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Robert Kratovil Memorial Seminar in Construction Law - Multidisciplinary Practice: A Construction Law Perspective, 33 J. Marshall L. Rev. 413 (2000)

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ESSAY

THE ROBERT KRATOVIL MEMORIAL SEMINAR IN CONSTRUCTION LAW

MULTIDISCIPLINARY PRACTICE: A CONSTRUCTION LAW PERSPECTIVE

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A war is taking place in our largest cities. Rival factions are arming themselves for the fight. Brother has turned against brother, neighbor against neighbor. Is it yet another outbreak of hostility between the Crips and the Bloods? No, this outbreak pits the lawyers against the accountants. The "Big Five" accounting firms have been identified as the enemy by large segments of the American bar.¹

A number of hot-button issues have contributed to this state of affairs. Accounting firms are competing head-to-head with tax lawyers. Accountants have been granted a limited privilege to protect client confidences when dealing with the Internal Revenue Service.² Accounting firms "get in on the ground floor" through their auditing function, thus enhancing their marketing capability. They also offer clients "one-stop shopping" for a wide array of consulting services.³ Some of the "consulting services"

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1. See, e.g., Gregory S. Smith, *A Little Off the Top: Accounting Firms Edge Into the Legal Market*, GA. B.J., Oct., 1998, at 10.

2. I.R.C. § 7525 (1999).

3. John Gibeaut, *Squeeze Play*, 84-Feb. A.B.A. J. 42, 43 (1998).

offered by accounting firms are very similar to services traditionally performed by law firms, and are in many cases performed by law school graduates and even by members of the bar.⁴ As a result, accounting firms are becoming the largest employers of lawyers in the United States.⁵ Accounting firms have also become the largest law firms in several European countries.⁶ Accounting firms' strategic business plans typically focus on aggressive expansion of consulting services, as opposed to traditional audit services.⁷

In response to the challenge of the accounting firms, the American Bar Association (ABA) established a Commission on Multidisciplinary Practice in August 1998, to determine what changes, if any, should be made in the ABA *Rules of Professional Conduct* with respect to the delivery of legal services by multidisciplinary professional service firms.⁸ These Rules, along with similar or equivalent rules, have the force of law in nearly every U.S. jurisdiction. The applicable Rules provide that, in general, a lawyer or law firm cannot share legal fees with a non-lawyer, cannot form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law, and cannot practice in any profit-making organization in which a non-lawyer owns any interest, is a corporate director or officer, or has the right to control the professional judgment of a lawyer.⁹

In the current debate, these Rules seem to be distilled into one overriding precept: accounting firms cannot practice law. But, of course, the issues are more complicated than that. Other paradigms considered by the Commission included firms offering "one-stop shopping" for financial planning, social services, psychological counseling, or gerontological consulting in conjunction with legal services.¹⁰ Although empirical evidence is lacking, there appears to be a market for firms offering a

4. *Id.* at 43-44.

5. *See id.* at 44 (describing accounting firms in many European markets as the largest employers of lawyers, and suggesting that that practice is now beginning to appear in the United States).

6. *Id.*

7. *See generally* Gibeaut, *supra* note 3, at 42 (describing the mergers and acquisitions typical of larger accounting firms that expand services the firms may provide).

8. American Bar Association Center for Professional Responsibility Commission on Multidisciplinary Practice, *ABA President Philip S. Anderson Appoints Commission on Multidisciplinary Practice* (Aug. 4, 1998 Press Release) (visited Jan28, 2000) <<http://www.abanet.org/cpr/newsrelease/multicom.html>> [hereinafter Professional Responsibility]. All of the relevant documents considered and issued by the ABA Commission have been posted on the American Bar Association's web site at <<http://www.abanet.org/cpr/multicom.html>>.

9. MODEL RULES OF PROF'L CONDUCT Rule 5.4 (1999).

10. Professional Responsibility, *supra* note 8.

multidisciplinary practice, or what the Commission called MDPs. So, one might ask, "What is the problem?"

The problem, according to opponents of change, is that the public interest would suffer if the core values of the legal profession were compromised, including, most importantly: the principles of confidentiality, independent judgment, attorney-client privilege, and avoidance of conflicts of interest.¹¹ These core values cannot be maintained, it is said, by MDPs in which non-lawyers occupy positions of power and authority.¹²

After studying these issues for a year, hearing sixty hours of testimony from fifty-six witnesses, and considering written submissions from numerous others, the Commission respectfully, but unanimously, disagreed with the opponents of change.¹³ In a report submitted to the ABA's annual meeting in August of 1999, the Commission recommended that lawyers be permitted to practice in MDPs if a number of restrictions and safeguards were put in place.¹⁴ These safeguards include: the continued prohibition against the provision of legal services by non-lawyers, the continued applicability of the *Rules of Professional Conduct* to lawyers acting under the supervision of non-lawyers within an MDP, the applicability to an MDP of all of the same professional conduct rules that apply to a law firm, the treatment of all of the MDP's clients as the equivalent of legal services clients for the purpose of applying conflict of interest rules, the education of clients with respect to the differences between an MDP's legal services and non-legal services, and most importantly, the adoption of special rules applying to MDPs controlled by non-lawyers designed to preserve the independence of lawyers practicing within them, including submission of the MDP to the regulatory authority of the highest court of the applicable jurisdiction.¹⁵

The ABA delegates subjected the Committee's report and recommendations to intense debate at the ABA meeting.¹⁶ By a

11. See, e.g., ABA Commission, *Written Remarks of Lawrence J. Fox, "You've Got the Soul of the Profession In Your Hands"* <<http://www.abanet.org/cpr/fox1.html>> (responding to the remarks of the commissioners shortly after the meeting of the Multidisciplinary Practice Commission in August of 1999).

12. *Id.*

13. ABA Commission, *Report to the House of Delegates* (visited Jan. 28, 2000) <<http://www.abanet.org/cpr/mdpreport.html>> [hereinafter *Report*]; ABA Commission, *Recommendation* (visited Jan 28, 2000) <<http://www.abanet.org/cpr/mdprecommendation.html>> [hereinafter *Recommendation*].

14. See *Report*, *supra* note 13 (summarizing the study of the Commission on Multidisciplinary Practice); *Recommendation*, *supra* note 13 (proposing an amendment to the ABA MODEL RULES OF PROF'L CONDUCT).

15. *Report*, *supra* note 13; *Recommendation*, *supra* note 13.

16. *No Multidisciplinary Practice for Now: ABA House of Delegates Refuses to Consider Changes Without More Study*, 85-Sep. A.B.A. J. 23, 23 (1999)

vote of 304-98, the delegates voted to make no changes in the rules governing multidisciplinary practice, "unless and until additional study demonstrates that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients."¹⁷

The Commission's chair vowed to bring the issues back to the floor at the next annual meeting.¹⁸ Philip S. Anderson, the outgoing ABA president who had appointed the Commission, told the delegates, "The response of 'I don't like it' won't make it go away. I don't like it either, but it's here and it's here to stay."¹⁹ The primary questions that remain, however, are: 1) what "it" is from the point of view of lawyers serving the construction industry; and 2) what, if anything, construction lawyers should do about "it." But to determine what "it" is, one must first have a basic understanding of the construction industry itself.

THE CONSTRUCTION LAWYER'S ROLE IN THE CONSTRUCTION INDUSTRY: AN OVERVIEW

To help the reader answer these questions, the author offers the following personal observations on the nature of the construction industry and the construction lawyer's role within it. The industry has always been fragmented, and in an age of conglomerates and rollups, it remains so. The construction industry's organization and structure have long been characterized by short-term project-based contractual relationships. Until about twenty-five years ago, these relationships were structured in a relatively stable, predictable manner. Owners hired architects or engineers to design projects, which were then constructed by general contractors and their sub-contractors. These parties arrayed themselves in the familiar triangular structure, documented by an owner-architect agreement on one side and a construction contract on the other. This rigid, sequential process was challenged by the double-digit inflation of the 1970s, giving rise to fast track construction and the role of construction manager. Design/build also emerged as a more unitary delivery system that supposedly offered owners the advantage of single point responsibility for design and construction. Other alternatives now proliferate, with program management, bridging, and delegated design crowding the field of available project delivery options.

This continuing process might well be called the

[hereinafter *No Multidisciplinary Practice*].

17. ABA Comm'n, *Florida Bar Recommendation* (visited April 18, 2000) <<http://www.abanet.org/cpr/flbarrec.html>>.

18. *No Multidisciplinary Practice*, *supra* note 16, at 23.

19. *Id.*

“deconstruction” of the American construction industry. It has resulted in the blurring of traditional roles, including those of well-established licensed professions. Architects, for instance, have seen their once-exclusive territory invaded by competitors like interior designers, professional engineers, construction managers, and program managers. The revolution in information technology has accelerated the entry of non-licensees into the project delivery arena, through interoperable computer aided design and Internet-based project management systems. The American Institute of Architects has responded to these challenges by modularizing its standard form design contract, to permit architects to regain their initiative by offering a broad menu of traditional and non-traditional services.²⁰ But the competition is fierce, and the challenge to the architectural profession is daunting.

In the expanding economy of the last decade, these deconstructive forces have been subsumed by the rising tide of opportunity for all. The inevitable downturn will bring a shakeout, however, and those professional service providers who have not adapted to the new competitive realities of the construction industry will lose market share to those who have. Architects will once again hold retreats to bemoan their fate, as they did at the beginning of the 1990s. The question is whether they will be joined in their despair by construction lawyers?

The evidence of construction lawyers' competitive problems is largely anecdotal. Many non-legal professionals aggressively market their contract drafting and dispute resolution services. Clients and former clients tell many construction lawyers that a non-lawyer, often at lower rates, is handling some aspect of the lawyer's former service. For example, many architectural firms who had lawyers review their contracts in the 1980s emerged from the recession with a tendency to send their contracts to their professional liability insurance agents or carriers for review. In the competitive insurance market of the 1990s, insurers and agents expanded these contract review services as a component of their marketing programs.²¹

Contributing to this perceived problem are factors that are embedded in the construction industry itself. Professional and

20. American Institute of Architects Document B141-1997, Standard Form of Agreement Between Owner and Architect with Standard Form of Architect's Services (available from the American Institute of Architects).

21. One piece of empirical evidence illustrates this trend. Lori Tripoli, *Growth Practice Areas . . . IP Wins, Litigation Places, Employment Shows*, OF COUNSEL, May 3, 1999, at 11. Even in the current hot construction climate, the industry is apparently not considered to be a rapidly expanding market for legal services. *Id.* In a recent survey of 700 law firms, only one listed “Construction/Design Law” as its fastest growing practice area. *Id.*

trade associations like the American Institute of Architects and the Associated General Contractors of America have published standard form contracts that many people use with little or no legal review.²² Construction contracts have a high proportion of graphic and technical content in the form of drawings and specifications, yet these documents are not drafted or negotiated by lawyers. Many non-lawyers who work in the industry (such as project managers, civil engineers, and some architects) are trained and experienced in drafting and administering contracts. Many construction industry contracts contain alternative dispute resolution provisions that require or encourage the parties to manage their conflicts in forums that, unlike courtrooms, lawyers do not control, and in which lawyers may not be welcome, or even permitted.²³ Although traditionally labeled as litigious, the construction industry recently has made a concerted effort to conduct its affairs in such a manner as to avoid conflict with lawyers, courts, or arbitrators. Partnering with the legal profession is one manifestation of this effort.

Other aspects of the problem are caused by the nature of construction lawyers' services and the nature of the competition they face. A minimal amount of what construction lawyers do for a living is arguably defined as being within the monopoly granted to members of the bar, and it is not clear what is inside and what is outside the zone of exclusivity. The ambiguity associated with this zone was brought into focus by the testimony and debate surrounding the ABA Commission's report. The Commission pointed out the under-appreciated fact that there is no generally recognized and accepted definition of what constitutes the practice of law. The ABA *Model Rules*, for instance, do not contain such a definition, nor do the laws, rules and regulations applicable in many states. To advance the discussion, the Commission took it upon itself to propose a definition of the practice of law, which included the following activities:

1. Preparing any legal documents, including . . . contracts except routine agreements incidental to a regular course of business;
2. Preparing or expressing legal opinions;

22. See Martin A. A. Diestler, *Procedures and Preparations of Proof for Damage Claims Based on Construction Delays and Failures*, ILL. INST. FOR CONTINUING LEGAL EDUC. § 4.1 (1999) (describing how "[t]oo often the parties use a standard [form contract], ignoring the fact that such forms are created by architects and are designed to shield the architect from responsibility and spread such liability elsewhere").

23. See generally *id.* at §§ 4.3-4.4 (detailing the typical terms of abandonment and termination contained in alternative dispute resolution provisions).

3. Appearing or acting as an attorney in any tribunal;
4. Preparing any claims, demands, or pleadings . . . for filing in any . . . tribunal; and
5. Providing advice or counsel as to how any of [these activities] might be done . . . in accordance with applicable law.²⁴

As might be expected, this definition did not meet with universal acceptance.²⁵ It was vigorously opposed by accountants and other professionals, who claimed that such a definition would prohibit them from doing what they already do. (One might surmise, of course, that that was precisely the Commission's intent.)

The initial reaction of many construction lawyers to non-lawyer competition is to simply bar such practices through aggressive enforcement of unauthorized practice rules.²⁶ The unauthorized practice strategy poses substantial difficulties. A large number of professional disciplines provide a great variety of services in many jurisdictions. The logistical challenge of plugging all of these holes through the judicial process is overwhelming. As noted above, the definition of the practice of law is itself unclear in many jurisdictions, reducing the prospect of success on the merits. To the extent that the construction industry uses the services about which lawyers are complaining, a legal initiative to deprive members of the lawyers' target market of their ability to choose their service providers would not seem to be a shrewd public relations move.

A second, more positive response by construction lawyers would be an attempt to educate and persuade potential clients that lawyers possess unique skills that can add value to the project delivery system in a cost-effective manner. Though a matter of debate, the response that many lawyers would feel most comfortable with is to stay the course, provide good service, serve clients faithfully, and get the word out. This response could work.

As a third response, many construction lawyers would prefer

24. ABA Commission, *Appendix A to Report to the House of Delegates* (visited Jan. 28, 2000) <<http://www.abanet.org/cpa/mdpappendixa.html>>.

25. See John Gibeaut, *MDP Debate Still Alive* (visited April 25, 2000) <www.abanet.org/journal/oct99/amdp.html> (explaining how the American Institute of Certified Public Accountants opposed the proposal "because it would force the legal profession's conduct rules on everyone in the practice").

26. See ABA Commission, *Background Paper on Multidisciplinary Practice: Issues and Developments* (visited Jan. 28, 2000) <http://www.abanet.org/cpr/multicomreport_0199.html> (discussing how the Texas Bar started down the road of aggressive enforcement in 1997 with a complaint against Arthur Andersen, which was voluntarily dismissed and the record sealed).

to emulate architects by broadening their menu of services to increase market share in collaboration with other service providers. These lawyers would likely want to see a continuation of the efforts begun by the ABA Commission to expand opportunities for interdisciplinary practice. However, these efforts appear to be stalled, and the battle can be described as a stalemate. The ABA Commission's attempts to mediate the inter-professional dispute seem to have satisfied practically no one. Not only was its report overwhelmingly rejected, in effect, by the delegates at the ABA annual meeting, the ABA's report also failed to gain the support of the accounting profession.²⁷ The accountants were particularly upset at the proposed judicial regulation of MDPs controlled by non-lawyers.²⁸ The Board of Directors of the American Institute of Certified Public Accountants (AICPA) adopted resolutions branding the Commission's regulatory proposals "inappropriate," "overreaching," and "onerous."²⁹ The Chair of the AICPA Board called the proposals "counterproductive," and an "insurmountable barrier" to the formation of accountant-controlled MDPs.³⁰

MODELS FOR MULTIDISCIPLINARY PRACTICE

In the near future, when not only the ABA but also most of the state bar associations will be reexamining the interdisciplinary practice issue, different perspectives may be brought to bear by interested parties, including construction lawyers.³¹ The ostensible failure of the Commission's report to gain support was primarily due to the inflammatory issue of accountant-controlled law firms (which was, of course, the very issue that gave rise to the Commission's appointment in the first place). While it appears that our nation will not be seeing a firm such as Deloitte Touche Baker & McKenzie burst on the scene any time soon,³² smaller steps might be considered that could strengthen rather than

27. See Professional Responsibility, *supra* note 8 (summarizing the comments of the disgruntled delegates).

28. *Id.*

29. Resolution of Bd. of Directors of Am. Assn. of Certified Public Accountants (July 15, 1999) (visited Jan. 28, 2000) <<http://www.abanet.org/cpr/aicpa2.html>>.

30. Letter from Olivia F. Kirtly to ABA Committee (July 30, 1999) (visited Jan. 28, 2000) <<http://www.abanet.org/cpr/aicpa2.html>>.

31. The ABA Commission's web site provides links to state bar associations' MDP committees and reports (visited Jan. 28, 2000) <<http://abanet.org/cpr/mdplinks.html>>.

32. The firm of McKee Nelson Ernst & Young was, however, recently established in Washington, D.C., by five former King & Spalding partners with financing from a Big Five accounting firm. ABA Commission, *Updated Background and Informational Report and Request for Comments* (visited Jan. 28, 2000) <<http://www.abanet.org/cpr/febmdp.html>>.

weaken the position of lawyers in some markets and practice areas, while at the same time "furthering the public interest."³³

Some of these possible steps are contained in the Commission report itself and in its voluminous supporting materials. The Commission considered not only the accountant-controlled MDP (which it referred to as the "Fully Integrated Model"), but also four alternative models for interdisciplinary professional practice.³⁴

The first is the "Cooperative Model."³⁵ Under this model, lawyers work with non-lawyer professionals who are employed by them, retained by them as independent consultants, or retained by their clients.³⁶ As long as legal fees are not shared and steps are taken to ensure that the non-lawyer professionals' conduct is compatible with the professional obligations of the lawyer, services can be performed by the lawyers and non-lawyers in a unified, coordinated manner.³⁷ This model is fully permissible today under the *ABA Model Rules*, and requires no rule changes for implementation. Construction lawyers and other industry professionals can enter into arms-length relationships, structured in such a way as not to run afoul of existing professional regulations. This opportunity is easy to lose sight of in the high-concept debate over MDP sound bites.

The second model is termed "Command and Control."³⁸ This model is based on a variation of the present ABA Rule 5.4, which is now in effect in the District of Columbia.³⁹ In that small but lawyer-saturated jurisdiction, a lawyer may practice in an organization in which a non-lawyer holds a financial interest or exercises managerial authority and performs professional services that assist the organization in providing legal services to clients, but only if three conditions exist: (1) the sole purpose of the organization must be to provide such legal services, (2) the non-lawyers must agree to abide by the *Model Rules of Professional Conduct*, and (3) the lawyers must be responsible for the non-lawyers' actions as if they were lawyers.⁴⁰ A hypothetical example offered by the Commission is an MDP owned and managed by a lawyer, an accountant, and a financial planner, which offers estate

33. *Florida Bar Recommendation*, *supra* note 17. "[F]urther[ing] the public interest" was by vote of the delegates, and made a precondition to reconsideration of the interdisciplinary practice issue by the ABA. *Id.*

34. See ABA Commission, *Hypotheticals and Models* (visited Jan. 28, 2000) <<http://www.abanet.org/cpr/multicomhypos.html>> [hereinafter *Hypotheticals and Models*] (listing and describing the Cooperative, Command and Control, Ancillary Business, and Contract models).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. DISTRICT OF COLUMBIA RULES OF PROF'L CONDUCT (1999).

40. *Id.*

planning and other services which, taken as a whole, could reasonably be defined as legal services.⁴¹

This model might be criticized for not requiring that lawyers hold a majority interest or exercise majority control, and in fact it might seem to resemble too closely the unpopular model that was so soundly rejected by the ABA delegates. However, the requirement that all of the MDP's non-legal services be offered in furtherance of its mission of providing legal services is more likely to satisfy accounting firms. The model can also be adjusted to require more control by lawyers than is required in the District of Columbia.

In this regard, it might be useful to study the various architectural registration laws adopted by states around the country that have struggled with the issue of protecting the public interest as it is served by that profession. Dozens of "Command and Control" rules apply to firms that perform architectural services. These rules range from virtually no entity-level regulation in California,⁴² to a requirement of full ownership and control on the current ABA model in New York.⁴³ In between are a variety of approaches that are intended to maintain the independence of registered architects' professional judgment, including a model act promulgated by the National Council of Architectural Registration Boards that focuses on the composition of the boards of directors of corporate architectural firms, not their shareholders.⁴⁴

The third model is the "Ancillary Business Model," under which a law firm owns in whole or in part an ancillary business that provides professional services to clients. If the services are "law-related," as defined in ABA Model Rule 5.7,⁴⁵ certain safeguards must be imposed, primarily consisting of advising the entity's clients that the services are not strictly legal in nature, and that the protections of the lawyer-client relationship therefore do not exist.⁴⁶ This model is currently available under the ABA *Model Rules*, and could be creatively employed by construction lawyers as a method of collaborating with other industry professionals in the coordinated performance of services.

The fourth and final model is the "Contract Model." Under this model a law firm and a firm of non-legal professionals form a contractual strategic alliance with many variable characteristics. It may be either exclusive or non-exclusive, may or may not be

41. *Hypotheticals and Models*, *supra* note 34.

42. CALIFORNIA BUSINESS AND PROFS. CODE §§ 5500-5527 (West 1999).

43. N.Y. EDUC. L. § 7300 (McKinney 1999).

44. LEGISLATIVE GUIDELINES AND MODEL LAW §§ 11(12), 100.901(b) (National Council of Architectural Registration Bds. 1999).

45. MODEL RULES OF PROF'L CONDUCT Rule 5.7 (1999).

46. *Id.*

held out and advertised as an affiliation of the two firms, and may or may not involve sharing of overhead costs, office space, and staff management. Each firm would be subject to the ethical rules of its own profession. The Commission's discussion of this model states, however, "whether [the law firm and the professional service firm] should be treated as a single entity for conflict of interest and [other legal ethics] purposes is an open issue."⁴⁷ Clearly two firms seeking to enter into such a strategic alliance should be very careful under the current ABA Rules. It is possible that these rules could be changed to facilitate such relationships as one way to permit coordinated interdisciplinary practice.

CONCLUSION

There is another approach to the issue, which, unlike the above models, the Commission did not appear to consider. Such an approach recognizes that the relationship between the lawyer and non-lawyer professionals could vary depending on the types of legal services provided, and/or the types of clients to whom they are provided. For instance, the approach would make a distinction between the solicitor-like services of the transactional lawyer and the barrister-like services of the trial lawyer, and different multidisciplinary practice rules would apply to the two types of services. Such an approach would also distinguish between services performed for individual clients and services performed for presumably sophisticated commercial and institutional clients. The distinction may be made on the theory that the former require more regulatory protection, while the latter can knowingly consent to business and professional relationships that might compromise some of the advantages of the full package of the ABA *Model Rules*, in return for achieving other benefits such as cost efficiency and multidisciplinary competence.

Multidisciplinary practice was not a common subject of discussion five years ago. Lawyers have only recently begun to admit publicly that they are concerned with competition among themselves, much less competition from the population of professionals outside of the legal profession. It is too early to tell how construction lawyers will ultimately view the phenomenon of multidisciplinary practice, or whether they will take advantage of it given the opportunity to do so. They may see it as a threat, or they may see it as an opportunity. Similarly, one must ask how construction industry clients will view the phenomenon: as a problem or as a solution. Based on the current status of the law, the comment of the former ABA president is as good a way as any to sum up the current situation, and is therefore worth repeating: "[t]he response of 'I don't like it' won't make it go away. I don't

47. *Hypotheticals and Models*, *supra* note 34.

like it either, but it's here and it's here to stay."⁴⁸

48. *No Multidisciplinary Practice*, *supra* note 16, at 23.