rate-making case involving a question of deprivation of property without due process of law.

On the other hand, under the legislative function of a regulatory commission, a layman may:

- (1) complete forms which do not require any knowledge and skill beyond that possessed by the ordinarily experienced and intelligent layman;
- (2) represent a client in a hearing relating to rate making not involving a question of deprivation of property without due process of law;
- (3) perform the services of engineers, experts, accountants and clerks; and
- (4) act in an agency proceeding involving the adoption of a rule of future action which affects a



group and where no vested rights of liberty or property are at stake.<sup>33</sup>

Courts of two states, however, have permitted laymen to practice before state administrative agencies. The Court of Appeals of Michigan held that an unemployment compensation cost control service could represent employers before the Michigan Employment Security Commission on the grounds that the state judiciary did not have the power to assert ultimate authority over the practice of law in proceedings before the Commission and the non-lawyer representation was permitted by statute.<sup>34</sup> Similarly, the Supreme Court of Indiana has held that a non-lawyer labor relations representative who represented a state employee before the State Employees' Appeals Commission did not engage in the unauthorized practice of law where the members of the commission were not required to have legal training, the commission was an intermediate rather than a final step in the process, the employee could adequately present his complaint without resort to legal techniques, and there was little potential for detriment to the public because the process affected only the state as an employer and state employees.

These cases provide some potential guidelines for the preservation profession. As an initial matter, they underscore the importance of acquiring independent professional recognition. By analogy to the accountant cases, it appears that non-lawyer preservation professionals are on firm ground in preparing Preservation Certification Applications which,





like income tax returns, are accompanied by instructions intended for use by non-professional applicants. The provision of more generalized advice concerning the entire rehabilitation process, however, brings the non-lawyer consultant into a gray area in which he might be accused of practicing law. With respect to the issue of acting as a client's representative before the various regulatory bodies, limiting oneself to dealing with those agencies concerned with historic and design issues (such as the State Historic Preservation Office and the National Park Service) makes sense because the preservation consultant is likely to have similar training and speak the same technical language as the members of those agencies. However, in the absence of an express authorization by statute or agency rule, such non-lawyer representation is extremely vulnerable to accusations of unauthorized practice of law by both state licensing authorities and dissatisfied clients who wish to avoid paying their bills.

Just as the unlicensed preservation professional must avoid engaging in the unauthorized practice of a licensed profession, the licensed professional must concern himself with how engaging in a secondary profession may affect his standing in his primary field. Many of the licensed professions are subject to regulations or ethical rules which, although not directly proscribing the practice of a dual profession, nonetheless impact on the ability of a licensed professional to engage profitably in activities outside his traditional field.



The most common inhibition to engaging in a dual profession are restrictions on with whom a licensed professional may practice. For example, in Pennsylvania, certified public accountants may practice in partnership only with other certified public accountants.<sup>36</sup> If the practice is in the form of a professional corporation or association, lay directors, governors or officers are prohibited from exercising any authority whatsoever over professional matters.<sup>37</sup>

Architects are also subject to limitations concerning the persons with whom they may engage in the practice of architecture. The Pennsylvania Architects Licensure Law requires that in a partnership engaged in the practice of architecture at least one-third of the partners be licensed architects and that at least two-thirds of the partners be licensed architects, engineers or landscape architects.<sup>38</sup> The board of governors of a professional association engaging in the practice of architecture must meet the same requirements.<sup>39</sup>

Lawyers are the most constrained with respect to their professional dealings with non-lawyers. Pursuant to the ethical codes of the various state courts, as well as the American Bar Association Model Rules of Professional Conduct, a lawyer may not form a partnership with a non-lawyer if any of the activities of the partnership consists of the practice of law. Nor may a lawyer share legal fees with a non-lawyer.<sup>40</sup> Moreover, a lawyer may not practice in a professional association or corporation if a non-lawyer owns any interest in it, is a corporate officer or director, or has the right to control



the professional judgment of a lawyer.<sup>41</sup> These rules are based on the traditional notion that a lawyer is obligated to his client to exercise independent professional judgment and preserve his secrets and confidences.

Such restraints on the extent to which licensed professionals may combine with others to practice severely limits the ability to engage in multidisciplinary practices, to which historic preservation is particularly well-suited. Lawyers in particular are virtually barred from entering into working relationships with non-lawyers if they wish to utilize their legal skills within that arrangement. The participation of lawyers with non-lawyers in such multidisciplinary activities as financial planning,<sup>42</sup> real estate management,<sup>43</sup> unemployment insurance consulting,<sup>44</sup> lobbying,<sup>45</sup> and labor relations,<sup>46</sup> has been permitted only so long as none of the services provided involved the practice of law. Although the ethical opinions virtually never define the "practice of law," at least one ethical opinion has observed that some non-legal specialties are so closely law-related that an attorney's participation in them would constitute practicing law.<sup>47</sup>

Other ethical rules may limit the extent to which a licensed professional may engage in a dual profession on an individual basis. Certified public accountants may not engage in "incompatible" businesses or occupations.<sup>48</sup> The comments to the American Institute of Certified Public Accountants Rules of Conduct note that "while certain occupations are clearly incompatible with the practice of public



accounting, the profession has never attempted to list them." It gives as an example, however, the conflict of interest which would occur if a practicing certified public accountant were to serve on a tax assessment board because he would be open to accusations of favoring his clients.<sup>49</sup>

The participation by lawyers in a dual profession is further restricted by ethical rules which prohibit them from implying that they are specialists in a particular field, prohibit them from directly soliciting clients and require that they preserve the confidences of their clients. For years, lawyers who were engaged in the practice of law and another profession were not permitted to indicate their dual professional status on their letterhead, sign or card, or identify themselves as being lawyers in any publication in connection with their other profession or business.<sup>50</sup> This prohibition has been cut back considerably in recent years, as some state courts have dropped the rule from their ethical codes.<sup>51</sup> The recently issued American Bar Association Model Rules of Professional Conduct do not prohibit a lawyer from disclosing his qualifications in another field, under the rationale that such communications do not indicate special competence as a lawyer, but rather competence as defined and evaluated by the other profession involved.<sup>52</sup> The prohibition may still be in force in some states, however, and would therefore restrict some attorney historic preservation professionals from communicating their dual expertise.

The prohibition against direct solicitation of clients





by lawyers also inhibits attorneys from engaging in dual professions. There is some fear on the part of the legal profession that the dual professional will attract potential clients to his law practice by self-referring from his second professional practice, i.e., engage in "feeding his practice."<sup>53</sup> Accordingly, an ethical opinion has prohibited an attorney from forming an association with a non-lawyer to offer combined real estate brokerage and legal services because of the appearance that would be created that one business feeds the other.<sup>54</sup> Although an attorney could ethically be employed as an accountant and also engage in private law practice, he was admonished in an ethical opinion to keep the two practices separate and operate them from different offices.<sup>55</sup> Similarly, an attorney employed by a CPA firm was not permitted to practice law as a second occupation out of his office at the CPA firm because the arrangement would inevitably serve as a feeder to his law practice.<sup>56</sup> Some jurisdictions which have permitted a lawyer to engage in two practices at the same office nevertheless require the lawyer to maintain separate files and financial records<sup>57</sup> and to refrain from representing the same clients in both capacities.<sup>58</sup>

Other jurisdictions have permitted the dual profession lawyer to serve the same client in both roles, but caution practitioners to take steps to preserve the attorney-client privilege. Thus, an attorney may not perform accounting services for his client while serving as an attorney if the performance of the accounting services would create a waiver of



the attorney-client privilege.<sup>59</sup> Similarly, an attorney/physician must scrupulously maintain completely separate recordkeeping and filing systems in order to avoid any risk of inadvertent disclosure of legal confidences by a waiver of the physician-patient privilege.<sup>60</sup>

The preservation lawyer should therefore remain sensitive to the question of whether he is acting as a lawyer or as a member of a distinct preservation profession. Until preservation has separate professional status and preservation lawyers seek to use the designation of the separate profession, the distinction will be primarily self-imposed. The preservation attorney must nevertheless be judicious in the manner in which he presents himself to the public and conduct his practice in a manner which prevents waiver of the attorney-client privilege.



## V. THE NEED FOR ETHICAL STANDARDS

As discussed in Chapter III, one of the fundamental requisites for the achievement of independent professional status is a commonly accepted code of professional conduct. Formal standards of conduct are particularly helpful to an emerging profession like historic preservation. They provide guidelines for participants in the field to use as they are confronted with previously unencountered situations. They also serve as a means to educate clients and the public as to what they may expect from the profession. In situations in which a client's desires conflict with an individual practitioner's ethical standards, the existence of a legally enforceable code of ethics might facilitate in the resolution of the dispute.

While to a layman the notion of an ethical code may suggest optional moral principles above those minimally required by law, most licensed professionals are subject to standards of conduct imposed by law as a condition of engaging in their chosen professions. Thus, in Pennsylvania, the licenses of architects, landscape architects and certified public accountants may be revoked by their respective regulatory boards for the violation of rules of professional conduct promulgated by statute or regulation.<sup>1</sup> Similarly, attorneys may be disbarred for violating any of the Disciplinary Rules adopted by the Supreme Court of Pennsylvania.<sup>2</sup> Professional organizations also promulgate standards of conduct which may be completely voluntary (subject to peer pressure), mandatory to



the extent that compliance is a requisite to membership, or mandatory as a result of adoption by the relevant regulatory authority.

Any viable ethical code must address issues which bear on the professional's responsibility to his clients, to other members of his profession, to the regulatory forum before whom he practices, and to the public. In the case of historic preservation professionals, considerations relating to academic integrity, which might be characterized as responsibility to the historic building or site, should be included within the professional's ethical duty to the public.

Fundamental to a professional's relationship with his client are considerations of competence, confidentiality, honesty and conflicts of interest. The fact that various undertakings may require varying degrees of competence beyond the minimum necessary to qualify for a license is recognized in the ethical codes of several of the traditional professions. Thus, the American Institute of Architects' Ethical Principles advise architects to evaluate their resources and ability to perform given tasks, and undertake only assignments which they and their associates are competent to perform.<sup>3</sup> Similarly, the Code of Professional Responsibility adopted by the Supreme Court of Pennsylvania provides that a lawyer "shall not handle a legal matter which he knows or should know that he is not competent to handle, without associating with...a lawyer who is competent to handle it."<sup>4</sup> It would therefore be unlikely that an antitrust lawyer would give an opinion





on a complicated tax issue. Similar ethical considerations are relevant to the historic preservation field, where the range of skills and areas of expertise is so wide. A person whose primary training is in archival research would probably not be competent to give an opinion on the chemical deterioration of stone. Similarly, an expert on historic construction techniques in one part of the country might not be qualified to give advice concerning a building in a different, distinct cultural area. Absent an intricate system for qualifying people to practice in distinct subject areas of the preservation field, it will be necessary for preservation professionals to assume the ethical responsibility to limit themselves to matters which they are competent to handle.

While the requirements of confidentiality and honesty are fairly straightforward, issues of conflicts of interest can be quite subtle and complex in the context of historic preservation practice. Conflict of interest occurs where the interests of a client conflict with either those of the professional himself or those of another client. Except with the consent of his client after full disclosure, a lawyer may not accept employment if the exercise of his professional judgment on behalf of the client may reasonably be affected by his own financial, business, property or personal interests.<sup>5</sup> He is similarly prohibited from accepting employment where the interests of another client may impair his independent professional judgment.<sup>6</sup> The AIA Ethical Principles provide that an architect should disclose to a client any



circumstance which could be construed as a conflict of interest and should ensure that such conflict does not compromise the interests of the client.<sup>7</sup>

In the preservation field, conflicts of interest between clients are likely to occur where a consultant tries to represent both individual property owners and an agency having jurisdiction over an area in which those properties are located. For example, a potential conflict exists where a consultant undertakes a survey for a municipality in order to establish the boundaries of a historic district, while at the same time representing owners of buildings within the area who may wish either to be included or excluded from historic district designation. Another potential conflict of interest situation exists where a preservation consultant undertakes an assignment to draft design guidelines for a historic district in which he also represents individual property owners. Full disclosure to all clients, with the initial client having the right to require the consultant to decline subsequent engagements which cause conflicts of interest would be appropriate in these circumstances.

A common situation in which a preservation professional's self-interest may conflict with that of a client is where he is engaged to give a preliminary opinion which will determine whether a more substantial amount of work will become available to him. For instance, the initial determination of an archaeological consulting firm concerning whether or not a federally financed project will have an "adverse effect" on



archaeological resources will affect whether a contract for more extensive archaeological investigation may be obtained by the same firm. Similarly, an opinion concerning the date of a particular building or site may determine whether its owner decides to undertake an extensive (and lucrative) restoration. One solution to this situation may be to require the provider of the initial opinion to disqualify himself from contracting for future work on the project.

The professional's responsibility to his peers requires that he be courteous, as well as conduct himself in a manner that does not reflect unfavorably on the profession as a whole. The Code of Professional Responsibility adopted by the Supreme Court of Pennsylvania states that a lawyer should be courteous to opposing counsel and accede to reasonable requests concerning procedural matters which do not prejudice the rights of his client.<sup>8</sup> The AIA Ethical Principles admonish architects to compete fairly with one another and not offer or accept improper contributions in order to obtain work.<sup>9</sup>

According to Moore, "all professionals suffer a sense of shame and chagrin at the conspicuous misconduct of a fellow...."<sup>10</sup> It is therefore not surprising that the AIA Ethical Principles state that architects should uphold the credibility and dignity of the profession.<sup>11</sup> And it has long been a canon of legal ethics that lawyers should avoid even the appearance of professional impropriety.<sup>12</sup> While acting in a courteous and honorable manner should not present any



particular difficulty in the preservation field, it is important for preservatists, as an emerging profession, to act in a manner that brings credibility to the profession.

Preservation professionals commonly deal with administrative agencies who frequently rely on their representations made in various applications, meetings or review proceedings. As an advocate, the preservation professional must balance his responsibility to advance his client's interests, while complying with his obligation to deal with regulatory forums in a truthful and ethical manner. The legal profession has long grappled with this dual responsibility, as reflected in the ethical precept that a lawyer should represent a client zealously within the bounds of the law.<sup>13</sup>

The preservation professional is confronted with such an ethical challenge most often in connection with rehabilitation projects in which federal investment tax credits for historic rehabilitations are sought. An owner of a building might try to persuade a preservation consultant to compose a National Register nomination or Part I application in light of what changes the owner wishes to make to the building, and consequently ignore significant aspects or downplay portions of the building which he does not wish to retain. Similarly, a consultant might be urged to exclude certain details or parts of a building on a Part II application, or fail to describe the proposed work adequately. Despite the possibility of such practices, however, relevant agencies have not reported having detected any gross slanting of applications.





As might be expected, in cases where they have perceived some minor tinkering, they are much more thorough in scrutinizing the work of the guilty consultant in all subsequent projects.<sup>14</sup>

The preservation professional's final responsibility is best described as a responsibility to the building or other cultural resource. Most professionals are drawn to their particular fields because their values conform with the goals of the profession. For example, doctors generally are committed to healing and lawyers usually care about justice. Preservation professionals are usually drawn to preservation because they respect historical resources. However, while a doctor's patients and a lawyer's clients generally have goals in common with their respective provider -- i.e., being healed or receiving justice -- that is not always the case with preservation clients. Not only may a preservation client not know much about preservation standards or values, he may view them as being adverse to his interests. Consequently, the preservation consultant must be diligent to exercise his independent judgment based upon his training and expertise. Preservation professionals may take some guidance from the public accounting profession which recognizes a similar need to exercise independent professional judgment. Certified public accountants are prohibited by regulation from subordinating their judgment to others, and, except under certain limited circumstances, may not offer or perform a professional service for a fee which is contingent upon the findings or results of such service.<sup>15</sup>



If preservation professionals wish to be recognized as a distinct profession, it is incumbent upon them to devise and follow standards of ethical conduct. While such a code will be founded on commonly embraced modes of acceptable behavior, its creation requires a detailed analysis of the kinds of situations a professional may encounter when practicing in the preservation field.



VI. VULNERABILITY TO PROFESSIONAL LIABILITY CLAIMS AND  
THE NECESSITY OF ADEQUATE INSURANCE COVERAGE

As preservation professionals increasingly offer services based on their specialized skill and expertise, they must concern themselves to a corresponding degree with their exposure to lawsuits alleging professional liability or malpractice. The prospect for preservation professionals becoming targets for such litigation becomes more likely as their client base becomes more sophisticated and the financial stakes of preservation projects increase.

It is a fact of life that individuals are legally accountable for the consequences of their everyday actions. Such responsibility extends to the professional arena where the failure of a professional to exercise adequate skill and judgment may cause injury, loss or damage to a client. Restatement (Second) of Torts §299A summarizes the standard of care required of persons who render services in a profession or trade:

Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.<sup>1</sup>

Consequently, in the absence of a special representation of having either more or less skill than the norm, the standard of skill and knowledge required of a person who practices a profession or trade is that which is commonly possessed and employed by members of that particular profession or trade.<sup>2</sup>



Legal accountability for failure to exercise the requisite degree of skill and care is not necessarily limited to members of the traditional or licensed professions. The quoted section of the Restatement covers those who undertake to render services in the practice of a trade as well as a profession. Early cases have applied such a standard to a dressmaker,<sup>3</sup> an insurance broker,<sup>4</sup> and a wheat thresher.<sup>5</sup> The rationale for application of the standard is that a person who undertakes to perform a service for a fee impliedly represents that he possesses and will exercise such reasonable skill as the nature of the service requires.<sup>6</sup> In more recent cases, this doctrine of malpractice liability has been applied to karate instructors<sup>7</sup> and social workers.<sup>8</sup>

The parameters of the duties of design professionals to their clients were set forth in the landmark decision of Bayshore Development Co. v. Bonfoey:

The responsibility resting on an architect is essentially the same as that which rests upon the lawyer to his client, or upon the physician to his patient, or which rests upon any one to another where such person pretends to possess some skill and ability in some special employment, and offers his services to the public on account of his fitness to act in the line of business for which he may be employed. The undertaking of an architect implies that he possesses skill and ability, including taste sufficient to enable him to perform the required services at least ordinarily and reasonably well, and that he will exercise and apply in the given case his skill and ability, his judgment and taste, reasonably and without neglect. But the undertaking does not imply or warrant a satisfactory result. It will be enough that any failure shall not be by the fault of the architect.<sup>9</sup>

The professional practitioner is therefore to be compared





with other practitioners in his field, and his performance measured against the skill generally possessed and employed by them.<sup>10</sup> Consequently, in a lawsuit alleging malpractice by a professional, expert testimony must be presented by a person qualified in that particular field to establish what the relevant standard is and whether the standard was complied with.<sup>11</sup> Such expert testimony may be dispensed with only where the matter under investigation is so simple and the lack of skill so obvious that it is within the range of the ordinary experience and comprehension of non-professional persons.<sup>12</sup>

As noted in Bayshore, a professional does not guarantee or warrant a satisfactory result in absence of an express agreement to do so. However, a professional might bind himself by contract to performing in excess of the typically accepted standard of care. For example, where an engineering firm had agreed to design furnaces similar to certain other furnaces, the fact that the furnaces designed were dissimilar and were inefficient established a prima facie case of malpractice.<sup>13</sup>

Negligence in the nature of malpractice will generally constitute a breach of contract, as well as the tort of negligence. In the absence of an express contract, the courts will imply an undertaking to comply with the standard of care normally employed by the profession.<sup>14</sup> As in any negligence case, the complaining party must prove: (1) that the professional had some duty towards him; (2) that the professional



breached the duty (i.e., was negligent); (3) that he suffered some injury, loss or damage; and (4) that the professional's negligence was the proximate cause of the injury, loss or damage.

In addition to the traditional areas of construction litigation involving alleged deficiencies in plans, specifications, estimates and similar matters, the unique aspects of preservation projects have created new areas for potential professional liability claims. The most fertile area for claims against preservation professionals are large projects in which tax credits for certified historic rehabilitations are sought. The preservation professional may become the target of a suit where a building fails to achieve historical status under a Part I application or National Register nomination prepared by him, or where the project fails to achieve final certification under Part II or Part III applications for the work which was performed. In the former instance, the client might claim that he was damaged because he purchased the property or undertook rehabilitation work in reliance upon the preservation professional's opinion that the property would achieve National Register or Part I certification. A claim against the preservation professional resulting from the failure to obtain final certification of the work may be based on two types of arguments. First, where preliminary approval from the National Park Service was not obtained, the client may argue that he undertook expensive rehabilitation work in reliance on the preservation professional's



opinion that such work would be acceptable for final certification.<sup>15</sup> Where preliminary approval was obtained under the Part II phase, but the project failed to achieve certification in the Part III phase, the preservation professional may be subject to the accusation that the Part II application he prepared was either inadequate or misleading. Even where a project does eventually achieve certification, a client may nevertheless claim that the preservation professional's alleged malpractice caused him delay damages or other additional expense.

A preservation professional may be the target of similar claims where he is involved with a project which requires the approval of a local historical review board. Likewise, an archaeologist who gives a preliminary opinion of "no adverse effect" on a federally financed project might become the subject of a lawsuit when archaeological remains on the site are discovered during the construction process and his client must suspend construction pending archaeological mitigation.

Preservation professionals who give advice and opinions concerning materials conservation may also be the target of litigation where a procedure they propose either fails to remedy or aggravates the condition of a historic resource. It is also conceivable that some day a preservation professional may be sued on the grounds that his recommendations for an authentic restoration or reconstruction were inaccurate.

The present status of historic preservation as an emerging profession presents certain fundamental difficulties in



applying the traditional tests for professional liability. The performance of the accused preservation professional is to be measured against the skill generally possessed and employed by other practitioners in his field. But in the absence of any clear definition of who comprises the field and agreement as to even minimum standards of competence, how can such a comparison be made? Upon what criteria can a court decide whether an offered "expert" qualifies to testify concerning the standards of the profession?

The difficulty is further complicated by the diversity of training and subject matter expertise in the field. A lawsuit currently pending in Pennsylvania highlights this problem.<sup>16</sup> In that case the owner of a rehabilitation project sued its architect after the project failed to qualify for the twenty-five percent investment tax credit available to certified historic rehabilitation projects. One of the issues (among many) concerns whether the Part I application which the defendant submitted to the State Historic Preservation Office was prepared adequately. In his defense, the architect asserted that while he was an architect qualified and experienced in rehabilitating old buildings, he was not, and never represented himself to be, an expert in historical research needed to back up the application. Such an argument follows the AIA "preservation team" model of splintering the field of historic preservation into a multitude of subspecialties. It brings to mind the question of whether there should be different standards of care for preservation architects, preservation historians and preservation lawyers. It





also raises the question of whether a non-licensed preservation consultant would be competent to testify concerning the standard of care to be employed by a preservation architect in preparing Part I, Part II and Part III applications.

The question of what standard of care should be applied in a profession comprised of many specialists has been confronted by the legal profession, which while resisting official recognition of specialties has as a practical matter segmented itself into many specialized areas of practice. The issue of what standard of care should be applied in a matter calling for specialized skill was raised in a recent California case which dealt with a situation in which a general practitioner had mishandled a complicated tax matter. The court held that: (1) an attorney who is a general practitioner has a duty to refer his client to a specialist if under the circumstances a reasonably careful and skillful practitioner would do so; and (2) if he fails to make such a referral and attempts to perform the professional services himself without the aid of a specialist, he will be held to the standard of skill and care ordinarily exercised by such specialists.<sup>17</sup> By analogy, a preservation consultant holding a generalist degree in historic preservation would have a duty to refer a client with a complex materials conservation problem to an architectural conservator, or be held to the standard of skill and care possessed by such an expert if he attempts to undertake the work himself.

The defense argument in the pending Pennsylvania case noted above also raises the issue of who among the many



preservation specialists should have the overall responsibility to inform the client fully as to all requirements and implications involved in proceeding with the project, as well as to monitor the project to make sure all requirements have been fulfilled. For example, whose responsibility is it to inform the client that a preliminary approval of the proposed rehabilitation work can and should be obtained from the National Park Service?

The AIA "preservation team" model, with the architect as "team leader" suggests that the architect has this responsibility. Such a result would be in line with the traditional role of the architect as the general overseer of the entire construction project. The situation is analogous to a very old case where, at a time when steam heating was a relatively new convenience, an architect argued that the extent of his responsibility for ascertaining the correct dimensions of a chimney flue was to confer with the steam-heating contractor.<sup>18</sup> The court rejected the argument out of hand, noting that an architect is duty bound to possess reasonable skill and knowledge of all elements which go into the construction of his project:

...when, in the progress of civilization, new conveniences are introduced into our homes, and become, not curious novelties, but the customary means of securing the comfort of the unpretentious citizen, why should not the architect be expected to possess the technical learning respecting them that is exacted of him with respect to other and older branches of his professional studies?<sup>19</sup>

By analogy, could preservation procedure be considered a



modern day equivalent of steam heat? And should not an architect who calls himself an expert in rehabilitating old buildings or a "preservation architect" in undertaking a project in which tax certification is expected, be bound to know the overall regulatory scheme for obtaining tax certification just as much as he is bound to know the building code?

One item of concern to persons practicing in an emerging profession like historic preservation is the fact that theories and standards may change dramatically as new discoveries are made and prior assumptions are subjected to greater academic scrutiny. This is particularly true in the materials conservation area in which the sophistication of the practice is increasing exponentially. Accordingly, a practitioner may be faced with having given advice based on his best judgment in a relatively unknown subject matter only to find out later, as a consequence of new discoveries or research in the field, that he was wrong.

Such predicaments are similar to those of attorneys who are frequently called upon to give advice concerning unsettled areas of the law, which may at a later date be resolved by court decision or regulatory agency interpretation. In responding to claims brought against attorneys under such facts, courts have held attorneys to the standard of skill and knowledge possessed by the profession at the time the advice was given. While the attorney does not guarantee that his opinion is correct, he does assume an obligation to his client to undertake reasonable research in an effort to ascertain



relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem.<sup>20</sup> The courts therefore look at what steps the professional undertook in arriving at an opinion rather than at whether the opinion was right or wrong. An informed judgment, even if subsequently proven to be erroneous, is not negligence.<sup>21</sup>

Historic preservation professionals also frequently find themselves called upon to either predict what a regulatory agency may do or obtain approvals from regulatory agencies. Absent a representation or agreement tantamount to a guarantee, an incorrect prediction or a failure to obtain a desired approval will not in themselves subject a professional to malpractice liability. Accordingly, proof that an attorney failed to foresee rejection of an employee benefit plan by the Internal Revenue Service was by itself insufficient to prove malpractice.<sup>22</sup> Similarly, the mere failure of an architect to produce plans acceptable to a city building department was held not to be evidence of negligence where the architect agreed to make every effort to obtain approvals before a new zoning code became effective, but expressly denied any guarantee.<sup>23</sup>

Given the potential for becoming the target of a lawsuit alleging failure to exercise adequate skill and care in performing their services, preservation professionals should be attentive to having insurance coverage which covers such claims. Comprehensive general liability insurance policies,





upon which most businesses rely to provide blanket insurance coverage, sometimes contain a specific exclusion for claims arising from rendering or failing to render professional services.<sup>24</sup>

A person need not be a member of the traditional or licensed professions in order to fall under the professional services exclusion in such a policy. In cases dealing with the application of such exclusionary clauses, the courts have defined the term "professional" to mean "something more than mere proficiency in the performance of a task," implying "intellectual skill as contrasted with that used in an occupation for production or sale of commodities." A "professional act or service" is one "arising out of a vocation, calling, occupation or employment involving specialized knowledge, labor or skill," where the labor or skill is "predominantly mental or intellectual, rather than physical or manual."<sup>25</sup>

In determining whether a particular act is of a professional nature, the courts will look to the act itself, rather than to the title of the person performing it.<sup>26</sup> Accordingly, a medical technician who caused a disaster while boiling water was held not to be acting in a professional capacity.<sup>27</sup> However, a medical technician who failed to determine that a prison inmate required an insulin injection was held to be performing in a professional capacity.<sup>28</sup> As persons whose services involve predominantly mental and intellectual skills, preservation professionals subject themselves to some risk if they rely solely on a comprehensive general liability policy which contains such an exclusion.



Preservation professionals who engage in a dual practice may also be subject to some risk that the professional liability policies which they carry for their primary profession will not cover preservation services. Many professional liability policies limit themselves to coverage for the insured's designated profession. Architects and engineers' policies are designed to protect the insured for his legal liability arising out of the performance of professional services for others in his capacity as an architect or engineer, and do not apply to claims arising out of the performance of services not customary for an architect or engineer.<sup>29</sup> Both versions of the Insurance Services Office standard form lawyers professional liability policies limit coverage to claims arising "out of the performance of professional services for others in the insured's profession as a lawyer."<sup>30</sup> The policies expressly limit coverage for acts taken as a fiduciary to those of a legal nature, and expressly exclude coverage for claims arising out of the conduct of a business enterprise or the insured's dual capacity as both lawyer and officer or director of an organization.<sup>31</sup>

Such limitations have generally been upheld by the courts. Accordingly, an attorney's undertaking to invest funds for a client was held not to be covered by a policy which limited coverage to damages "arising out of the performance of professional services for others in the insured's capacity as a lawyer."<sup>32</sup> Similarly, an optometrist was held not covered by an optometrist's professional liability policy where he



exceeded the authority of an optometrist by surgically removing a foreign substance from a patient's eye.<sup>33</sup> Professionals who venture into areas which may be construed as the practice of law have also been subject to denial of coverage by their professional liability policies. For example, an abstract company employee who prepared a deed for a fee was held to have engaged in the practice of law, thereby precluding coverage for negligent preparation of the deed under a policy which excluded "conduct of any business enterprise other than abstracting services."<sup>34</sup> An argument that an accountant should not be covered by an accountant's professional liability policy because the tax advice he gave amounted to the practice of law was rejected, however, where the court found that services in the "twilight zone" between law and accounting were within the broad coverage of the policy.<sup>35</sup> Accordingly, a dual professional in the preservation field could reasonably expect that services closely related to his primary profession (such as a lawyer giving advice concerning the tax certification process) would be covered by his primary policy. However, when he goes far afield of his primary profession (such as the lawyer performing a mortar analysis) his coverage is far more questionable.

As members of an emerging profession, preservation professionals must remain aware of their increasing vulnerability to litigation arising out of rendition of services. Practitioners may take steps to minimize their risk on the individual level by communicating clearly with their clients



in order to forestall unreasonable expectations, as well as by obtaining adequate insurance coverage. Practitioners must also work towards the creation of a common professional identity so that reasonable standards of skill and care may be established against which their performance may be measured.





## VII. ESTABLISHING STANDARDS OF COMPETENCE AND CONDUCT FOR PRESERVATION PROFESSIONALS THROUGH LICENSING OR CERTIFICATION

In view of the increasing reliance placed on preservation professionals by clients, as well as the irreversible impact which their exercise of skill and judgment may have on cultural resources, the question arises as to whether there should not be some mechanism for qualifying those who seek to represent themselves as experts in the preservation field. Precedent for certification of preservationists exists in Europe, where most countries have followed the French and Italian tradition of training preservationists and restorationists by the apprenticeship method. National institutions accept young architects, art historians and archaeologists for a period of internship and fieldwork which is followed by examinations and certification.<sup>1</sup>

Although the issue of qualifying preservation professionals in the United States has been addressed a number of times, it has yet to be resolved. When the Association for Preservation Technology was created in 1968, it was initially intended to be a professional organization. However, when the question of having a screening process for membership in the organization was considered, concerns relating to the diversity of the field as exhibited by the participation of numerous professional groups led the founders to question whether they were equipped to become the arbiters of who should qualify as a preservationist.<sup>2</sup> Accordingly, membership in the Association for Preservation Technology is open



to any interested person, and the organization has become best known for its research and dissemination of information concerning appropriate preservation techniques.

The issue of professional qualifications in historic preservation was raised a second time with the formation of the Institute of Historic Preservationists in the late 1970's. The IHP was formed as an organization for "professional preservationists" to "address practical professional problems, ... deal with qualifications and standards for the profession, ...and provide a forum for communication among preservationists all over the country."<sup>3</sup> The goals of the organization included establishing guidelines for practice and ethics, reaching a consensus on requirements for experience and training for the professional preservationist, and defining preservation as a single profession.<sup>4</sup> It was anticipated that the organization would have different categories of membership and maintain a list of "Full Members" which would serve as a "nationwide listing of qualified preservationists."<sup>5</sup>

The function and goals of the IHP became, however, the subject of hot debate among its membership. The argument centered on whether the organization should represent the interests of professional preservationists by setting guidelines for qualifications, standards of practice and ethics, or serve primarily as a communication network for preservationists in general -- both vocational and avocational. Reasons offered against a system of certification centered on the fear by non-degreed preservationists that they would



not meet the certification requirements and the belief that the field was too diverse, and the backgrounds of the participants too varied, for certification to be a realistic objective.<sup>6</sup> Although the IHP achieved membership of approximately two hundred, it eventually became inactive and went out of existence.<sup>7</sup>

In view of the inability of preservationists to come to terms with the issue of professional qualifications in the past, an initial inquiry must be made as to whether conditions have changed sufficiently to justify considering the certification issue once again. Events which have occurred in just the past few years suggest that another examination of the issue is indeed justified. In the last few years the number of graduates from university historic preservation programs has increased dramatically, infusing the preservation field with a substantial group of people who have a financial commitment to preservation work in the form of the time and tuition they spent in acquiring preservation skills and expertise. Changes in the federal tax code which caused a proliferation of certified historic rehabilitation projects have had an ancillary effect of increasing the number of persons who engage in preservation activities for their livelihood. As a result of both the work arising out of tax certification programs and the strengthening of the university programs, a body of knowledge and literature concerning preservation theories and techniques has developed from which standards and guidelines can be drawn more easily than in the past.



A system for qualifying those who practice as professionals in the historic preservation field should respond to the needs of the cultural resources which are the subject matter of the vocation, the clients served by the professionals and the practitioners themselves. The needs of the cultural resources were aptly described by Charles Peterson in 1969:

In this country anyone who has, or can borrow, the necessary money is entitled to start banging away on an old building, with or without an architect at hand. It seems to me that to protect what unspoiled buildings we have left, some kind of prequalification for architectural restoration practice is necessary -- even to the extent of licensing restorationists.

\* \* \*

Judging by the way things are going today, we won't know two hundred years from now what an early American building really looked like.

\* \* \*

Possibly the only way to stop this destructive trend is to require a license for restorationists which would guarantee the competence of the practitioner in advance of awarding commissions.<sup>8</sup>

While licensing or certification of preservation professionals would not necessarily guarantee that historic restorations would be performed accurately, the satisfaction of minimum competency requirements would make it more likely than not that the professional would approach a project with a basic understanding of preservation theory and techniques.

Licensing or certification would benefit clients by affording them a rational basis upon which to select a preservation professional, as well as providing some basis for





accountability. Most clients lack a clear understanding of what it is that preservation professionals do, let alone what their qualifications to perform the work should be. Some clients assume that persons engaged in preservation consulting for the purpose of placing properties on the National Register are in fact already certified. In response to the demand by clients for some guidance in the retention of a preservation consultant, the Pennsylvania Historical and Museum Commission (the state historic preservation office) has prepared a list of consultants who are interested in researching and writing National Register nominations on a professional basis.<sup>9</sup> Inclusion on the list does not, however, indicate the endorsement or recommendation of the Commission, nor does it indicate that the Commission staff considers all those included to be qualified.<sup>10</sup> Some form of professional qualification procedure, whether it be licensing, certification or some other approach, would at a minimum provide a relatively uninformed client with a means for seeking out preservation professionals with verified minimum competence in the preservation field.

Certification or licensing would also provide a framework for accountability by preservation professionals to their clients. A client who is dissatisfied with the work of a preservation professional has no real basis for knowing whether his dissatisfaction is justified, or whether he has any recourse against the preservation professional for what he perceives to be deficient performance or wrongful conduct. The dissemination of ethical standards for certified or licensed



preservation professionals, as well as the development of commonly accepted standards of skill and care, would serve as means to educate clients as to what they may reasonably expect from preservation professionals.

A professional qualification procedure would also assist preservation practitioners in achieving independent professional status by defining the parameters of the profession and providing standards of competence and conduct. A clear definition of the scope of the profession, as well as the delineation of responsibilities of the specialists within the field would contribute to the resolution of regulatory issues caused by overlap with the more traditional professions. Commonly accepted standards of care would be available to use as a measure of performance should a preservation professional become the target of malpractice litigation. Ethical standards would enhance both the credibility and reputation of preservation practitioners as an emerging profession.

The arguments presented against the prequalification of preservation professionals are substantially the same today as those which were advanced in the past. The most serious objection arises out of the diversity of the participants in the field. Critics legitimately argue that one regulatory body could not judge adequately the qualifications of architects, historians, archaeologists, lawyers, material conservationists, and every other academic discipline involved in the field. The response to such objections must be that the relevant regulatory body should not be expected



to pass upon the qualifications of each specialist to perform his particular specialty. Rather, the inquiry should be whether the preservation professional has a solid grasp of the basic principles and general techniques of preservation practice. Such a process might be analogous to the multi-state bar examination, which tests aspiring lawyers on general principles of law, but does not expect the examinee to give an opinion on a complex federal tax issue or on the corporation law of a particular state. Like lawyers, preservation professionals who exhibit minimum competency should nevertheless have a legal and ethical obligation to refuse work which requires special skills outside of their particular realm of expertise.

A prequalification standard based on knowledge of basic, generally accepted preservation theories and techniques would also circumvent the difficulty in attempting to certify particular specialties, such as architectural conservation chemistry, where the state of the art may still be in the experimental stage. Following principles of professional liability law, the standard of skill and care expected from those who practice within those specialties would correspond to the standards of the specialty as a whole as they develop over time. Although a practitioner who meets the general, minimum competency requirements for preservation practice would not face an additional regulatory obstacle to engaging in such sophisticated work, he would be ethically and legally obligated to exercise the same degree of skill and care as trained specialists in the discipline.



The other major ground of opposition towards certification or licensing of preservation professionals is an ideological one raised by people who view preservation as essentially a value rather than a professional discipline. Such people believe that preservation is best advanced on the grass roots level and view certification and professionalism as a step towards elitism.

Such a view ignores the reality that a substantial group of professional practitioners has already developed and appears to be thriving in the preservation field. Eighty percent of the National Register nominations submitted to the Pennsylvania Historical and Museum Commission are prepared by professional preservation consultants.<sup>11</sup> While the Commission does not require that an owner use a consultant for National Register nominations or tax certification projects, the staff may recommend that he obtain the assistance of a consultant where the information he has submitted is inadequate and he is operating under time constraints.<sup>12</sup> The situation is similar to that in the tax area, where with time and patience an intelligent layman can prepare his own income tax return, but may prefer to hire a tax accountant who can prepare it more expeditiously.

Assuming that prequalification is desirable for those who hold themselves out as preservation professionals, the next inquiry must be what form it should take. The options include state regulation in the form of licensing or certification, certification by a professional organization, or





admission to practice by the regulatory agencies which are primarily involved with preservation activities.

Licensing has been defined as "the process by which an agency of government grants permission to an individual to engage in a given occupation upon finding that the applicant has attained the minimal degree of competency necessary to ensure that the public health, safety, and welfare will be reasonably well protected." Since the applicable licensing law sets forth a "scope of practice," licensing laws are often referred to as "practice acts."<sup>13</sup> The rationale for prohibiting practice by anyone who has not undergone the scrutiny required for obtaining a license is that the consumer is unable to evaluate the quality of the professional services and that a risk of hazard exists both to the consumer and to the public if an erroneous selection is made.<sup>14</sup> Common characteristics of licensing laws are: a statutorily created expert board with the jurisdiction to administer the law; entry standards which incorporate minimum education, experience and fitness qualifications; grandfathering of existing practitioners; a code of conduct; disciplinary procedures to enforce the code of conduct; and a statutory prohibition of professional practice by unlicensed individuals.<sup>15</sup>

Licensing laws have the beneficial attribute of most clearly deterring the untested practitioner from undertaking tasks which he is not competent to perform. They also provide the strongest form of professional accountability, since a violation of ethical standards may cost the licensed professional his means of livelihood.



Licensing laws have become the subject of vigorous attack, however. Reasons cited in opposition to them include their anticompetitive effect; the questionable relationship in some professions between the criteria of admission and ability to perform; the cost to the public of staffing the official administrative bodies; their tendency to bar entry to ethnic minorities; and skepticism concerning whether the regulated occupations in fact affect the public welfare.<sup>16</sup> In the current political environment in which more regard is given to the operation of market forces than to consumer protection, it is unlikely that full scale licensing is a viable objective for preservation professionals. Even if such an objective were possible, it is questionable whether as a relatively new, emerging field of practice, it would want to lock itself into a strong, bureaucratic system of regulation.

In contrast to licensing, certification is the process by which either a governmental authority or a professional organization gives an individual who has met qualification standards the right to use a specified title. Statutes which provide for such certification are commonly referred to as "title laws."<sup>17</sup>

The major deficiency of certification is that unqualified persons may legally engage in the practice of the profession so long as they do not use the statutory designation. Unscrupulous individuals may therefore use a title similar to the official title in order to mislead uninformed clients into believing that they are certified professionals.



The major benefit of certification is the opportunity it presents to members of the certified group to educate their client base. Having obtained the exclusive right to use a particular designation, they may explain to the consuming public how their qualifications differ from those who do not have the right to use it. Moreover, those who have the right to use the designation are likely to be attentive to the good reputation and ethical practices of the group as a whole. This is particularly true where the designation is viewed as the symbol of a strong professional association. As observed by Moore:

If a conspicuous miscreant is not a member...its spokesman can disavow him with ample and unctuous piety. If he is affiliated with the proper and relevant association, his conduct may be brought under review by his colleagues....<sup>18</sup>

Designations arising solely from membership in professional organizations may be meaningless, however, if the organization fails to apply stringent professional criteria. Moore refers to the "affiliated laity" which often becomes more embarrassing than advantageous to an overinclusive organization which admits anyone professing an interest in the subject. Accordingly, most associations have established restrictive criteria for membership or set up classes of members to distinguish between those who are "qualified" and those who are merely "interested".<sup>19</sup>

A third alternative for prequalification of preservation professionals is a system where regulatory agencies primarily involved with preservation activities would admit



qualified professionals to represent clients in connection with dealings with those agencies. Both the United States Patent and Trademark Office and the Internal Revenue Service have mechanisms by which professionals qualify to represent clients in their respective proceedings.<sup>20</sup> An analogous qualification procedure could be established for those who act as preservation consultants in projects seeking tax credits for certified historic rehabilitations. Department of Interior regulations setting forth qualifications of staff members of approved state historic preservation programs could be extended to those who seek to represent clients before the National Park Service and (where permitted by state law) the state historic preservation offices.

Such a program would have the advantage of providing professional standards in the area of preservation in which unlicensed consultants are most active and in which the financial stakes are the highest. At the same time, it would alleviate the necessity of addressing the issue of licensing or certification of preservation professionals in fifty separate states.

This option has the corresponding disadvantage, however, of covering only one segment of preservation practice. Moreover, if the tax credits for certified historic rehabilitations are repealed, preservation professionals would be back to ground zero in their quest for professional status.

It is unlikely, in any event, that the relevant regulatory agencies would want to take on the additional





responsibility of screening aspiring preservation consultants. At the outset of the federal tax certification program, the National Park Service discussed and rejected the idea of certifying qualified, private professionals to administer the program on a local or regional basis.<sup>21</sup> Moreover, some view the Park Service's role in the tax certification program as limited to ensuring compliance with the applicable law, and not as protecting privately owned property or its owners.

Of all of the above options, certification by a professional organization of preservation practitioners (possibly a revived IHP) would be the most feasible from both a political and regulatory standpoint. However, the creation and implementation of a viable certification procedure (or any other form of prequalification system) demands the preliminary attainment of a sense of collectivity and unity of interest among the profession as a whole. Moreover, preservation professionals must confront and resolve those issues which have prevented them from organizing effectively in the past. For example, persons who engage in preservation activities for their livelihood must recognize that while they may share common values with avocational preservationists, they have distinct concerns in terms of financial commitment and legal accountability which warrant the advancement of professionalism in the field. Additionally, practitioners should cease characterizing their diversity in background and expertise as an insurmountable obstacle to the formulation of professional standards, and focus instead on identifying those



basic principles and techniques which are crucial to competent performance by all preservation professionals.

Like any regulatory system, certification of preservation professionals will not guarantee perfection in preservation practice. It will, however, represent the first milestone towards achieving professional status and accountability in the historic preservation field.



## I. INTRODUCTION

<sup>1</sup>As will be discussed in Chapter IV, the extent to which a lawyer may represent that he is a specialist within the general practice of law is regulated by the ethical rules of the jurisdiction within which he practices. Most lawyers, however, do in fact limit their practice to certain areas of the law, and at least informally refer to themselves as real estate lawyers, criminal lawyers, tax lawyers, etc. Directories reflecting areas of practice, such as directories of insurance lawyers and antitrust lawyers, have become commonplace. In 1984, the National Trust for Historic Preservation published a Directory of Historic Preservation Lawyers in which 212 attorneys are listed.

<sup>2</sup>For the purpose of analysis in this thesis "preservation professionals" will be limited to those who provide services, advice or information to others for a fee. Excluded from this analysis are persons engaged exclusively in teaching or academic research, and salaried employees of organizations, institutions or government agencies who provide services or advice solely to their employers.

## II. THE DEFINITION AND SCOPE OF PRESERVATION PRACTICE

<sup>1</sup>National Council for Preservation Education Committee on Promotion and Tenure, Toward Promotion and Tenure: Guidelines for Assessing the Achievement of a Preservation Educator (Murfreesboro, Tennessee: n.p. 1984), p. 1.

<sup>2</sup>National Conservation Advisory Council, Report of the Study Committee on Architectural Conservation (Washington, D.C.: n.p. 1977), p. 5.

<sup>3</sup>Antoinette J. Lee, Guide to Undergraduate and Graduate Education in Historic Preservation (Washington, D.C.: National Trust for Historic Preservation, 1981).

<sup>4</sup>The identification of preservation programs as either "generalist" or "specialist" was made in Antoinette J. Lee, Summary Report on Historic Preservation and Higher Education (Washington, D.C.: National Trust for Historic Preservation, 1980), pp. 7-8.

<sup>5</sup>In addition to the data noted hereafter, information concerning the nature of preservation practice is based upon interviews with the various practitioners listed in the Acknowledgment, as well as advertising literature produced by those practitioners.



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<sup>6</sup>American Institute of Architects' Committee on Historic Resources, Guide to Historic Preservation (Washington, D.C.: American Institute of Architects, n.p. 1985).

<sup>7</sup>*Ibid.*, pp. 5-6.

<sup>8</sup>Interview with Donna Williams, Acting Director, Bureau of Historic Preservation, Pennsylvania Historical and Museum Commission, in Harrisburg, Pennsylvania (July 23, 1985).

### III. THE POTENTIAL FOR BECOMING A SEPARATELY RECOGNIZED PROFESSION

<sup>1</sup>Wilbert E. Moore, The Professions: Roles and Rules (New York: Russell Sage Foundation, 1970), pp. 5-15.

<sup>2</sup>*Ibid.*, p. 55.

<sup>3</sup>*United States v. Laws*, 163 U.S. 258, 266 (1896) (employment of German chemist by Louisiana sugar plantation did not violate federal contract labor statutes because chemist was a professional).

<sup>4</sup>See N.Y. Tax Law §703 (McKinney 1975) which excluded from coverage of the Unincorporated Business Income Tax the practice of any profession in which capital is not a material income producing factor and in which more than eighty per centum of the gross income for the taxable year is derived from personal services. This section was repealed effective December 31, 1982. L. 1978, c. 69, §7.

<sup>5</sup>*Koner v. Procaccino*, 39 N.Y.2d 258, 262, 347 N.E.2d 658, 660, 383 N.Y.S.2d 295, 298 (1976); *Geiffert v. Mealey*, 293 N.Y. 583, 586, 59 N.E. 414, 415 (1944); *Perlman v. State Tax Comm'n*, 63 A.D.2d 762, 404 N.Y.S.2d 732 (3rd Dept. 1978); *Rosenbloom v. State Tax Comm'n*, 44 A.D.2d 69, 70, 353 N.Y.S.2d 544, 546 (3rd Dept. 1974); *Sunberg v. Bragalini*, 7 A.D.2d 15, 19, 179 N.Y.S.2d 903, 907 (3rd Dept. 1958).

<sup>6</sup>*Frye v. Comm'r of Fin. of City of N.Y.*, 95 A.D.2d 274, 466 N.Y.S.2d 3 (1st Dept. 1983), *aff'd*, 62 N.Y.2d 841, 466 N.E.2d 151, 477 N.Y.S.2d 611 (1984); *Perlman v. State Tax Comm'n*, 63 A.D.2d 762; *Giordano v. State Tax Comm'n*, 52 A.D.2d 691, 382 N.Y.S.2d 576 (3rd Dept. 1976); *Rosenbloom v. State Tax Comm'n*, 44 A.D.2d 69. As noted in Rosenbloom,





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<sup>6</sup>(cont.) the criteria relating to barriers to carrying on the occupation as a corporation is now less significant since New York now permits certain professionals to incorporate.

<sup>7</sup>Teague v. Graves, 261 A.D. 652, 27 N.Y.S.2d 762 (3rd Dept. 1941), aff'd, 287 N.Y. 549, 38 N.E.2d 222 (1941).

<sup>8</sup>Id.

<sup>9</sup>Id., 261 A.D. at 654-55, 27 N.Y.S.2d at 764.

<sup>10</sup>Id.

<sup>11</sup>Geiffert v. Mealey, 293 N.Y. 583, 59 N.E. 414.

<sup>12</sup>Id., 293 N.Y. at 585, 59 N.E. at 415 (emphasis added).

<sup>13</sup>Id.

<sup>14</sup>Rosenbloom v. State Tax Comm'n, 44 A.D.2d 69.

<sup>15</sup>Kormes v. Murphy, 9 A.D.2d 1003, 194 N.Y.S.2d 820 (3rd Dept. 1959).

<sup>16</sup>Id., 9 A.D.2d at 1004, 194 N.Y.S.2d at 821 (emphasis added).

<sup>17</sup>Herman v. Murphy, 14 A.D.2d 473, 218 N.Y.S.2d 444 (3rd Dept. 1961).

<sup>18</sup>See cases cited in Note 6, supra.

<sup>19</sup>Wooddell v. Dailey, 230 S.E.2d 466, 470 (W. Va. 1976).

<sup>20</sup>Giordano v. State Tax Comm'n, 52 A.D.2d at 691, 382 N.Y.S.2d at 577.

<sup>21</sup>Id.

<sup>22</sup>Perlman v. State Tax Comm'n, 63 A.D.2d 762, 404 N.Y.S.2d 732.

<sup>23</sup>McCormick v. Bragalini, 8 A.D.2d 885, 186 N.Y.S.2d 851 (3rd Dept. 1959).

<sup>24</sup>Tannenbaum v. State Tax Comm'n, 46 A.D.2d 400, 401, 362 N.Y.S.2d 608, 610 (3rd Dept. 1975).



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<sup>25</sup>Glushak v. City of N.Y., 6 A.D.2d 381, 178 N.Y.S.2d 33 (1st Dept. 1958).

<sup>26</sup>Id., 6 A.D.2d at 384, 178 N.Y.S.2d at 36.

<sup>27</sup>Sundberg v. Bragalini, 7 A.D.2d 15, 179 N.Y.S.2d 903.

<sup>28</sup>Id., 7 A.D.2d at 18-19, 179 N.Y.S.2d at 906-07.

<sup>29</sup>16 U.S.C.A. §470a (West 1985).

<sup>30</sup>36 C.F.R. §61.4 (July 1, 1985).

<sup>31</sup>Id.

<sup>32</sup>36 C.F.R., Part 61, Appendix A (July 1, 1985).

<sup>33</sup>36 C.F.R. §61.4 (July 1, 1985) (emphasis added).

<sup>34</sup>Pa. Stat. Ann. tit. 71, §1047.1f (Purdon Supp. 1985) (emphasis added).

<sup>35</sup>Fla. Stat. Ann. §267.0612 (West Supp. 1985) (emphasis added).

<sup>36</sup>N.C. Gen. Stat. §143B-63 (1983) (emphasis added).

### IV. THE REGULATORY IMPLICATIONS OF ENGAGING IN PRESERVATION PRACTICE

<sup>1</sup>See 36 C.F.R. Part 60 (July 1, 1985); 36 C.F.R. Part 67 (July 1, 1985).

<sup>2</sup>See National Historic Preservation Act of 1966 §106, 16 U.S.C.A. §470f (West 1985).

<sup>3</sup>Dent v. West Virginia, 129 U.S. 114, 122 (1889).

<sup>4</sup>See Pa. Stat. Ann. tit. 71, §807.1 (Purdon Supp. 1985) (action for an injunction may be maintained against any person to restrain or prevent his practicing any profession without a license whenever a license to engage in such activity is required by law); Pa. Stat. Ann. tit. 63, §34.20 (Purdon Supp. 1985) (any person who engages or offers to engage



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### IV. THE REGULATORY IMPLICATIONS OF ENGAGING IN PRESERVATION PRACTICE

<sup>4</sup>(cont.) in the practice of architecture without a license shall on the first offense be guilty of a summary offense and on a second offense be guilty of a misdemeanor); 42 Pa. Cons. Stat. Ann. §2524 (Purdon 1981) (any person who practices law without being an attorney at law commits a misdemeanor of the third degree).

<sup>5</sup>Restatement (Second) of Contracts §181 (1981).

<sup>6</sup>Design-4 v. Masen Mountainside Inn, Inc., 148 N.J. Super. 290, 372 A.2d 640 (1977).

<sup>7</sup>Pa. Stat. Ann. tit. 63, §34.18 (Purdon Supp. 1985).

<sup>8</sup>Pa. Stat. Ann. tit. 63, §34.3 (Purdon Supp. 1985).

<sup>9</sup>Pa. Stat. Ann. tit. 63, §34.15 (Purdon Supp. 1985) (emphasis added).

<sup>10</sup>State Bd. of Examiners v. Rodgers, 69 S.W.2d 1093 (Tenn. 1934).

<sup>11</sup>Loewy v. Rosenthal, 104 F.Supp. 496 (E.D. Mich. 1952).

<sup>12</sup>Id. at 502.

<sup>13</sup>State ex rel. Love v. Howell, 316 S.E.2d 381 (S.C. 1984).

<sup>14</sup>See 42 Pa. Cons. Stat. Ann. §2524 (Purdon 1981).

<sup>15</sup>Denver Bar Ass'n v. Public Utilities Comm'n, 154 Colo. 273, 279, 391 P.2d 467, 471 (1964).

<sup>16</sup>Interview with Donna Williams (July 23, 1985).

<sup>17</sup>Id.

<sup>18</sup>Telephone interview with staff of Historical Commission of Philadelphia (October 15, 1984).

<sup>19</sup>Auerbacher v. Wood, 142 N.J. Eq. 484, 486, 59 A.2d 863, 864 (1948).

<sup>20</sup>142 N.J. Eq. at 485-86; 59 A.2d at 864.

<sup>21</sup>Lowell Bar Ass'n v. Loeb, 52 N.E.2d 27 (Mass. 1943).

<sup>22</sup>Id. at 34.



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### IV. THE REGULATORY IMPLICATIONS OF ENGAGING IN PRESERVATION PRACTICE

<sup>23</sup>In re Bercu, 273 A.D. 524, 78 N.Y.S.2d 209 (1948), aff'd, 299 N.Y. 728 (1949).

<sup>24</sup>Gardner v. Conway, 234 Minn. 468, 481, 48 N.W.2d 788, 796 (1951).

<sup>25</sup>Id.

<sup>26</sup>In re Bercu, *supra*; State ex rel. State Bar of Wisconsin v. Keller, 16 Wis.2d 377, 114 N.W.2d 796 (1962), vacated, 374 U.S. 102, 83 S. Ct. 1686, modified, 21 Wis.2d 100, 123 N.W.2d 905 (1963).

<sup>27</sup>Act of November 8, 1965, 79 Stat. 1282, P.L. 89-332 (Internal Revenue Service); 31 C.F.R. Part 10 (July 1, 1985); 35 U.S.C.A. §31 (West 1984); 37 C.F.R. §§1.341-1.348 (July 1, 1985) (Patent and Trademark Office).

<sup>28</sup>Sperry v. State of Florida, 373 U.S. 379 (1963).

<sup>29</sup>Denver Bar Ass'n v. Public Utilities Comm'n, 154 Colo. 273; State ex rel. State Bar of Wisconsin v. Keller, 16 Wis.2d 377.

<sup>30</sup>State ex rel. State Bar of Wisconsin v. Keller, 16 Wis.2d 377.

<sup>31</sup>Id.

<sup>32</sup>Denver Bar Ass'n v. Public Utilities Comm'n, 154 Colo. 273.

<sup>33</sup>Id.

<sup>34</sup>State Bar of Michigan v. Galloway, 124 Mich. App. 271, 335 N.W.2d 475 (1983).

<sup>35</sup>State ex rel. Pearson v. Gould, 437 N.E.2d 41 (Indiana 1982).

<sup>36</sup>Pa. Stat. Ann. tit. 63, §§9.8c-9.8f (Purdon Supp. 1985).

<sup>37</sup>Pa. Stat. Ann. tit. 63, §§9.8d(5), 9.8f(5) (Purdon Supp. 1985).

<sup>38</sup>Pa. Stat. Ann. tit. 63, §34.13(b) (Purdon Supp. 1985).





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### IV. THE REGULATORY IMPLICATIONS OF ENGAGING IN PRESERVATION PRACTICE

- <sup>39</sup>Pa. Stat. Ann. tit. 63, §34.13(c) (Purdon Supp. 1985).
- <sup>40</sup>Pa. Code of Professional Responsibility DR3-103, DR3-102 (1985); Model Rules of Professional Conduct Rule 5.4.
- <sup>41</sup>Model Rules of Professional Conduct Rule 5.4(d).
- <sup>42</sup>State Bar of Wisconsin Comm. on Professional Ethics, Formal Op. E-84-21 (1984); State Bar of Michigan Comm. on Professional Ethics, Op. CI-954 (1983).
- <sup>43</sup>Nassua County Bar Ass'n Comm. on Professional Ethics, Op. 84-5 (1984).
- <sup>44</sup>Maryland State Bar Ass'n Comm. on Professional Ethics, Op. 79-9.
- <sup>45</sup>Nebraska State Bar Ass'n Comm. on Professional Ethics, Op. 80-7.
- <sup>46</sup>Missouri Bar Admin., Informal Op. 3 (1981).
- <sup>47</sup>Kansas Bar Ass'n Comm. on Professional Ethics, Op. 82-41 (1983).
- <sup>48</sup>See Pa. Stat. Ann. tit. 63, §§9.8d(2), 9.8f(2) (Purdon Supp. 1985).
- <sup>49</sup>(CCH) Accountancy Law Reporter ¶1056 (1984).
- <sup>50</sup>Lawrence J. Raifman and Jean A. Hinlicky, Ethical Issues in Dual Professional Practice (Chicago: National Center for Professional Responsibility - ABA, 1982), p. 6; See former Pa. Code of Professional Responsibility DR2-102(D) (1983).
- <sup>51</sup>See Pa. Code of Professional Responsibility DR2-102; Massachusetts Bar Ass'n Comm. on Professional Ethics, Op. 82-2 (1982).
- <sup>52</sup>ABA/BNA Lawyers Manual on Professional Conduct 81:3005.
- <sup>53</sup>Raifman, p. 12.
- <sup>54</sup>State Bar of Michigan Comm. on Professional Ethics, Op. CI-688 (1981).



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### IV. THE REGULATORY IMPLICATIONS OF ENGAGING IN PRESERVATION PRACTICE

- <sup>55</sup>Missouri Bar Admin., Informal Op. 5 (1982).
- <sup>56</sup>Mississippi State Bar Comm. on Professional Ethics, Op. 65 (1981).
- <sup>57</sup>State Bar of Michigan Comm. on Professional Ethics, Op. CI-669 (1981).
- <sup>58</sup>Maryland State Bar Ass'n Comm. on Professional Ethics, Op. 83-48 (1982); Dallas Bar Ass'n Comm. on Professional Ethics, Op. 1981-11 (1981).
- <sup>59</sup>State Bar of Arizona Comm. on Professional Ethics, Op. 80-16 (1980).
- <sup>60</sup>ABA Comm. on Professional Ethics, Informal Op. 83-1497 (1983).

### V. THE NEED FOR ETHICAL STANDARDS

- <sup>1</sup>Pa. Stat. Ann. tit. 63, §34.19(4) (Purdon Supp. 1985) (architects); Pa. Stat. Ann. tit. 63, §904(4) (Purdon Supp. 1985) (landscape architects); Pa. Stat. Ann. tit. 63, §9.9a(4) (Purdon Supp. 1985) (certified public accountants).
- <sup>2</sup>Pa. R.D.E. 203, 204.
- <sup>3</sup>AIA Ethical Principles VII.
- <sup>4</sup>Pa. Code of Professional Responsibility DR6-101.
- <sup>5</sup>See Pa. Code of Professional Responsibility DR5-101A.
- <sup>6</sup>See Pa. Code of Professional Responsibility DR5-105.
- <sup>7</sup>AIA Ethical Principles IX.
- <sup>8</sup>Pa. Code of Professional Responsibility EC7-38. Ethical Considerations (EC) do not, however, have the same force as Disciplinary Rules (DR), the violation of which may justify disbarment.
- <sup>9</sup>AIA Ethical Principles XI.
- <sup>10</sup>Moore, p. 240.



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### V. THE NEED FOR ETHICAL STANDARDS

<sup>11</sup>AIA Ethical Principles III.

<sup>12</sup>See Pa. Code of Professional Responsibility, Canon 9.

<sup>13</sup>See Pa. Code of Professional Responsibility, Canon 7.

<sup>14</sup>Interview with Donna Williams (July 23, 1985).

<sup>15</sup>49 Pa. Admin. Code §§11.22, 11.25 (1984).

### VI. VULNERABILITY TO PROFESSIONAL LIABILITY CLAIMS AND THE NECESSITY OF ADEQUATE INSURANCE COVERAGE

<sup>1</sup>Restatement (Second) of Torts §299A (1965).

<sup>2</sup>Restatement (Second) of Torts §299A, comment e (1965).

<sup>3</sup>Lincoln v. Gay, 164 Mass. 537, 42 N.E. 95 (1895).

<sup>4</sup>Milliken v. Woodward, 64 N.J.L. 444, 45 A. 796 (1900).

<sup>5</sup>Van Nortwick v. Holbine, 62 Neb. 147, 86 N.W. 1057 (1901).

<sup>6</sup>Id.

<sup>7</sup>Fantini v. Alexander, 172 N.J. Super. 105, 410 A.2d 1190 (1980).

<sup>8</sup>Horak v. Biris, 130 Ill. App. 3d 140, 474 N.E.2d 13 (2d Dist. 1985); Contra Martino v. Family Serv. Agency of Adams County, 112 Ill. App. 3d 593, 445 N.E.2d 6 (4th Dist. 1983).

<sup>9</sup>Bayshore Development Co. v. Bonfoey, 75 Fla. 455, 459, 78 So. 507, 509 (1918) (quoting Coombs v. Beede, 89 Me. 187, 36 A. 104 (1896)).

<sup>10</sup>See Lentino v. Fringe Employee Plans, Inc., 611 F.2d 474 (3rd Cir. 1979) (attorney); Nat'l Housing Indus., Inc. v. E. L. Jones Dev. Co., 118 Ariz. 374, 576 P.2d 1374 (1st Div. 1978) (engineer).

<sup>11</sup>Id.

<sup>12</sup>Lentino v. Fringe Employee Plans, Inc., 611 F.2d 474.



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### VI. VULNERABILITY TO PROFESSIONAL LIABILITY CLAIMS AND THE NECESSITY OF ADEQUATE INSURANCE COVERAGE

<sup>13</sup>Follesbee Bros. v. Garrett-Cromwell Engineering Co., 48 Pa. Super. 183 (1911).

<sup>14</sup>See James Acret, Architects and Engineers, 2d ed. (New York: McGraw-Hill, 1984), p. 65.

<sup>15</sup>A prudent preservation professional will recommend to the client in writing that work not be commenced until Part I approval has been achieved and preliminary approval of Part II has been obtained. He should also avoid engaging in puffery concerning the extent of his abilities to obtain approvals which might be construed as a warranty of a satisfactory result.

<sup>16</sup>Sheppard & Myers, Inc. v. Lynch, No. 84-07997 (Ct. Common Pleas, Chester Co., Pa. filed 1984). Description is based on Amended Complaint and Answer to Amended Complaint.

<sup>17</sup>Horne v. Peckham, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (3rd Dist. 1979).

<sup>18</sup>Hubert v. Aitken, 2 N.Y.S. 711 (C.P.N.Y. 1888).

<sup>19</sup>Id. at 712.

<sup>20</sup>Smith v. Lewis, 13 Cal.3d 349, 530 P.2d 589, 118 Cal. Rptr. 62 (1975).

<sup>21</sup>Mazer v. Security Insurance Group, 368 F.Supp. 418 (E.D. Pa. 1973), aff'd, 507 F.2d 1338 (3d Cir. 1975).

<sup>22</sup>Lentino v. Fringe Employee Plans, Inc., 611 F.2d 474.

<sup>23</sup>530 East 89 Corp. v. Unger, 54 A.D.2d 848, 388 N.Y.S.2d 284 (1st Dept. 1976), aff'd, 43 N.Y.2d 776, 373 N.E.2d 276, 402 N.Y.S.2d 382 (1977).

<sup>24</sup>"Professional Versus General Liability Insurance," The Fire, Casualty and Surety Bulletin (Cinn. Ohio: National Underwriter Co., 1981), p. Dma-1.

<sup>25</sup>Marx v. Hartford Accident and Indemnity Co., 183 Neb. 12, 13-14, 157 N.W.2d 870, 872 (1968).

<sup>26</sup>Id.

<sup>27</sup>Id.





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### VI. VULNERABILITY TO PROFESSIONAL LIABILITY CLAIMS AND THE NECESSITY OF ADEQUATE INSURANCE COVERAGE

<sup>28</sup>Multnomah County v. Oregon Automobile Ins. Co., 256 Or. 24, 470 P.2d 147 (1970).

<sup>29</sup>"Architects or Engineers Professional Liability Insurance," Policy, Form and Manual Analysis Service (Indianapolis, Indiana: Rough Notes Co.); Guide to Liability Insurance (Indianapolis, Indiana: Rough Notes Co., 1975), p. 105.

<sup>30</sup>Lawyers Professional Liability Insurance (Occurrence) and Lawyers Professional Liability Insurance (Claims Made) (New York: Insurance Services Office, Inc., 1981).

<sup>31</sup>Id.

<sup>32</sup>Smith v. Travelers Indemnity Co., 343 F.Supp. 605 (M.D.N.C. 1972).

<sup>33</sup>Kime v. Aetna Casualty & Surety Co., 66 Ohio App. 277, 33 N.E.2d 1008 (1940).

<sup>34</sup>St. Paul Fire & Marine Ins. Co. v. Nicholson, 263 Ark. 694, 567 S.W.2d 107 (1978).

<sup>35</sup>Bancroft v. Indemnity Ins. Co. of North America, 203 F.Supp. 49 (W.D. La. 1962), aff'd, 309 F.2d 959 (5th Cir. 1962).

### VII. ESTABLISHING STANDARDS OF COMPETENCE AND CONDUCT FOR PRESERVATION PROFESSIONALS THROUGH LICENSING OR CERTIFICATION

<sup>1</sup>James Marston Fitch, "Professional Training for the Preservationist," AIA Journal 51 (April 1969): 57.

<sup>2</sup>Interview with Lee H. Nelson, Chief, Preservation Assistance Division, National Park Service, in Washington, D.C. (July 25, 1985).

<sup>3</sup>"Information" and application form, The Institute of Historic Preservationists, New York, New York. Copy provided by Mary B. Dierickx, former member of Steering Committee, IHP.

<sup>4</sup>Ibid.



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### VII. ESTABLISHING STANDARDS OF COMPETENCE AND CONDUCT FOR PRESERVATION PROFESSIONALS THROUGH LICENSING OR CERTIFICATION

<sup>5</sup> Ibid.

<sup>6</sup> See "Members' Forum" and "From the editor...", IHP Newsletter 1 (September 1979): 1, 2, 4-5.

<sup>7</sup> Telephone interview with Mary B. Dierickx (August 7, 1985).

<sup>8</sup> Charles E. Peterson, "Comments on the Pistoia Working Paper," Monumentum 3 (1969): 75-76.

<sup>9</sup> "List of Consultants: Pennsylvania Historic Resource Forms and National Register of Historic Places Nominations," Commonwealth of Pennsylvania, Pennsylvania Historical and Museum Commission, Bureau for Historic Preservation. Provided by Donna Williams.

<sup>10</sup> Interview with Donna Williams (July 23, 1985).

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Randolph P. Reaves, The Law of Professional Licensing and Certification (Charlotte, N.C.: Publications for Professionals, 1984), p. 11.

<sup>14</sup> Stephen Rubin, "The Legal Web of Professional Regulation," in Regulating the Professions ed. Roger D. Blair and Stephen Rubin (Lexington, Mass.: D.C. Heath & Co., 1980), p. 38.

<sup>15</sup> Rubin, pp. 36-37.

<sup>16</sup> Jonathan Rose, Occupational Licensing: A Framework for Analysis, 1979 Ariz. St. L.J. 189; Walter Gelhorn, The Abuse of Occupational Licensing, 44 U. Chi. L. Rev. 6 (1976).

<sup>17</sup> Reaves, p. 11.

<sup>18</sup> Moore, p. 116.

<sup>19</sup> Moore, p. 162.

<sup>20</sup> Act of November 8, 1965, 79 Stat. 1282, P.L. 89-332; 31 C.F.R. Part 10; 35 U.S.C.A. §31 (West 1984).

<sup>21</sup> Interview with Lee H. Nelson (July 25, 1985).



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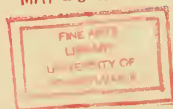
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