An accountant by any other name may be legal.

WHO CAN USE THE 'A' WORD?

by Richard B. Malamud, J.D., LL.M., CPA

Your name is Bonnie Moore. You graduated college with a major in accounting. You've never taken the CPA exam nor are you interested in taking it. You set up a company, called the "Accounting Center," where you design and install basic accounting systems for small clients and prepare monthly financial statements and projections. Your firm acts as bookkeeper and "audits" your clients' books in the generic sense, solely for internal purposes, although it does not prepare formal signed audits.

The terms "accountant" and "accounting" are used to describe Accounting Center's services. Can Bonnie Moore and her company be prohibited from using those terms by the State of California in order to protect the public from the possible confusion it may have in differentiating licensed (certified public accountants) from unlicensed "accountants"? In California the answer is yes -- and no.

The case

In 1992, the California Supreme Court had to decide whether Bonnie Moore, her Accounting Center and up to 60,000 unlicensed accountants in California could use the terms "accountant" and "accounting" to describe their services. (*Moore* v. *California State Board of Accountancy*, Cert. denied 2/23/93). The state has approximately 65,000 licensed accountants.

The court, in a 4 to 3 opinion, decided that the California State Board of Accountancy (the "Board"), a 12-person board including eight CPAs, could pass regulations that made it illegal for non-CPAs to use the terms "accountant" or "accounting." It also held the Board's regulations needed to be modified to take the First Amendment into consideration.

California's accounting regulation

In California, as in most states, to become a CPA, a candidate must pass the Uniform CPA Examination and meet an experience requirement, of two years in California's case. Once licensed, continuing education is required for license renewal and the state board has the power to revoke or suspend licenses.

The state board has no such powers over unlicensed practitioners, who seek to offer to the public limited categories of accounting services as a part of bookkeeping operations, unless a complaint is filed which alleges that an unlicensed person has claimed that he or she is a licensed accountant.

The California law states: "No person ... shall assume or use the title ... 'certified public accountant,' 'enrolled

agent,' 'registered accountant,' ... or *any other title or designation likely to be confused with* 'certified public accountant' or 'public accountant,' or ... 'C.P.A.' or 'P.A.' ..." (Emphasis added.)

The Board in its regulations implementing this section prohibited the use of the terms "accountant," "auditor," "accounting," or "auditing," because they are likely to be confused with the title CPA and public accountant.

The Board attempted to prove this consumer confusion by introducing into evidence a 1987 California poll which found that 55 percent of the people surveyed believed that all accountants are licensed by the state and that 53 percent believed that companies that advertised accounting services are also licensed by the state.

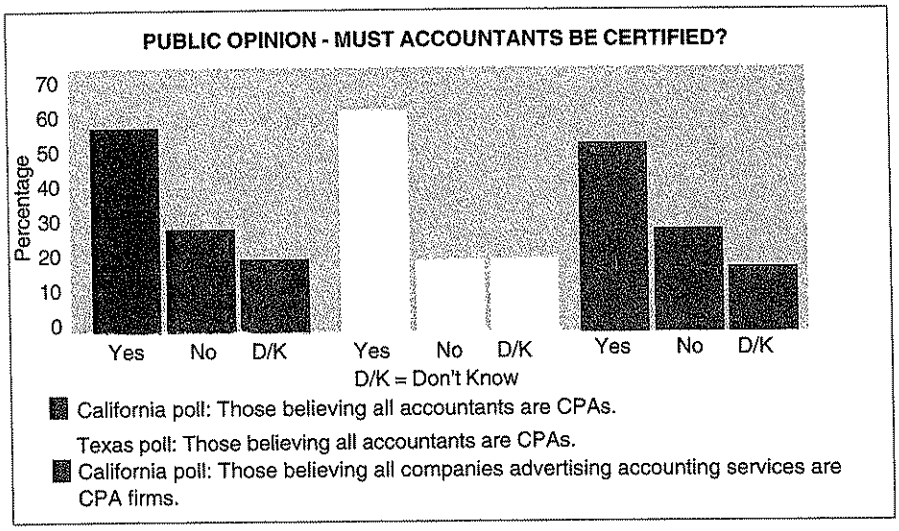
These results were very similar to a Texas poll conducted in 1985. (See graph on page 16). It is interesting that the poll did not try to determine why there are separate listings in the yellow pages for "accountants" and for "certified public accountants." If it had, a different result may have been obtained.

Before answering whether Ms. Moore could use the terms accountant or accounting (services), it is important to understand that the state was not claiming that any of the services provided by the Accounting Center were the wrongful practice of accounting without a valid license. Thus, even if she lost the case and had to change the business' name, she could continue to perform bookkeeping and related services, including some tax services, even without a license.

Why this lawsuit?

The case began in 1986 when Ms. Moore filed suit against the state board of accountancy because they had sent her a letter ordering her to cease and desist from using the terms accountant and accounting. Ms. Moore was joined in her suit by the 700-member California Association of Independent Accountants.

The Center for Public Interest Law, San Diego, filed a friend of the court brief in which it stated that 80 percent of the work done by licensed accountants does not require a CPA. It also stated that the prohibition on advertising was being enforced at the same time that the cost of CPA services had soared, putting CPAs



out of the reach of many small business owners. Finally, the Center alleged that the Board, mainly composed of CPAs, was attempting to impose advertising restrictions on direct competitors in order to increase the licensees' business.

California's reasoning

In answering the real question, whether the use of the term accountant could be reserved solely to "licensed" accountants, the California Supreme Court discussed numerous issues of statutory construction not relevant here. It also discussed whether the Board, made up largely of CPAs, could prohibit the use of the term "accountant" by unlicensed practitioners, even though the state legislature had not included that term in its list of protected names. The statute only protected the term "accountant" if it were preceded by the words "chartered," "licensed," "enrolled" or "certified."

The court then states "our task is to inquire into the legality of the ... regulation, not its wisdom" and it deferred to the regulatory agency's expertise rather than use its own judgment to determine if the protection was authorized by the legislature. The court subsequently determined that, based on the public opinion poll, prohibiting the use of the terms accountant or accounting is reasonably necessary to protect the public by eliminating any likelihood of confusion.

Freedom of speech?

Although the Board appeared to have obtained a victory, the court then looked at the effect of the First Amendment to the Federal Constitution, which provides for commercial free speech. The First Amendment prohibits a state or the federal government from regulating truthful advertising related to lawful activities, unless the advertising is inherently misleading or abusive. In such cases, a state may provide appropriate restrictions. However, the U.S. Supreme Court has held that a state may not completely ban statements that are not actually or inherently misleading. Since Ms. Moore was legally practicing bookkeeping and related services (known to some of the public as accounting) does the First Amendment prohibit the state of California from regulating her advertisements?

An identical situation occurred in Maryland in 1979 (*Comprehensive etc.* v. *Maryland State Bd. of Accountancy*). There the court held that the State of Maryland could not completely suppress the dissemination of truthful information about the company's "Accounting Service(s)." However, the court held that additional information, warning and disclaimers may be necessary to prevent deception of the public.

The California Supreme Court concluded that the use of the terms accountant or accounting services when used without qualification are potentially misleading. However: "(W)here the generic terms are used in conjunction with a modifier or modifiers that serve to dispel any possibility of confusion—for example, an express disclaimer stating that the 'accounting' services being offered do not require a state license—their use in such a context may not be constitutionally enjoined."

The dissent

It is interesting that three of the seven judges dissented in the *Moore* case. One judge pointed out that on either statutory or constitutional grounds courts in the states of Colorado, Florida, Maryland, Oklahoma, Virginia and Wisconsin have held that laws prohibiting the use of the terms accountant or accounting by unlicensed practitioner were unenforceable.

Similar provisions were held unconstitutional in Illinois, Tennessee and Mississippi.

As early as 1957, the Florida Supreme Court stated in *Florida Accountants Association* v. *Dandelake* that to prohibit non-certified accountants from doing routine accounting work and to require them to designate themselves as "bookkeepers" (rather than accountants) is in conflict with the spirit and express provision of the Constitution.

Only a Texas appellate court, in the 1978 *Fulcher* v. *Texas State Board of Accountancy* decision, has held that a state may prevent an unlicensed practitioner from using the terms accountant or accounting. It is interesting that approximately 22 states permit unlicensed individuals to hold themselves out as accountants.

Who won?

Based on the results in *Moore*, both sides have claimed victory. The state may prohibit the use of the unmodified term accountant or accounting thus protecting the public from unlicensed "accountants" and the unlicensed practitioner may continue to advertise as an accountant as long as there is a proper disclaimer. Where the disclaimer must appear, what size it must be, and other procedural questions were not addressed. For example, must the yellow pages have two separate listings, "licensed" and "unlicensed" accountants?

William Sager, legal counsel for the National Society of Public Accountants has written that the court's decision will generate endless disputes over what are appropriate modifiers and disclaimers. Mr. Sager further wrote in the September 1992 *National Public Accountant*, "Boards of Accountancy are preoccupied with protecting the turf of their licensees from the competition of unlicensed accountants. The result is that the Boards will argue for and support those modifiers or disclaimers that are so negative as to be self-deprecating to the unlicensed accountants who use them."

One 1969 Wisconsin case addressed this issue. In *Tom Welch Accounting Service* v. *Walby*, the state's supreme court had to decide whether the plaintiff, who was listed under accountant rather than under Certified Public Accountant in the yellow pages, had violated the law.

Even if she lost the case she could continue to perform bookkeeping and related services.

So long as the plaintiff did not deceive the public, the court stated that the statute had not been broken. Unlike the California Supreme Court almost 23 years later, the Wisconsin court held that the distinction between a nonregistered accountant and a public accountant is generally recognized: "One only has to turn to the yellow pages of a telephone directory to see the distinction maintained."

U.S. Supreme Court inaction

On appeal to the U. S. Supreme Court, Ms. Moore pointed out that the California Supreme Court had agreed that the generic terms accountant and accounting were truthful and accurate in describing the services she performed. She therefore asked the Supreme Court to affirm her First Amendment rights to use the term accountant or accounting without disclaimers. The Supreme Court did not rule on the Moore case. It simply decided not to hear the case and, therefore, the California decision was left in place. Accordingly, the Supreme Court neither accepted nor rejected the holding of the Moore case and it must be followed in California.

What is the effect on other states of the *Moore* decision? It's still too early to tell. It will probably be followed insofar as it held that the Constitution permits unlicensed accountants to advertise as accountants or for accounting services so long as a disclaimer is present. It is less clear whether other states will chose not to follow the decision and allow unlicensed practitioners to call themselves accountants without the use of disclaimers. ❐

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BIG 6 SURVEY *from page 7.*

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